IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY, FINANCIAL INSTITUTIONS DIVISION, Appellant, vs. TITLEMAX OF NEVADA, INC. A DELAWARE CORPORATION, Respondent.	**Supreme Court Case No.: 79224** **District Court Case No.: A-18-786784-C**

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT

OPPOSITION TO TITLEMAX'S MOTION TO STRIKE ARGUMENTS RAISED FOR THE FIRST TIME ON APPEAL AND FOR THE FIRST TIME IN REPLY BRIEF

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Appellant, State of Nevada Department of Business and Industry, Financial Institutions Division (FID) opposes Respondent, TitleMax of Nevada, Inc.'s (TitleMax) motion to strike and moves this Court to strike TitleMax's supplemental appendix documents. This appeal is from competing motions for summary judgment – there were no material issues of fact. TitleMax's motion seems to assert otherwise. The motion also includes several volumes of additional documents that were not part of the record before the district court and should not be considered now.

TitleMax's complaint against FID requested declaratory relief and allegedly concerned legal issues (related to the 2018 examination) excepting them from the requirement to exhaust administrative remedies. *See State v. Glusman*, 98 Nev. 412, 419, 651 P.2d 639 (1982) (noting exemption to exhaustion requirement). The district court found, without making any specific factual findings, "that TitleMax's practice of 'refinancing' does not violate either NRS 604A.5074 or NRS 604A.065." (FID 678).

TitleMax did not dispute the documents and exemplar loan files in the record before the lower court. There were thus no disputed issues of fact below. TitleMax's motion (which actually seems to be more of a sur-reply), now attempts to create issues of fact on appeal where there are none. Arguing over facts at this point means either summary judgment was not appropriate or the district court did not have subject matter jurisdiction to hear the case at all.

FID has not waived any arguments, and TitleMax's motion should not distract this Court from deciding the issues on appeal.

I. FID DID NOT WAIVE THE ARGUMENT THAT TITLEMAX'S REFINANCING RESULTS IN A STATIC PRINCIPAL.

TitleMax objects to FID's use of the word: static. FID uses this word to describe the principal amount of the loans TitleMax refinances. This argument of the principal remaining substantially the same is not a new argument on appeal. In its motion for summary judgment, FID argued that the principal was not reduced as a result of interest-only payments being made.

> As shown in the table above as well as by the payment receipt details in Exhibit "B," the four payments made by the borrower were generally interest only payments and were not ratably and fully amortized. TitleMax violated NRS 604A.5074(3)(b) because after the second interest only payment the principal was still $970.56. After four months (120 days) of interest payments totaling $610.06, a total of $2.60 was applied to the principal. The TILA box on the fourth agreement provides that the borrower still owes $968.40 in principal, and another $650.41 in interest for a total of $1,618.81 - which is essentially the same position the borrower was in four months earlier even though the borrower had now already paid $610.06 in interest. Exhibit "B".[1]

The original principal was $971.00. (FID 126). In this case, after four months, the principal had gone down merely $2.16. This principal was static.[2] This

[1] FID 126-127; *see also* FID 125 and FID 415.

[2] Webster's II New College Dictionary, 1077 (1999) (defining "static" as "[m]arked by absence of motion or progress.").

is just one example of how FID argued before the district court that the principal remains static when interest-only payments are made.

TitleMax says the use of the word is due to this Court's ruling in *Financial Institutions Division v. TitleMax of Nevada, Inc*., 135 Nev. 336, 342, 449 P.3d 835 (2019) (*TitleMax I*). To the extent findings from *TitleMax I* are applicable here, they should not be excluded as a new argument. This Court issued its decision in *TitleMax I* in September of 2019. Accordingly, FID properly cited to the current state of law and interpretation of NRS 604A.5074(3).

As with the Grace Period Payment Deferment Agreement, TitleMax's "refinancing" results in customers making interest-only payments on the original principal, or a substantially similar amount, multiple times. The difference here is the newly dated contract issued after each interest only payment.[3] Because the installment payments are required to be ratably and fully amortized, a customer should pay interest on the original amount of the principal only once. NRS 604A.5074(3); *TitleMax I*, 135 Nev. at 343. FID has consistently argued throughout the case that the "refinancing" results in a static, or unchanging, principal and violates NRS 604A.5074(3)(b) (requiring amortized payments). Interest-only

[3] *See e.g.*, FID 146-176.

payments are not allowed.[4] FID did not waive this argument and properly cited to controlling case law when it was issued.

II. ARGUMENTS MADE IN FID'S REPLY ARE NOT NEW AND WERE IN RESPONSE TO TITLEMAX'S ANSWERING BRIEF.

TitleMax's motion is a desperate attempt to change the legal analysis here. TitleMax adds several hundred pages of documents and a new declaration to the record that was not before the district court. FID's reply responded to TitleMax's answering brief. NRAP 28(c). None of the reply arguments are new and they are supported by the record (as it existed before the district court). Should this Court determine that this is not the case, the Court can exercise its discretion and not consider the arguments. *Brundy v. Bramlet*, 101 Nev. 3, 6 n.2, 692 P.2d 493 (1985) (denying motion to strike but disregarding arguments not properly preserved).

A. TitleMax fails to consider ability to repay and vehicle fair market value.

TitleMax alleges FID waived its right to argue: TitleMax does not consider ability to repay or vehicle fair market value with each refinance. Issues related to the ability to pay and vehicle fair market value were part of FID's examination findings. (FID 047-57). The issues were also included in FID's motion for summary judgment. (FID 133-134), and opposition to TitleMax's countermotion for summary judgment (FID 0430-432). The issues were included in FID's opening brief (*e.g.*,

[4] *See e.g.*, FID 126-127, 146-176; NRS 604A.5074(3)(a-b).

AOB at 4, 7-8, 44-47), as well as in FID's reply to TitleMax's arguments attempting to distinguish their refinance from an extension. (ARB at 18-21).[5] Whether or not some loans show an effort to look at ability to repay or vehicle fair market value is not determinative. The issue is whether TitleMax's collection of interest-only payments resulting in the extension of 210-day title loans is prohibited by statute. *See TitleMax I*, 135 Nev. at 343, NRS 604A.5074(3)(b). In its Opening Brief, FID argued, in a different context, that each "refinance" is an extension because TitleMax did not consider the ability to repay and the fair market value of the vehicle. (AOB at 4, 7-8, 44-47, ARB at 18-21). Though TitleMax had the opportunity to provide the district court with any documentation it deemed relevant, the record lacks any evidence that TitleMax re-evaluates each of these things for each refinance. (FID 007-661, 679-710). The record speaks for itself and nothing in the record supports TitleMax's position in this regard.

FID has not raised a new theory of argument. Issues regarding the ability to repay and the fair market value of vehicles were part of the report of examination that prompted the Complaint (FID 047-57), raised at the district court below (FID 117-135, 414-433, 683-694), and raised consistently through this appeal, and in the context of each refinance, in the Opening Brief and Reply. (AOB at 4, 7-8,

[5] TitleMax argues in its answering brief that its refinance is not the same as an extension and is therefore permitted by NRS 604A.

44-47, ARB at 18-21). These arguments support the same theories asserted by FID based on applicable statutes. FID has not waived these arguments.

B. Loan agreements are not marked paid in full.

TitleMax takes issue with FID's reply saying a majority of the loan agreements are not marked paid in full. FID mentioned the loan agreements in response to TitleMax's assertion that in their refinances "[t]he first loan is paid off and the loan agreement marked 'paid in full.'" (RAB at 32). FID is merely pointing out references in the record that show agreements that are not marked paid in full. (*e.g.*, FID 178, 188, 232, 238, 436, and 449). While TitleMax attempts to conflate the loan agreement with the *receipt* given to the customer, NRS 604A.508 sets the statutory requirements that must be met when a loan is paid in full. This was argued before the District Court (FID 692:1-15) as well as in the FID's opening brief and in response to TitleMax in the reply brief. (AOB at 7, 19 n.7, ARB at 4, 13, 23-24). Marking the loan agreement as paid in full does not change the fact that TitleMax is violating the statute by extending the original term of the loan past 210 days. The documents in the record speak for themselves and, with or without this argument, FID prevails.

C. TitleMax's loans agreements violate Regulation Z.

Regulation Z (also referenced as the Truth in Lending Act (TILA) box) was raised by TitleMax to say their "refinance" product is not an extension. (RAB at

31). TitleMax argues they comply with Regulation Z claiming that the amount of interest and fees in the TILA box is only a projection. (RAB at 40). FID addressed those statements in its Reply, and not as a new argument. (ARB at 13-14). Moreover, FID referenced TILA in its motion for summary judgment showing that the TILA box on Marlon's 4th loan agreement showed that the borrower was in essentially the same position it was in from the first agreement four payments earlier although the borrower had made interest-only payments in the amount of $610.10. (FID 127:1-7).

In addition, NRS 604A.5067, which incorporates Regulation Z, was argued before the district court. (FID 691). NRS 604A.5067(2)(c) requires a title loan to include things such as the "amount of the title loan, amount financed, annual percentage rate, finance charge, total of payments, [and] payment schedule . . .."

It is clear from TitleMax's own documents in the record that, when they roll the obligation over, the TILA box in the updated documents does not reflect the interest-only payment made before the new documents were drafted, and therefore, does not express the total amount of interest/finance charge that has been paid. (FID 146-176). As a result, customers are not shown the total finance charge or the total of payments. In this regard, TitleMax's loan agreements do not comply with Regulation Z or NRS 604A.5067. TitleMax knows what needs to be in the loan agreement and the loan agreements do not say interest-only payments are allowed

(because they are prohibited by NRS 604A.5074(3)(a-b)), yet interest-only payments are made and subsequent refinances are provided by TitleMax.[6]

D. TitleMax's loan agreements violate NRS 604A.5074(3)(b).

TitleMax misconstrues FID's argument. FID's reply footnote as quoted by TitleMax states: "an interest-only payment violates NRS 604A.5074(3)(b)." (ARB at 14, n.9). This footnote does not say the loan agreement violates NRS 604A.5074(3). It refers to the requirement that payments must be amortized and include both principal and interest, and the conclusion therefrom that interest-only payments do not comply with NRS 604A.5074(3)(b). The loan agreement says payments are applied first to interest, but the required payments must include both principal and interest per the payment schedule in the loan agreement. NRS 604A.5074(3)(a-b). Unless each payment is paid in full by the due date, the loan is in default. NRS 604A.045. An interest-only payment fails to comply with the amortized payment due under the loan agreement and does not constitute a full payment. NRS 604A.5074(3)(a-b). Instead of considering the loan in default and offering a repayment plan pursuant to NRS 604A.5083, TitleMax enters into a new 210-day title loan.[7]

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[6] *See* FID 146-176; *see also* FID 223, 255, 441, 444, 447, 577-580.

[7] *See, e.g.,* FID 232-262. This example includes Sally's 210-day title loans and subsequent agreements. According to the loan documents, Sally made payments pursuant to the agreements on two loans for two months. On December 1st she made a scheduled payment on one loan and an interest-only payment on the second loan.

III. TITLEMAX'S SUPPLEMENTAL APPENDIX, VOLUMES 1 AND 2, SHOULD BE STRIKEN.

According to NRAP 10(b), the record on appeal consists of the relevant portions of the district court record. FID filed the record on appeal in December 2019 in four volumes. TitleMax added legislative history records in May 2020 in five volumes. In November 2020 and in conjunction with its motion to strike, TitleMax filed supplemental appendices consisting of two volumes and 431 pages of documents. These documents were not before the district court. TitleMax did not seek leave to supplement the record and "[t]his court has no power to alter or amend the record of the lower court." *Carson Ready Mix, Inc. v. First Nat. Bank of Nevada*, 97 Nev. 474, 477, 635 P.2d 276, 278 (*quoting State v. Hunter*, 48 Nev. 358, 362, 232 P. 778, 779 (1925)). *See also State, Nevada Employment Sec. Dept. v. Weber*, 100 Nev. 121, 123, 676 P.2d 1318, 1319 (1984) ("Reference to matters outside the record is improper.") (citation omitted)); *Vacation Village v. Hitachi*, 111 Nev. 1218, 1220-21, 901 P.2d 706 (1995) (*citing Carson Ready Mix*, supra). TitleMax's supplemental appendices should be stricken.

(FID 244, 245). On the same day, Sally entered into a new loan for another 210 days combining the two loans and increasing the amount of the loan with another $1,827.60 advance, with no mention of the prior payments. Sally missed her January 1st and February 1st payments (technically in default per NRS 604A.045) and on February 13th Sally made an interest-only payment of $2,100 (FID 255) and entered into another 210-day loan. (FID 256).

CONCLUSION

This is an appeal of the grant of summary judgment allowing TitleMax to refinance 210-day title loans. TitleMax's motion attempts to raise new issues of fact by adding hundreds of supplemental documents that were not before the district court. As detailed above, FID did not make any new arguments in its briefing and, if the Court determines otherwise, they can be disregarded. FID requests TitleMax's motion be denied and the supplemental documents be stricken.

Respectfully submitted this 18th day of December, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on December 18, 2020.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

/s/ Marilyn Millam
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