IN THE SUPREME COURT OF THE STATE OF NEVADA

TITLEMAX OF NEVADA, INC. and TITLEBUCKS d/b/a TITLEMAX, a Nevada corporation.

Appellant(s),

v.

STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY FINANCIAL INSTITUTIONS DIVISION,

Respondent(s).

Case No. 69807

District Court No. A-16-743134-J

RESPONDENT'S ANSWERING BRIEF

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INTRODUCTION

TitleMax of Nevada, Inc. ("TitleMax") presents a very limited issue in this appeal: whether the district court properly dismissed its complaint for declaratory relief.[1] TitleMax is in the "title lending" business—offering high-interest loans of limited duration—licensed and regulated pursuant to Chapter 604A of the Nevada Revised Statutes ("NRS"). In its complaint, TitleMax challenged a determination by the Financial Institution's Division ("FID") that two specific lending practices TitleMax was engaging in violated certain provisions of Chapter 604A. TitleMax also sought to enjoin the FID from pursuing any disciplinary action with respect thereto. The FID is statutorily mandated with conducting examinations of licensees to enforce the provisions of Chapter 604A. Chapter 604A provides administrative remedies that must be exhausted, absent an applicable exception.[2] The district court found that TitleMax's complaint involved factual issues to be determined through administrative proceedings, that there was no applicable exception to the exhaustion requirement, and on that basis

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[1] *See Order Denying Motion*, Docket 69807, Document #16-38774 (December 14, 2016) (reiterating the "limited" issue on appeal).

[2] NRS 604A.820; NRS 604A.800.

properly dismissed this case. The sole issue on appeal is whether that dismissal was proper.[3]

STATEMENT OF THE ISSUES

Whether the district court properly dismissed this case for failure to exhaust administrative remedies.

STATEMENT OF FACTS

In 2014, the FID examined TitleMax and cited two violations. (JA 0097-98; JA 0349-0351). TitleMax was given a "Needs Improvement" rating with respect to two of its business practices: allowing non-owners of vehicles to be parties to title loans, and offering title loans twice the statutory duration limit through a so-called "grace period." (JA 0368).

Subsequently, the FID commenced its 2015 examination. (JA 0346). Within two weeks, TitleMax filed the complaint commencing this case. (JA 0002). The FID continued with the 2015 examination and, because TitleMax had not changed its business practices, cited

[3] NRAP 3A(b)(1). Because an order denying a motion for summary judgement is not an appealable order, the dismissal order is the only order on appeal. *See Taylor Constr. Co. v. Hilton Hotels*, 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984) (expressing that an order denying summary judgment is not an appealable order).

TitleMax for the same two violations cited in 2014. (JA 0368). FID completed the 2015 examination on July 17, 2015. (JA 0346). TitleMax was given an "Unsatisfactory" rating by a letter dated July 30, 2015. (JA 0089).

TitleMax was headed toward an administrative hearing provided it did not change its business practices. (JA 0069-0070). If the matter proceeded to hearing, TitleMax faced administrative fines of up to $10,000 for each offense and the voiding of loans and the repayment to the customers of principal and interest.[4] TitleMax's license could have also been subjected to suspension or revocation.[5]

However, TitleMax commenced this case before the 2015 examination was even completed. TitleMax also filed a motion seeking a preliminary injunction. (JA 0017-0043). The district court denied the

[4] NRS 604A.820; NRS 604A.900.

[5] NRS 604A.800; NRS 604A.820.

motion, preventing TitleMax's improper efforts to avoid an administrative hearing. (JA 253.1; JA 315-316).[6]

The FID moved to dismiss TitleMax's complaint on grounds of ripeness and failure to exhaust administrative remedies, and the district court granted the motion. (JA 0050-0070); (JA 0522-0523). The dismissal order states, in relevant part:

> As to the first question of whether Plaintiff has violated NAC 604A.230(1)(a) anytime a co-borrower (as the term is used by Plaintiff) is not listed on the title of a vehicle, the Court finds that there are questions of fact as to what the differences are between a co-borrower and a guarantor.
>
> As to the second question of whether Plaintiff is in violation of NRS 604A.210 by charging interest during a grace period, the Court finds that there is a question of fact as to the implementation of these grace periods and whether the total interest charged during the grace period plus the interest charged during the term of the loan (with extensions) exceeds the

[6] TitleMax failed to appeal the order denying its motion for a preliminary injunction. (JA 253.1; JA 315-316). NRAP 3A(b)(3) states that "[a]n order granting or refusing to grant an injunction or dissolving or refusing to dissolve an injunction" is an appealable order. Because this issue was not appealed, any arguments by TitleMax regarding potential irreparable harm, and any cases cited in support of such argument, are irrelevant and have been waived.

> amount of allowable interest under NRS 604A.455.

(JA 0523) (emphasis added).

Following dismissal of TitleMax's complaint, an administrative hearing was held. After a multiple-day hearing, the Administrative Law Judge ("ALJ") issued her Findings of Fact, Conclusions of Law and Decision ("ALJ's Decision").[7] Thereafter, TitleMax timely filed a separate petition for judicial review which is currently being litigated before the Eigth Judicial District Court court as Case #16-A-743134.

SUMMARY OF THE ARGUMENT

TitleMax unsuccessfully attempted to avoid the available administrative remedy by commencing this case. The lower court properly determined that no exception to the exhaustion requirement applied and dismissed this case, requiring TitleMax to exhaust administrative remedies. (JA 0523). Because TitleMax has subsequently had an administrative hearing and received a final

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[7] *See Respondent's Motion to Dismiss or Alternately Stay the Appeal and Request to Clarify Issue on Appeal ("Motion to Dismiss Appeal"), Docket 69807, Document #16-28341 (Sept. 13, 2016), Exhibit A (Copy of the ALJ's Decision).*

determination (which is the subject of TitleMax's petition for judicial review currently being litigated before the district court as Case #16-A-743134), it cannot have a trial de novo regarding the same issues.[8] Consequently, this case was properly dismissed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY REQUIRED THE EXHAUSTION OF ADMINISTRATIVE REMEDIES

a. Exhaustion is the Rule

Nevada law is clear, unless an exception applies, administrative remedies must be exhausted before a matter proceeds to the district courts. An agency having original jurisdiction should be allowed to enforce its regulatory scheme as intended by the Legislature.[9] "The exhaustion doctrine is concerned with the timing of judicial review of

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[8] If TitleMax had not filed a petition for judicial review, by application of administrative res judicata the matter would be over. *Britton v. City of North Las Vegas*, 106 Nev. 690, 692-693;799 P.2d 568 (1990).

[9] *See Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 572, 170 P.3d 989 (2007) (noting, "We have previously stressed the importance of state agencies' exclusive original jurisdiction over legislatively created administrative and regulatory schemes." (citation omitted)).

administrative action."[10] Judicial review of agency actions should not occur until after the agency with the specialized knowledge has had the opportunity to make a determination and there is a final decision in a contested case.[11]

In this case, TitleMax jumped ahead of the administrative proceedings to avoid them. In *Benson v. State Engineer*,[12] this Court expressed that an available remedy must be exhausted even if it is not the desired remedy. This Court also noted that initiating an administrative proceeding when the time for doing so has long since passed would be futile.[13] That is not the case here, as the administrative hearing has been completed and the final decision of the

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[10] *Nevada Power Co. v. Eighth Judicial District Court*, 120 Nev. 948, 959, 102 P.3d 578, 585 (2004)(internal quotes omitted).

[11] NRS 233B.130; *See Galloway v. Truesdell*, 83 Nev. 13, 29, 422 P.2d 237 (1967) ("It is well settled that under the division of powers, these ministerial fact-finding duties may not be delegated to courts . . .."); *Malecon Tobacco, LLC v. Dept. of Taxation,* 118 Nev. 837, 840-841, 59 P.3d 474 (2002) (providing, "courts have left the fact-finding to the administrative agencies, which are in the best position to make such determinations").

[12] 131 Nev. __, 358 P.3d 221, 224-226 (2015).

[13] *Id.* at 224.

ALJ is already the subject of a petition for judicial review (currently being litigated before the district court as Case #16-A-743134).

Reversing the district court's dismissal of TitleMax's complaint—which sought to preemptively challenge FID's ability to assess whether certain of TitleMax's lending practices violated Chapter 604A, and to enjoin the FID from pursuing any disciplinary action with respect thereto—would simultaneously undermine principles of judicial economy and infringe on appropriate separation of powers.

b. Chapter 604A Provides Administrative Remedies

Claiming there is no remedy for challenging a report of examination, TitleMax attempts to manufacture an issue that doesn't exist.[14] When a lender is granted a Chapter 604A license they assume the responsibility of complying with applicable statutes. Pursuant to NRS 604A.730, FID is statutorily mandated to examine each licensee at least once each

[14] *Appellant's Opening Brief*, p. 22.

year. Licensees are on notice that FID can take administrative action.[15] The statutes also provide notice that the available remedies include administrative hearings that can result in the revocation or suspension of a license.[16]

If FID discovers, through an examination or otherwise, that a licensee is violating Chapter 604A, FID can notice a pre-deprivation hearing.[17] If the circumstances require immediate revocation or suspension, a license can be suspended upon five-day notice pending a post-deprivation hearing.[18]

The FID hearings can occur after an examination is completed and are the legislatively mandated remedies for licensees. Proceeding in accordance with Chapter 233B of the NRS, licensees receive notice and

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[15] "Whenever the Commissioner has reasonable cause to believe that any person is violating or is threatening to or intends to violate any provision of this chapter, the Commissioner may, in addition to all actions provided for in this chapter and without prejudice thereto, enter an order requiring the person to desist or to refrain from such violation." NRS 604A.810(1).

[16] NRS 604A.800; NRS 604A.820; *See* NRS 233B.032 (defining a contested case); NRS 233B.121.

[17] NRS 604A.820.

[18] NRS 604A.800.

an opportunity for a hearing.[19] In addition, parties may present evidence and examine witnesses.[20] Upon being aggrieved by a final written decision, licensees can petition for judicial review pursuant to NRS 233B.130 (as TitleMax has done in the proceeding currently being litigated before the district court as Case #16-A-743134), and thereafter seek further appeal pursuant to NRS 233B.150. Reading the statutes as a whole, licensees know that their remedy is going to be one of the available types of hearings.[21] For TitleMax to argue that there is no applicable administrative remedy is disingenuous and, at the same time, highlights that TitleMax simply doesn't like the remedies that are available.

The provisions of Chapter 604A ensure that due process requirements are met.[22] Here, the remedies are in Chapter 604A, provided in conjunction with Chapter 233B. This Court has said,

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[19] NRS 233B.121.

[20] NRS 233B.123.

[21] *Public Service Com'n of Nevada v. Eighth Judicial Dist. Ct.,* 107 Nev. 680, 685, 818 P.2d 396 (1991) (providing, "a court will refuse to consider a complaint for declaratory relief if a special statutory remedy has been provided." (citation omitted)).

[22] *Maiola v. State,* 120 Nev. 671, 675, 99 P.3d 227 (2004) (due process requires notice and an opportunity to be heard).

"'[t]here is no reason to require the formalities of rulemaking whenever an agency undertakes to enforce or implement the necessary requirements of an existing statute.'"[23] In this case, no regulation is needed to give TitleMax further notice that NRS 604A.820 is a remedy or to conduct a hearing in accordance therewith. As the *Benson* case makes clear, it cannot be said that there is no remedy just because the available remedy is not the desired remedy.[24]

II. FACTUAL FINDINGS MUST BE MADE THROUH THE ADMINISTRATIVE PROCESS, NOT THROUGH PIECEMEAL LITIGATION

This Court has stated that fact finding duties should be left to the agencies.[25]

a. The District Court was Presented with a Mixed Question of Law and Fact

TitleMax essentially asked the district court for an advisory

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[23] *State, Dept. of Taxation v. Chrysler Group LLC*, 129 Nev. __, 300 P.3d 713, 717 (2013) (citation omitted).

[24] *Benson*, 131 Nev. __, 358 P.3d 221, 225-226 (2015).

[25] *See fn. 11, supra.*

opinion, when it hadn't even requested one from the FID.[26] TitleMax presented the court with a copy of its blank Grace Period Payment Deferment Agreement ("GPPDA") and asked the court to declare that it complied with Chapter 604A. The provision of a blank contract did not create a situation involving no questions of fact. To the contrary, the blank contract opened the door to TitleMax's use of self-serving hypothetical facts.[27]

For example, the blank contract expresses that the customer will be paying the same contract rate of interest when the loan is morphed into a GPPDA. (JA 0251-0253). It also shows a fourteen-month repayment schedule and expresses that the first seven payments are interest payments, potentially leading the customer to a conclusion that they are paying the same amount of interest as they would have through the original loan but paying it up front. (JA 0251-0253). The

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[26] *See* NAC 232.040 (providing procedure for requesting advisory opinion).

[27] *Galardi v. Naples Polaris, LLC*, 129 Nev.__, 301 P.3d 364 (2013) (expressing, 'in the absence of ambiguity or other factual complexities,' contract interpretation presents a question of law" and further stating that ""an ambiguous contract is 'an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning.'"" (citation omitted)).

blank form doesn't show that the total interest paid after converting to a GPPDA is actually greater than the total interest shown on the Truth in Lending Statement. (JA 0251-0253). Contrary to a typical amortized loan where a greater portion of the payment goes toward principle each successive month, here nothing is paid toward the principal until the eighth month. Because of the obscure language of the GPPDAs, these facts are more readily discovered when actual contracts are reviewed. (JA 0358-0365; JA 0326-0327).

TitleMax didn't simply ask the district court to declare what "additional" meant in NRS 604A.210.[28] Because TitleMax asked the court to consider and approve its business practice of offering the GPPDAs, the court was presented with a mixed question of law and

[28] *Cf. Financial Institutions Div. v. Check City ("Check City")*, 130 Nev. __, 337 P.3d 755, 756-758 (2014) (explaining that this Court determined what the statutory language meant).

facts and the court stated as much.[29] (JA 0510-0514; JA 0520).

TitleMax is still attempting to disguise the factual issues as questions of law. NRS 604A.210 allows grace periods to be granted but prohibits the charging of additional fees or interest. By definition, no grace period is granted if additional interest is charged.[30] TitleMax creatively argues that it grants a grace period because it merely charges the same rate of interest that the customer originally agreed to pay. In application, the facts reveal that applying the same rate of interest to the entire principal for seven months, rather than amortizing, results in

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[29] *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 965, 194 P.3d 96 (2008) (explaining that the appellants requested the court to interpret statutory language and apply its interpretation to the existing business practice *and* to grant injunctive relief and therefore appellants sought more than a mere determination of the meaning of the statute under NRS 30.100. In the case at hand, TitleMax similarly requested the court to interpret statutory language, apply its interpretation to the existing business practice and grant injunctive relief because an administrative remedy was also provided by statute, *Baldonado* could not get declaratory relief nor can TitleMax.).

[30] NRS 604A.070 (defining "grace period" as "any period of deferment offered gratuitously . . ..").

additional interest being charged in violation of NRS 604A.210 and NRS 604A.445.[31]

Pursuant to NRS 604A.070, the term "grace period" is defined as "any period of deferment offered gratuitously by a licensee to a customer if the licensee complies with the provisions of NRS 604A.210." (emphasis added). Because the GPPDAs charge interest on the entire original outstanding principle for seven months, rather than a decreasing principle, additional interest is charged. Because additional interest is charged and a payment is due in every period of the extended payment schedule, there is no deferment.[32] In addition, because TitleMax charges more interest through the GPPDA than through the original 210-day loan, the extended repayment schedule offered through

[31] Whether charged during, or for the granting of, a grace period, it's an additional charge because it's more than the 210 days of interest allowed by NRS 604A.445 and NRS 604A.210.

[32] Black's Law Dictionary, 421 (6th Ed. 1990) ("Deferment" is defined as, "[a] postponement or extension to a later time . . .." "Defer" is defined as "[d]elay; put off; . . . postpone to a future time.").

the GPPDA is not free of cost, and therefore is not gratuitous.[33] These are factual determinations, not questions of law.

No matter how it's spun, charging more interest simply doesn't comply with the statutory definition of a grace period.[34] In addition, the term "grace period" has been defined elsewhere as "[a] period of extra time allowed for taking some required action (such as making payment) without incurring the usual penalty for being late."[35] There is no question as to the meaning of "grace period", it simply is a period of time following a payment due date during which no interest accrues. Based on the facts presented at the hearing, the ALJ agreed that there is no grace period[36] experienced when an original 210 day loan is

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[33] Webster's II New College Dictionary, 486 (1999) (defining "gratuitous" as "[g]iven or received without cost or obligation: FREE.").

[34] Contrary to TitleMax's assertions, charging and collecting more interest constitutes an additional charge. *See Appellant's Opening Brief*, pp. 9-10.

[35] Black's Law Dictionary, 717 (8th Ed. 1999).

[36] TitleMax asserts that "[i]nterest was not charged during the grace period", which it claims is payments 8-14, even though the agreement is called a Grace Period Payment Deferment Agreement. *Appellant's Opening Brief*, p. 12. Even if the additional interest charged during payments 2-7 is an additional fee obtained for the granting of seven months of extension of the payment of principal, it still violates NRS 604A.210. *Id.*

amended to become a GPPDA.[37] The ALJ properly determined that the GPPDAs are loan extensions in violation of NRS 604A.445(3)(c).[38]

Because the GPPDA is a loan extension in violation of NRS 604A.445(3)(c), TitleMax's asserted dispute regarding the meaning of "additional interest" is really a red herring. Consequently, the commencement of this case really was creative piecemeal litigation.

With regard to the issue involving additional persons being allowed as parties to the title loans, the factual questions included whether the additional persons were actually borrowers[39] (and therefore potentially co-borrowers), guarantors or simply needed for purposes of meeting the ability to repay requirements set forth in NRS 604A.450(2). In addition, it was unknown whether the additional persons were legal owners of the vehicles and such facts could be provided through an administrative hearing. The ALJ decided this issue in favor of

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[37] *Motion to Dismiss Appeal, Exhibit A, p. 10-11.*

[38] *Id.*

[39] NRS 604A.040; NRS 604A.105.

TitleMax and therefore TitleMax was afforded relief and this issue is resolved because FID did not cross-appeal.[40]

The District Court saw through the shell game and properly dismissed this case and let the matter proceed through the administrative process. If allowed to avoid an administrative hearing, TitleMax would have avoided the facts as determined by the examiner and found by the ALJ through the administrative hearing. Proceeding properly through an administrative hearing and then a petition for judicial review, these same facts are to be given deference pursuant to NRS 233B.135 and related case law.[41]

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[40] *Motion to Dismiss Appeal, Exhibit. A, p. 12-13.*

[41] *See United Exposition Services, Co. v. State Industrial Insurance System*, 109 Nev. 421, 423, 851 P.2d 423, 423-424 (1993) ("It is well recognized that this court, in reviewing an administrative agency decision, will not substitute its judgment of the evidence for that of the administrative agency." (citation omitted)); *See Clements v. Airport Authority of Washoe County*, 111 Nev. 717, 722, 896 P.2d 458, 461 (1995). ("Although a reviewing court may decide pure legal questions without deference to an agency determination, an agency's conclusions of law which are closely related to the agency's view of the facts are entitled to deference and should not be disturbed if they are supported by substantial evidence." (citation omitted)).

The sort of piecemeal litigation pursued by TitleMax is not judicially economical and is disfavored.[42] The District Court properly put an end to the piecemeal litigation. (JA 0522-0523).

b. Due to the Existence of Factual Issues, the Exception for Seeking Pure Statutory Interpretation is not Applicable

TitleMax asserts that it merely asked the district court to decide a pure question of law. Pure questions of statutory interpretation and constitutional questions can be exempt from the exhaustion requirement.[43] As previously explained above, TitleMax did not present the district court with a question of pure statutory interpretation. In addition, TitleMax did not seek relief on a constitutional question. Consequently, this exception does not apply.

Contrary to TitleMax's assertions, the *Malecon*, *NAS*[44] and *Check City* cases actually support the FID's position. *Malecon* sets forth two exceptions to the exhaustion requirement and stresses that fact-finding

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[42] *Barbara Ann Hollier Trust v. Shack*, 131 Nev. __, 356 P.3d 1085, 1090 (2015).

[43] *Malecon,* 118 Nev. 837, 839, 59 P.3d 474 (2002); *Check City ("Check City"),130 Nev.* __, 337 P.3d 755, 758, n. 5 (2014).

[44] *Financial Institutions Div. v. Nevada Association Services ("NAS")*, 128 Nev. __, 294 P.3d 1223, 1228, 128 Nev. Adv. Op. 34 (Nev. 2012).

is to be done through the administrative proceedings.[45] Though *Malecon* and *Check City* both state that issues of pure statutory interpretation are an exception to the exhaustion requirement, they merely set forth the exception and the applicability of the exception is determined on a case-by-case basis.

In *Check City*, the issue was "whether NRS 604A.425 unambiguously states that the 25-percent cap includes both the principal amount borrowed and any interest or fees charged."[46] NRS 604A.425 states: "A licensee shall not . . . [m]ake a deferred deposit loan that exceeds 25 percent of the expected gross monthly income of the customer when the loan is made". This involved pure statutory interpretation because this Court analyzed the language of NRS 604A.425 and NRS 604A.050.[47] Unlike the case at hand, *Check City* was solely about the words in the statute.

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[45] 118 Nev. 837, 839-842, 59 P.3d 474, 476-477 (2002).

[46] 130 Nev. __, 337 P.3d 755 (2014).

[47] *Id.* at 756-758.

In *Malecon*, the taxpayers were challenging the constitutionality of two statutes as applied to them.[48] The exception did not apply because this Court determined that the taxpayer's complaint alleged a factual issue.[49]

In *NAS*,[50] this Court determined that FID did not have jurisdiction to issue the advisory opinion or take disciplinary action. Because FID did not have original jurisdiction as a matter of law, FID should not have issued the advisory opinion.[51] There were no factual issues to consider in this regard, *i.e.* it was a question of law.[52]

All three of the cases discussed above support the dismissal of this case. Considering the *Benson* decision, TitleMax is drawing at straws

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[48] 118 Nev. 837, 841, 59 P.3d 474 (2002).

[49] *Id.* ("The constitutionality of the statutes challenged here, as applied, involves a factual evaluation, and this evaluation is best left to the Department of Taxation, which can utilize its specialized skill and knowledge to inquire into the facts of the case.").

[50] 128 Nev. __, 294 P.3d 1223, 1227-1228 (2012).

[51] *See Sobol v. Capital Management Consultants, Inc.*, 102 Nev. 444, 446, 726 P.2d 335, 337 (1986) (providing, "acts committed without just cause which unreasonably interfere with a business or destroy its credit or profits, may do an irreparable injury and thus authorize issuance of an injunction." (citation omitted)).

[52] *Id.*

and has no basis upon which to assert that any of these cases render the FID's position, or the lower court's dismissal order, anything but proper.

III. The District Court did not Ignore the Futility Exception to the Exhaustion Requirement.[53]

This Court has stated that the futility exception applies when an agency "is statutorily precluded from granting a party any relief at all."[54]

The record on appeal indicates that an administrative complaint was issued, a hearing was noticed and the matter proceeded under the jurisdiction of an ALJ.[55] (JA 0367-0381; JA 0353-355). TitleMax had a multiple day hearing during which it had the opportunity to fully present all of its issues.[56] In addition, TitleMax was able to cross-examine the FID's witnesses and directly examine its own witnesses.[57] Following the hearing, TitleMax received a final decision reducing the requested fines from $3,070,000 to $307,000 with $257,000 of the fine

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[53] *Appellant's Opening Brief*, pp. 20, 30.

[54] *Benson*, 131 Nev. __, 358 P.3d 221, 225 (2015).

[55] The jurisdiction of the Commissioner of the FID was delegated pursuant to NRS 233B.122(2-3).

[56] *Motion to Dismiss Appeal, Exhibit A, p. 4-16.*

[57] NRS 233B.123(4).

held in abeyance and $50,000 due in 30 days.[58] In addition, the final decision determined that TitleMax could allow co-borrowers on title loans.[59] TitleMax simply cannot argue that this remedy did not provide "any relief at all," nor could it have successfully made such an argument to the lower court.[60]

The administrative hearing actually provided TitleMax with the opportunity to obtain all the relief it was seeking, *i.e.* an interpretation of the statutes as applied to the facts related to the business practices. Consequently, the futility exception is not applicable.

In addition, TitleMax cites to *State v. Scotsman Mfg. Co.*, 109 Nev. 252, 255, 849 P.2d 317, 319 (1993), *Malecon*, 118 Nev. 837, 839, 59 P.3d 474, 476 (2002) and *Engelman v. Westergard*, 98 Nev. 348, 647 P.2d 385 (1982). In *Scotsman*, this Court determined that it would have been futile to require Scotsman to submit administrative refund requests because the time for doing so had already passed and this Court had already determined, in a prior case, that the sales tax

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[58] *Motion to Dismiss Appeal, Exhibit A, pp. 15-16.*

[59] *Id., at p. 12-13.*

[60] *Benson*, 131 Nev.__, 358 P.3d 221, 225 (2015).

assessment was unconstitutional and had granted a refund.[61] The *Scotsman* decision states, "The statutory procedure offers Scotsman no relief at all given the three-year period of limitations invoked by the state" because the refund claims would have been time barred.[62]

TitleMax cited to *Malecon* to cite to *Karches v. City of Cincinnati*, 526 N.E.2d 1350, 1355-56, 38 Ohio St.3d 12 (Ohio 1988), which is not a Nevada case, for the purpose of arguing that exhaustion is not required when "administrative remedies would be futile or unusually onerous."[63] The administrative hearing is over and it was not "onerous or unusually expensive" as compared to what the Karches went through.[64] To the extent the *Karches* decision indicates that exhaustion is not required when there is no administrative remedy available which can provide the relief sought, this Court has stated that the futility exception does not

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[61] 109 Nev. 252, 255, 849 P.2d 317, 319-320 (1993).

[62] *Id.*

[63] *Appellant's Opening Brief*, p. 30-31.

[64] *Karches*, 526 N.E.2d 1350, 1355-57, 38 Ohio St.3d 12 (Ohio 1988).

apply just because the available remedy isn't the desired remedy.[65] In this case, the administrative hearing provided adequate relief[66] and the final decision can be reviewed by the district court.[67]

In *Engelman,*[68] similar to *Scotsman,* Engelman had not received actual notice and the time for pursuing administrative remedies had passed.

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[65] *Benson*, 131 Nev. __, 358 P.3d 221, 226 (2015). If licensees could obtain an injunction every time FID caused an NRS 604A.820 hearing to be noticed, no such hearings would ever occur and the statute would be rendered meaningless. The Legislature would not have enacted the statute if they didn't want it to be used. *See Allstate Insurance Co. v. Thorpe*, 123 Nev. 565, 572, 170 P.3d 989 (2007) (providing, "'[i]t is not conceivable that the legislature would give its extensive time and attention to study, draft, meet, hear, discuss and pass this important piece of legislation were it not to serve a useful purpose.'").

[66] *Public Service Com'n of Nevada v. Eighth Judicial Dist. Ct.*, 107 Nev. 680, 685, 818 P.2d 396 (1991) (explaining that but for the need for extraordinary writ relief a petition for judicial review is an adequate remedy.).

[67] NRS 233B.135.

[68] 98 Nev. 348, 353, 647 P.2d 385 (1982).

The Nevada precedent[69] is the *Benson* case, which explains that the futility exception is applicable when the time limits for pursuing the administrative remedy have expired.[70] Because TitleMax has had an administrative hearing, this futility exception does not apply.

IV. The Motion to Dismiss was Procedurally Proper

Finally, exalting form over substance, TitleMax posits that the FID's motion to dismiss on grounds of ripeness and failure to exhaust administrative remedies was tainted by some procedural "defect." That FID styled its motion under Rule 12(b)(5) (failure to state a claim) as opposed to a motion under Rule 12(b)(1) (lack of subject matter jurisdiction) amounts to a distinction without a difference. In similar circumstances, federal courts easily recognize that even if improperly styled as a failure to state a claim, such a motion will be treated as brought as a Rule 12(b)(1) motion for lack of subject matter

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[69] The rest of the cases cited by TitleMax relative to this issue are not Nevada cases. *Apellant's Opening Brief*, p. 31. Contrary to TitleMax's argument that there was certainty of an adverse decision, the ALJ was not part of FID and had not given any prior indication of what position she may have had with regard to the issues to be determined. *Id.*

[70] 131 Nev. __, 358 P.3d 221, 224-226 (2015).

jurisdiction.[71] Here, moreover, there was no procedural "defect" in FID's styling its motion under Rule 12(b)(5).

Because TitleMax had not been aggrieved by a final agency decision, the matter was not ripe for review. Because the case was non-justiciable or not ripe, TitleMax could not state a claim upon which relief could be granted.[72] Moreover, the District Court's dismissal can be affirmed even if it should have been based on NRCP 12(b)(1).[73] Consequently, the dismissal was procedurally proper.

CONCLUSION

For all of the reasons argued above, the dismissal order of the

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[71] "Like other challenges to a court's subject matter jurisdiction, motions raising the ripeness issue are treated as brought under Rule 12(b)(1) even if improperly identified by the moving party as brought under Rule 12(b)(6)." *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989) *citing Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir.1983), and generally 5 C. Wright & A. Miller, Federal Practice & Procedure § 1350 (1969).

[72] NRCP 12(b)(5).

[73] *Sengel v. IGT*, 116 Nev. 565, 570, 2 P.3d 258 (2000) (a district court's order reaching the correct conclusion for the wrong reasons can be affirmed on the correct basis).

district court should be affirmed.

Dated: January 13, 2017.

ADAM PAUL LAXALT
Attorney General

By: /s/ DAVID J. POPE
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Senior Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I electronically re-filed the foregoing in accordance with this Court's electronic filing system and consistent with NEFCR 9 on January 17, 2017.

Participants in the case who are registered with this Court's electronic filing system will receive notice that the document has been filed and is available on the court's electronic filing system.

/s/ Debra Turman
An employee of the Office of the Attorney General

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Dated: January 17, 2017.

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