Case No. 79224

In the Supreme Court of Nevada

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

Appellant,

*vs.*

TITLEMAX OF NEVADA, INC., a Delaware corporation,

Respondent,



**APPEAL**

from the Eighth Judicial District Court, Clark County
The Honorable JERRY A. WIESE II, District Judge
District Court Case No. A-18-786784-C

# MOTION TO STRIKE ARGUMENTS RAISED FOR THE FIRST TIME ON APPEAL AND FOR THE FIRST TIME IN REPLY

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Respondent TitleMax of Nevada, Inc. moves to strike arguments appellant FID raised for the first time on appeal – and particularly those raised for the first time in reply. This Court should refuse to consider the FID's arguments made for the first time in its reply that TitleMax violated Regulation Z (without explaining how) and that TitleMax's loan agreement violates NRS 604A.5074(3)(b) (when the FID admitted in its opening brief that TitleMax's loan agreement complies with NRS 604A.5074(3)(b)).

The Court should also refuse to consider the FID's new factual arguments made for the first time on appeal. If the FID had raised below the arguments it now raises that TitleMax's refinances are not really new loans because (a) TitleMax does not consider ability-to-repay and vehicle fair market value upon refinancing, (b) the prior loan agreement is not marked "paid in full," and (c) loan principal remains static, TitleMax would have submitted to the district court evidence proving these assertions false. TitleMax does not, as the FID would have this Court believe, treat refinances like an extension of an existing loan – TitleMax's refinances are truly new loans, and TitleMax treats them as such.

The FID's arguments are doubly improper because they raise factual issues that are immaterial to the pure legal question on summary judgment: whether NRS Chapter 604A prohibits title loan refinancing. This Court should strike the noncompliant portions of the FID's briefs.[1]

## I. THIS COURT SHOULD STRIKE THE FID'S ARGUMENTS MADE FOR THE FIRST TIME ON REPLY

It is well-established that arguments made for the first time in reply should not be considered. *Khoury v. Seastrand*, 132 Nev. 520, 530, 377 P.3d 81, 88 n.2 (2016) ("Because [appellant] raises this issue for the first time in his reply brief, it is deemed waived and we do not consider it here."); *Edelstein v. Bank of New York Mellon*, 128 Nev. 505, 523, 286 P.3d 249, 261 n.12 (2012) ("[Appellant] does not make this argument in his opening brief thus, we do not consider it.").

[1] TitleMax attaches to this motion examples of some of the evidence it would have presented to the district court had the FID properly preserved its arguments, but if this Court strikes the FID's improper arguments, there is no need to consider TitleMax's evidence.

### A. The Court Should Strike the FID's Allegation that TitleMax Violates Regulation Z

The Court should strike the FID's argument that "TitleMax violates … Regulation Z." (ARB at 20.) The FID never argued that TitleMax violated Regulation Z in its opening brief (or below) – so TitleMax has had no chance to respond. Moreover, the FID never explains how TitleMax purportedly violates Regulation Z. The FID states, "Regulation Z is a federal rule which states…" but then goes on to quote NRS 604A.5067, not Regulation Z. (ARB at 20-21.) Regulation Z is a massive regulation with several different subparts. TitleMax should not be required to guess as to what the FID means by its ambiguous allegation, and the FID's argument should not be considered in any event because it is immaterial to the issues on appeal and is raised for the first time on reply.

### B. The Court Should Strike the FID's Allegation that TitleMax's Loan Agreement Violates NRS 604A.5074(3)(b)

Having never before asserted any issue with TitleMax's simple-interest loans in which payments are applied first to accrued interest, the FID now claims that "[e]ven if a customer does not adhere to a payment schedule, each payment must still be amortized" and "[t]he

terms of the loan agreement cannot violate the statute. Accordingly, TitleMax's claim, (AB 39), that the loan agreement provides for payments to interest first does not change the fact that an interest-only payment violates NRS 604A.5074(3)(b)." (ARB at 14 & n.9.) However, the FID previously admitted that the terms of TitleMax's loan agreement comply with NRS 604A.5074(3). (AOB at 3 ("TitleMax enters into a 210-day loan agreement that complies with NRS 604A.5074(3).").) The FID cannot argue precisely the opposite in its reply brief.

The FID has known all along that TitleMax offers simple-interest loans in which payments are applied first to unpaid interest and then to principal. (A.App. 335.) The Court should strike the FID's new argument made for the first time on reply that these standard provisions of TitleMax's loan agreement somehow violate NRS 604A.5074.[2]

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[2] Despite previously arguing that TitleMax's refinances were not really new loans (ARB at 23; A.App. 125, 424), the FID now concedes that TitleMax's refinances "[r]eplac[e] the original loan with a new loan." (ARB at 11; *see also* ARB at 3-4 ("The [refinance] agreements are simply another 210-day title loan under the same conditions as the original 210-day title loan.").) The FID's admission that TitleMax's refinances are new loans is significant because (a) this brings them squarely within the definition of a refinance (*see* AOB at 13 (agreeing that

## II. THIS COURT SHOULD STRIKE THE FID'S FACTUAL ARGUMENTS MADE FOR THE FIRST TIME ON APPEAL

The FID raises at least three new assertions in its appellate briefing: that (1) TitleMax allegedly does not consider ability to repay or the vehicle's fair market value upon refinancing; (2) the paid-off loan agreements are not marked "paid in full;" and (3) refinancing results in principal remaining static. (AOB at 4,7; ARB at 12; AOB at 3-4; ARB at 4 n.1; *see also* RAB at 58-59.) The Court should refuse to consider these new and unfounded contentions.

### A. The FID Waived Any Argument That TitleMax Does Not Consider Ability to Repay or the Vehicle Fair Market Value with Each Refinance

The FID's opening brief lacks any citation to the record where the FID preserved an argument that TitleMax does not consider ability to repay and fair market value with each refinance or that the paid-off loan is not marked paid in full. The FID nonetheless persists in arguing that "TitleMax does not redetermine the customer's ability to repay

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"refinance" generally "refers to an exchange of old debt for a new debt, as by … repaying the existing loan with money acquired from a new loan") (quotations and citations omitted)); and (b) this means that TitleMax's refinances (which use the same 210-day loan agreement) also comply with NRS 604A.5074(3).

with each subsequent loan agreement" and "TitleMax does not reappraise the vehicle used as collateral" in its reply brief—again without record citation. (*See, e.g.*, ARB at 4, 12-13, 24.)[3]

These arguments are not just procedurally forfeited; they are false. TitleMax pointed to numerous new income documentation and fair market evaluations in the record accompanying refinances. (RAB at 59-60.)[4] The FID ignores this evidence, instead supporting its new argument on appeal with cherry-picked examples that omit several of the documents demonstrating TitleMax evaluates ability to repay and vehicle fair market value with each refinance. The FID had these

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[3] The FID points to only one instance where it argued below that the customer does not "get a *receipt* showing that loan is paid in full." (ARB at 24 (citing FID 692) (emphasis added).) But the FID's citation is to oral argument in front of the district court – not to any briefing to which TitleMax had the opportunity to respond or supplement the record. The FID's single record cite is telling in that it confirms the FID *never* alleged that TitleMax does not consider ability to repay or vehicle fair market value upon refinancing. TitleMax does. Nor did the FID ever allege that the loan agreement for the paid off loan is not marked "paid in full." It is.

[4] (A.App. 569-575, 592-596 (new income documentation and new fair market value evaluation for Jason's 5/30/18 and 8/20/18 refinances); 373-374, 377-380 (vehicle evaluations with refinances); 382-382, 385-388, 399-403 (new income documentation with refinances, including Sally's 12/13/18 refinance).)

documents from its evaluation of TitleMax, and had the FID raised this issue at the appropriate time before the district court, TitleMax would have countered by submitting them to the district court.[5] The Court should refuse to consider the FID's new arguments raised for the first time on appeal.[6]

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[5] (*See* 1 R.Supp.App. 52-55, 75-77, 78-80 (income documentation with Fredrik's 12/1/17, 12/28/17, and 1/31/18 refinances); 1 R.Supp.App 44-51 (income documentation and vehicle fair market evaluation with Kay's 1/31/18 refinance); 1 R.Supp.App. 135-144 (income documentation and vehicle fair market evaluation with Kelly's 10/27/17 and 12/04/17 refinances); 1 R.Supp.App 8-10, 30-35 (income documentation with Marlon's 11/27/17, 12/28/17, and 1/31/18 refinances); 1 R.Supp.App 100-04 (income documentation and vehicle fair market evaluation with Sally's 12/01/17 refinance); 1 R.Supp.App. 81-85 (income documentation with Sally's 2/13/18 refinance); *see also* 2 R.Supp.App. 428-429, Urbaez Cotto Decl. ¶¶ 3-7 (explaining TitleMax's policy to evaluate ability to repay and vehicle fair market value with every refinance); 1 R.Supp.App. 170-172, 188-189, 197-199, 216-217, 225-227, 231-236; 2 R.Supp.App. 273-276, 301-308, 335-338, 358, 366-368, 386-390, 412, 420-422 (income documentation and vehicle fair market evaluations accompanying additional examples of refinances).)

[6] "A party may not raise 'new issues, factual and legal, that were not presented to the district court ... that neither [the opposing party] nor the district court had the opportunity to address.'" *Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. 689, 693, 290 P.3d 249, 252 n.3 (2012) (quoting *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 437, 245 P.3d 542, 545 (2010)); *Penrose v. O'Hara*, 92 Nev. 685, 686, 557 P.2d 276, 277 (1976) ("Appellant raises these contentions for the first time on appeal; thus, we will not consider them.").

## B. The FID Both Waived and Should Be Estopped from Arguing That Paid-Off Loans Are Not Marked Paid in Full

Upon refinancing, the prior loan is paid off and the prior loan agreement is marked "paid in full." (A.App. 303, ¶ 62.) The FID argued for the first time in reply that the "majority of the loan agreements are not marked paid in full," citing this footnote:

> [7] *See, e.g.*, FID 178-184, 188-194, 208-214 (Fredrik-three out of the 4 agreements were not marked paid in full); FID 154-160, 170-176 (Marlon-two of the four agreements were not marked paid in full); FID 232-236, 238-242, 246-254, 256-262 (Sally-none of the four agreements were marked paid in full); FID 436-440, 449-453, 461-467, 468-474 (Kelly-four out of the five agreements were not marked paid in full).

(ARB at 12 & n.7.) As an initial matter, the FID has a math problem. Only those loan agreements that have actually been paid off should be marked "paid in full." The last loan still outstanding as of the time of the FID's examination should not have been marked "paid in full" because it was not yet paid[7] – so it is error for the FID to suggest that *all* the loan agreements for each customer should have been marked "paid

[7] (A.App. 208-214, 170-176, 256-262, 461-467, 468-474.) Moreover, A.App. 461-367 and 468-474 are two copies of the same loan agreement, so Kelly did not have five agreements as the FID states.

in full." Moreover, the FID simply missed one of the "paid in full" notations.[8]

More significantly, the FID chose what documents to submit to the district court and omitted several of the "paid in full" copies of the loan agreements, sometimes submitting unsigned, unstamped versions of loan agreements even though signed versions marked "PAID" were in TitleMax's loan files. (A.App. 178-184, 188-194.) If the FID had argued below what it argues now – that paid-off loan agreements are not marked "paid in full" – TitleMax would have submitted the "paid in full" versions of the loan agreements that the FID omitted.[9] It was the

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[8] (A.App. 154-160 (stamped "PAID IN FULL" and hand-marked "PF".)

[9] (R.Supp.App. 61-67 (Fredrik's 11/09/17 loan agreement marked "PAID 12/01/2017" upon 12/01/17 refinance); 1 R.Supp.App 68-74 (Fredrik's 12/01/17 loan agreement marked "PAID 12/28/2017" upon 12/28/17 refinance); 1 R.Supp.App. 130-34, 145-49 (Kelly's 7/07/17 and 7/27/17 loan agreements marked "PAID IN FULL"); 1 R.Supp.App. 23-29 (Marlon's 11/27/17 loan agreement marked "PAID 12/29/2017" upon 12/29/17 refinance); 1 R.Supp.App. 112-21 (Sally's 9/29/17 and 10/12/17 loan agreements marked "PAID IN FULL"); 1 R.Supp.App. 105-11 (Sally's 12/01/17 loan agreement marked "PAID 02/13/2018" upon 2/13/18 refinance); *see also* 1 R.Supp.App. 152-158, 178-184, 206-212, 250; 2 R.Supp.App. 251-256, 266-272, 294-300, 328-334, 348-354, 379-385, 404-410 (additional examples of refinancing where the original loan agreement was marked "PAID" or "PAID IN FULL").) To the extent there are isolated instances in which the prior loan agreement is not marked

FID that placed unmarked versions of the loan agreements in the record – and now cites the purported absence of the "paid in full" notation to try to prove TitleMax committed a statutory violation it never committed. The Court should strike the FID's misleading argument made for the first time on reply.[10]

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"PAID IN FULL" upon refinancing, that is due to employee error, not TitleMax policy. (2 R.Supp.App. 429, Urbaez Cotto Decl. ¶ 10.)

[10] The FID also misleads the Court when it claims that "TitleMax does not mark the customer's receipt paid in full as required by NRS 604A.508(2)(b)(6)" and then includes this footnote:

> [8] *See, e.g.*, FID 492, 494, 511, 530, 533, 552, 553, 557, 577, 579, 580 (Jason); FID 441, 444, 447 (Kelly); FID 245, 255 (Sally); FID 233 (Kay); FID 204, 205, 207 (Fredrik); FID 153, 161, 169 (Marlon).

(ARB at 13 & n.8.) Contrary to the FID's assertion, several of the listed receipts *are* marked "PAID IN FULL." (*See* A.App. 494, 511, 533, 557, 580.) Several more are not the date of a refinance, and thus there is no reason for them to be marked "PAID IN FULL." (*See* A.App. 492, 530, 552, 553, 577, 579, 204, 205.) And FID 233 is not a receipt for Kay at all, but rather a page of a loan agreement for Sally. (A.App. 233.) The FID's citations cannot be trusted. Moreover, the FID's entire premise is misplaced. The FID wants the receipt for the last payment made before refinancing to be marked "paid in full." But it is not the last partial payment made that pays off the prior loan – it is the refinance itself. It is only when proceeds from the new loan are applied to the previous loan account that the prior loan is paid in full. (A.App. 303, ¶ 62.) Thus, it is not the partial payment the customer makes that should generate a receipt marked "paid in full." Rather, when a loan is refinanced and the refinance in fact pays off the prior loan, the prior loan agreement is marked "paid in full" and given to the customer – this is the relevant receipt. (A.App. 303, ¶ 62; 2 R.Supp.App. 429, Urbaez Cotto Decl. ¶¶ 8, 11.)

### C. The FID Waived Any Argument that Refinancing Results in Static Principal, and that Argument is Incorrect

In its briefing to the district court, the FID did not once use the word "static." (A.App. 117-136, 414-434.) In contrast, on appeal, that has become the FID's watchword. In attempting to shoe-horn refinancing into *TitleMax I*'s holding,[11] the FID on appeal argues again and again that the principal is static. (*See* AOB at 3 (citing *TitleMax I* and arguing that TitleMax's "'refinance' product … similarly charges interest on a static principle [sic]"); AOB at 4 ("In this way, TitleMax can collect interest only payments on the static principal – which, coincidentally, is the same practice that this Court recently determined to be in violation of the statutes.") (citing *TitleMax I*); ARB at 4 n.1 ("In

[11] The problem with the GPPDA in *TitleMax I* is that it was not *calculated* to ratably and fully amortize principal and interest (not that individual payments might not be applied equally to principal and interest due to the nature of a simple interest loan where interest is paid down first). *See* NRS 604A.5074(3)(b) (the payments on a 210-day title loan must be "*calculated* to ratably and fully amortize" principal and interest) (emphasis added); *Dep't of Bus. & Indus., Fin. Institutions Div. v. TitleMax of Nevada, Inc.* ("*TitleMax I*"), 135 Nev. 336, 338, 342, 449 P.3d 835, 837, 841 (2019) ("TitleMax collected seven months of interest-only payments calculated based on a static principal balance.… Payments on a loan under the GPPDA *never ratably amortize*") (emphasis in original).

practice, the 'refinance' is far more egregious and detrimental than the GPPDA rejected by this Court in *TitleMax I* because the interest-only payments on the static principal go on for a potentially unlimited amount of time, as opposed to the seven months of additional interest collected under the GPPDA.").)[12]

However, the only evidence the FID cites in support of its argument that principal remains static is documents from its six cherry-picked examples, and especially the single example of Marlon's loan file.[13] (ARB at 3 & n.2.) The very documents the FID cites belie its

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[12] (*See also, e.g.*, AOB at 6 ("TitleMax then restarts the 210-day clock by 'refinancing' the static principal into a new 210-day payment structure."); AOB at 10 ("By collecting an unamortized interest payment and then rolling the full, unreduced static principal into a new title loan, TitleMax has found another way to charge additional interest"); AOB at 15; AOB at 17 ("TitleMax collects additional interest each month by collecting unamortized interest on a static principal balance."); AOB at 27 ("Each subsequent month, the customer makes another unamortized interest only payment on the static principal"); AOB at 48 ("TitleMax's refinance program . . . includes interest only payments on a static principal"); ARB at 3 ("The loan principal, meanwhile, is not reduced.") (emphases added).)

[13] (*See* AOB at 19 ("After making monthly payments of interest only for as long as TitleMax can drag it out, the borrower still owes virtually the same principal and interest that it owned at the inception of the original loan and TitleMax still holds the title to the customer's vehicle.") (citing FID 146-176, Marlon loan documents); ARB at 3 n.2 ("The principal is rarely ever paid down, except by a few odd pennies.")

argument and establish that principal does not remain static.[14] While Marlon made certain payments that went primarily toward interest, that was because of the timing and amounts of his payments—sometimes tardy or partial—which had to be applied first to accrued interest. (A.App. 335.)

If the FID had made the same arguments below that it makes now, TitleMax would have submitted evidence to the district court that Marlon ended up refinancing one more time after the FID's examination (refinanced on March 16, 2018) and then completely paid off his loan on March 28, 2018. (1 R.Supp.App. 1, 11-18.) Far from being the parade of horribles and never-ending interest-only payments argued by the FID,

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(citing FID 126, 146-176, Marlon's loan documents and a page of the FID's district court briefing discussing Marlon's loan documents).)

[14] (*See, e.g.*, A.App. 185 (Fredrik's principal reduced by $83.82); 186 (Fredrik's principal reduced by $74.57); 195 (Fredrik's principal reduced by $473.80); 196; 205 (Fredrik's principal reduced by $107.66); 206 (Fredrik's principal reduced by $226.50); 237 (Sally's principal reduced by $700.67); 243 (Sally's principal reduced by $235.24); 244 (Sally's principal reduced by $859.97); 245; 442; 443 (Kelly's principal reduced by $164.25); 445 (Kelly's principal reduced by $168.68); 446 (Kelly's principal reduced by $341.10); 490, 491, 493 (Jason's principal reduced by $101.40); 509-510 (Jason's principal reduced $64.82); 532 (Jason's principal reduced by $72.36); 551, 554-557 (Jason's principal reduced by $143.40); 576, 578, 580).)

Marlon in fact paid off his original 10/28/17 loan and all his refinances within 152 days – far less than the original projected payment schedule of 210 days.

Moreover, TitleMax would have submitted to the district court ten examples of refinances in which principal was significantly reduced (between 16% and 78%) before refinancing and in which payments were frequently applied to pay down both principal and interest (i.e. were "amortized" according to the FID's definition). (1 R.Supp.App. 150 – 2.R.Supp.App. 427; 2.R.Supp.App. 431.) For example, one customer paid down over 60% of principal prior to refinancing, obtained a lower monthly payment by refinancing, and paid off the original loan and the refinance in 115 days (far less than 210 days). (1 R.Supp.App. 150-176; 2.R.Supp.App. 431.) Another customer paid down 78% of principal prior to refinancing. (1 R.Supp.App. 231–2.R.Supp.App. 261; 2.R.Supp.App. 431.) TitleMax's refinances do not result in static principal.

## CONCLUSION

For the foregoing reasons, TitleMax requests that the Court decline to consider the FID's new and misleading arguments.

Dated this 18th day of November, 2020.

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## CERTIFICATE OF SERVICE

I certify that on November 18, 2020, I submitted the foregoing "Motion to Strike Arguments Raised for the First Time on Appeal and for the First Time in Reply" for filing via the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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