



ORDR

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
MALANI DALE KOTCHKA-ALANES (SBN 13168)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169-5996
(702) 949-8200
DPolsenberg@LRRC.com
JHenriod@LRRC.com
MKotchkaAlanes@LRRC.com

PATRICK J. REILLY (SBN 6103)
ERICA C. SMIT (SBN 13959)
HOLLAND AND HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
Tel: (702) 669-4600
Fax: (702) 669-4650
PReilly@HollandHart.com
ECSmit@HollandHart.com

Attorneys for Petitioner
TITLEMAX OF NEVADA, INC., d/b/a
TITLEBUCKS d/b/a TITLEMAX

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Petitioner,

vs.

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

Respondent.

Case No. A-16-743134-J
Dept. No. XV

**ORDER REVERSING AND
VACATING ADMINISTRATIVE LAW
JUDGE'S ORDER**

Hearing Date: August 3, 2017
Hearing Time: 9:00 a.m.

<input type="checkbox"/> Jury	<input type="checkbox"/> Disposed After Trial Start
<input type="checkbox"/> Non-jury	<input type="checkbox"/> Judgment Reached
<input type="checkbox"/> Jury	<input checked="" type="checkbox"/> Transferred before Trial
<input type="checkbox"/> Verdict Reached	
<input type="checkbox"/> Other -	

1 I.

2 **BACKGROUND, FINDINGS, AND SUMMARY OF RULING**

3 1. On August 3, 2017, this Court heard oral argument on TitleMax’s Petition for
4 Judicial Review. Daniel F. Polsenberg and Dale Kotchka-Alanes of Lewis Roca
5 Rothgerber Christie LLP, as well as Patrick J. Reilly of Holland & Hart LLP,
6 appeared on behalf of TitleMax. Deputy Attorneys General David J. Pope, William
7 J. McKean, Vivienne Rakowsky, and Rickisha Hightower-Singletary appeared on
8 behalf of the State of Nevada Department of Business and Industry Financial
9 Institutions Division (the “FID”).

10 2. The Court reviewed all the briefing by the parties, as well as pertinent parts of
11 the administrative record (“ROA”) and the transcript of the hearing before the
12 Administrative Law Judge (“Hr’g Tr.”). The Court also considered the arguments of
13 the parties, all of which lead the Court to its holding set forth herein.

14 A. **TitleMax’s Offering of the GPDA**

15 3. Under NRS 604A.445, the original term of a title loan can be 30 days or up to
16 210 days if certain conditions are met.

17 4. TitleMax originally offered a 30-day product in Nevada and allowed
18 customers to refinance up to six times. TitleMax offered a repayment plan that
19 incorporated a grace period under which the customer had to make minimum interest
20 payments, but could then take an additional seven or eight months to repay principal
21 only. (Hr’g Tr. 477:11-478:3.)

22 5. The FID took issue with TitleMax’s 30-day product, arguing only that
23 TitleMax did not adequately take into account customers’ ability to repay the loan in
24 30 days. (Hr’g Tr. 478:9-15; 479:6-9.)

25 6. TitleMax disagreed with the FID’s interpretation that its 30-day loan product
26 did not adequately take into account borrowers’ ability to repay due to the ability of
27 customers to extend the loan up to six times, but nevertheless stopped offering the 30-
28 day product in a good faith attempt to please the FID. (Hr’g Tr. 478:16-23.)

1 7. As an alternative to the 30-day product, TitleMax began offering a 210-day
2 loan in 2014. (Hr’g Tr. 478:19-479:13.)

3 8. To offer customers flexibility in repayment, TitleMax, in reliance on counsel,
4 also began offering a Grace Period Payments Deferment Agreement (“GPDA”).
5 (Hr’g Tr. 480:9-22, 496:10-24.)

6 9. The GPDA contained a payment schedule comprised of fourteen 30-day
7 payment periods. (Hr’g Tr. 483:10-11; ROA 010646-010648.)

8 10. Under the GPDA, the customer was charged only 210 days of interest, and the
9 interest rate under the loan agreement remained unchanged. (ROA 010646-010648.)

10 11. The first seven payments could be interest-only payments, and then the
11 customer had an additional 210 days to repay the principal without any interest or
12 fees included. (ROA 010646-010647; Hr’g Tr. 482:1-12, 488:17-21, 490:12-16.)

13 12. The payment schedule under the GPDA was as follows:

Payment Number	Amount of Payment	Deferred Periodic Due Date
1	<Interest Only Pymt on New Principal Bal.>	<Fist 30 Day Due Date>
2	^same as above	^Plus 30 Days
3	^same as above	^Plus 30 Days
4	^same as above	^Plus 30 Days
5	^same as above	^Plus 30 Days
6	^same as above	^Plus 30 Days
7	^same as above	^Plus 30 Days
8	<New Principal bal. divided by 7>	^Plus 30 Days
9	<New Principal bal. divided by 7>	^Plus 30 Days
10	<New Principal bal. divided by 7>	^Plus 30 Days
11	<New Principal bal. divided by 7>	^Plus 30 Days
12	<New Principal bal. divided by 7>	^Plus 30 Days
13	<New Principal bal. divided by 7>	^Plus 30 Days

14	<New Principal bal. divided by 7> **If odd amt list odd amt here	^Plus 30 Days
The total amount paid after making all payments under the terms of the Grace Period Payments Deferment Agreement:	Total of above columns	

(ROA 010646-10647.)

13. There was no customer deception in the GPDA. When voluntarily signing the GPDA, customers acknowledged that their obligation to pay simple interest under the loan agreement remained unchanged and that interest would be charged at the original contractual interest rate. (ROA 010646-10648.)

14. TitleMax gratuitously offered the GPDA and did not charge any fees for entering the GPDA. (Hr’g Tr. 74:25-75:12; 192:20-25; 398:12-17.)

15. While the GPDA allowed for interest-only payments for the first 210 days, customers could make payments on the principal before the end of the first 210 days. In fact, TitleMax had several customers who repaid their loan in full within the first 210 days, even though they had signed a GPDA.¹

16. Before TitleMax offered the GPDA, it consulted with its own legal department and outside counsel, both of whom advised that the GPDA complied with Nevada law. (Hr’g Tr. 488:23-489:3, 496:10-24, 509:13-17.)

B. Relevant Chronology

17. December 18, 2014, was the date that the FID’s 2014 examination of

¹ (See ROA 001840-001858, 007211-007233, 003905-003927, 008395-008421, 006568-006591, 000467-000491, 006651-006675, 002451-002473, 002475-002500, 000793-000815, 005309-005331, 002957-002980, 007152-007173, 002786-002805, 002192-002212, 001118-001137, 004799-004819, 001474-001492, 003399-003420, 001432-001451, 003644-003662, 008821-008840, 000167-000191, 000229-000254, 006288-006308.)

1 TitleMax closed. (ROA 008918.) The FID issued a Report of Examination with a
2 “Needs Improvement” rating and stated that TitleMax’s GPDA “violates NRS
3 604A.445(3) and NRS 604A.210.” (ROA 008918-008934.)

4 18. Shortly after the conclusion of the FID’s examination in December 2014,
5 TitleMax – through counsel – wrote a detailed letter to the FID, responding to the
6 alleged statutory violations. (ROA 009991-010000.) In this February 9, 2015, letter,
7 TitleMax spent several pages setting forth its position why the GPDA did not violate
8 NRS 604A.210 and 604A.445. (ROA 009995-0100000.) TitleMax informed the
9 FID, “As an alternative to the 210-day single-pay loan, the Companies are willing to
10 revert back to their prior approach with 30-day single pay loans, which the
11 Companies believe are in full compliance with applicable law.” (ROA 009999.)

12 19. TitleMax explained that it considered the GPDA to be in full compliance with
13 Nevada law and requested that the FID “change its ‘Needs Improvement’ rating to
14 ‘Satisfactory’ for each of the 2014 audits. *If the Division believes that our analysis is*
15 *incorrect or that our procedures will result in further negative regulatory findings;*
16 *however, please respond to us in writing.*” (ROA 009999-010000 (emphasis added).)

17 20. In a letter dated March 2, 2015, the FID addressed a different statutory issue
18 and then stated in a single sentence: “With regard to your other matters raised in your
19 February 9 Letter, the FID stands by its position.” (ROA 010004-010006.)

20 21. The FID did not respond to TitleMax’s offer to revert back to the 30-day loan
21 product, nor did the FID offer any reasoning, explanation, or legal authority for the
22 proposition that the GPDA allegedly violated NRS 604A.210 and 604A.445.

23 22. The FID commenced another examination of TitleMax beginning in May
24 2015, which closed on June 17, 2015. (ROA 008936.) In its 2015 Report of
25 Examination, the FID issued an “Unsatisfactory” rating to TitleMax, citing
26 TitleMax’s offering of the GPDA as “a repeat violation.” (ROA 008936-008948.)

27 23. On June 1, 2015, TitleMax filed a declaratory relief action in state court,
28 sixteen days before the 2015 examination was completed. (Hr’g Tr. 438:14-21,

1 517:2-4; ROA 010697-010700.) TitleMax sought declaratory relief as to whether the
2 GPDA violated NRS 604A.210 and 604A.445. (ROA 010697-010700.)

3 24. On October 6, 2015, the FID moved to dismiss TitleMax's pending
4 declaratory relief action for alleged "failure to exhaust administrative remedies."
5 (ROA 011010-011021).

6 25. On the same day, the FID filed the administrative complaint against TitleMax
7 that forms the basis of TitleMax's appeal to this Court. (ROA 000001-000017.)

8 **C. The Administrative Proceedings Against TitleMax**

9 26. On October 6, 2015, the FID filed an administrative complaint against
10 TitleMax, alleging that TitleMax violated NAC 604A.230 and willfully violated NRS
11 604A.210 and NRS 604A.445. (ROA 000001-000017.)

12 27. The parties called witnesses and conducted administrative proceedings before
13 Administrative Law Judge ("ALJ") Denise S. McKay on July 18, July 19, and July
14 20, 2017. (*See* 10/18/2016 Petitioner's Notice of Transmittal of Record of
15 Proceedings and accompanying hearing transcript ("Hr'g Tr.").)

16 28. On August 12, 2016, the ALJ issued Findings of Fact, Conclusions of Law,
17 and Order ("Order"). (ROA 0122279-012295.)

18 29. In her Order, the ALJ found that TitleMax did not violate NAC 604A.230's
19 prohibition against guarantors by allowing individuals who were not legal owners of
20 the vehicle to be co-borrowers on the title loan; she pointed out that there was no
21 evidence that TitleMax received payment from the non-legal owner in any instance
22 and that the non-legal owners were not acting as guarantors. (ROA 0122290-012291.)

23 30. The FID did not challenge or appeal the ALJ's ruling that TitleMax did not
24 violate NAC 604A.230, so it is not before this Court.

25 31. However, the ALJ concluded that TitleMax's practice of offering the GPDA
26 violated NRS 604A.210 and NRS 604A.445. (ROA 0122287-012290.) The ALJ
27 further concluded that TitleMax willfully violated NRS 604A.210 and NRS
28 604A.445 because it continued to offer the GPDA even after TitleMax was advised

1 by FID lay examiners that they believed the GPDA violated the statutes. (ROA
2 012292-012294.) The ALJ ordered:

- 3 a. That TitleMax immediately cease and desist offering the GPDA to
4 customers;
- 5 b. That TitleMax conduct a full accounting and return of all principal and
6 interest it collected under every GPDA entered into after December 18,
7 2014;
- 8 c. That TitleMax pay an administrative fine of \$307,000 with \$257,000
9 held in abeyance provided TitleMax was, and remained, complaint with
10 NRS 604A.445; and
- 11 d. That TitleMax compensate the FID for the costs expended on the court
12 reporter and transcripts in the administrative proceedings. (ROA
13 012294.)

14 32. These determinations by the ALJ are before this Court, as they are the subject
15 of TitleMax's Petition for Judicial Review.

16 **D. Relevant Statutes**

17 33. At issue in these proceedings are various provisions of NRS 604A.²

18 34. NRS 604A.070 defines grace period to mean "any period of deferment
19 offered gratuitously by a licensee to a customer if the licensee complies with the
20 provisions of NRS 604A.210."

21 35. NRS 604A.210, in turn, provides:

22 The provisions of this chapter do not prohibit a licensee from
23 offering a customer a grace period on the repayment of a loan or an
24 extension of a loan, except that the licensee shall not charge the
25 customer:

- 26 1. Any fees for granting such a grace period; or

27 ² Chapter NRS 604A was recently amended, with changes to take effect July 1 and
28 October 1, 2017. In this Order, unless otherwise indicated, the Court cites to the
versions of the statutes in effect at the time TitleMax offered the GPDA and does not
include the 2017 amendments.

1 2. Any additional fees or additional interest on the outstanding loan
2 during such a grace period.

3 36. The definition of “extension” in NRS 604A.065 provides:

4 1. “Extension” means any extension or rollover of a loan beyond
5 the date on which the loan is required to be paid in full under the
6 original terms of the loan agreement, regardless of the name given
7 to the extension or rollover.

8 2. The term does not include a grace period.

9 37. NRS 604A.445(3) provides:

10 Notwithstanding any other provision of this chapter to the
11 contrary:

12

13 3. The original term of a title loan may be up to 210 days if:

14 (a) The loan provides for payments in installments;

15 (b) The payments are calculated to ratably and fully amortize
16 the entire amount of principal and interest payable on the
17 loan;

18 (c) The loan is not subject to any extension; and

19 (d) The loan does not require a balloon payment of any kind.

20 **E. The ALJ’s Decision**

21 38. The ALJ stated that “NRS 604A.210 and NRS 604A.[0]70 are the only
22 provisions in Chapter 604A that address grace periods,” but nevertheless concluded
23 that the GPDA had to comply with NRS 604A.445(3). (ROA 012287-012290.)

24 39. The ALJ found that the GPDA did not comply with NRS 604A.445(3)
25 because it “is an illegal extension of the loan in violation of NRS 604A.445(3)(c)”
26 and the payments are not ratably and fully amortized. (ROA 012289-012290.)

27 40. The ALJ concluded that the GPDA “does not constitute a true grace period”
28 and that the “imposition of seven interest-only payments is simply the impermissible
 charging of additional interest,” as “TitleMax stands to earn more money in interest
 charges under the [GPDA].” (ROA 012289-012290.)

1 41. The ALJ also found that TitleMax willfully violated NRS 604A.445(3) by
2 continuing to offer the GPDA after being told by the FID during 2014 and 2015
3 examinations that the GPDA was unlawful. (ROA 012292-012293.)

4 42. Since “TitleMax was placed on notice by [the] FID that” the GPDA “violated
5 the law” no later than December 18, 2014, the ALJ ruled that “every [GPDA] entered
6 into after December 18, 2014, is void, and TitleMax is not entitled to collect, receive
7 or retain any principal, interest or other charges or fees with respect to those loans.”
8 (ROA 012293.) Only 307 loans, however, were in evidence in the administrative
9 proceedings.

10 **F. Ruling**

11 43. The Court hereby reverses and vacates the ALJ’s order. The Court disagrees
12 with and reverses the ALJ’s conclusions regarding TitleMax’s interpretation of NRS
13 604A.070, NRS 604A.210, and NRS 604A.445. The Court also finds that TitleMax
14 did not willfully violate any of these provisions.

15 44. The GPDA as written does not violate NRS 604A.070, NRS 604A.210, or
16 NRS 604A.445.

17 45. The plain language of NRS 604A.445(3) indicates that this statute applies to
18 the “original term” of the loan, and does not govern grace periods. NRS 604A.445(3)
19 does not set a maximum time period on the loan, and amortization is not a
20 requirement for grace periods.

21 46. Moreover, the word “additional” as used in NRS 604A.210 means something
22 more than the original contractual rate of interest. The legislative history of NRS
23 604A.210 supports TitleMax’s statutory interpretation.

24 47. At a minimum, TitleMax’s statutory interpretation, if not correct, is
25 reasonable and thus precludes a finding of willfulness. That the FID attempted to
26 pass a regulation in 2012 that would have prohibited charging any interest during a
27 grace period, but did not do so, demonstrates that TitleMax reasonably interpreted
28 NRS 604A.210 and did not act willfully. TitleMax’s reliance on counsel, although

1 not dispositive, is another indication that TitleMax acted in good faith and did not
2 willfully violate any provision of NRS 604A. The FID’s failure to respond to
3 TitleMax’s request for an explanation of the FID’s position also leads to the
4 conclusion that TitleMax did not act willfully.

5 48. The ALJ’s conclusion that TitleMax acted willfully because it failed to
6 immediately change its way of doing business the moment lay FID examiners opined
7 it should, is illogical and clearly erroneous.

8 49. In sum, the ALJ’s ruling is clearly erroneous, arbitrary and capricious, and is
9 hereby reversed and vacated.

10 **II.**

11 **TITLEMAX DID NOT VIOLATE NRS 604A.070, NRS 604A.210, OR NRS 604A.445**

12 **A. This Court Owes No Deference to the FID**
13 **or the ALJ in Interpreting Plain Statutory Language**

14 50. The Court finds NRS 604A.070, NRS 604A.210, and NRS 604A.445 to be
15 unambiguous and thus this Court need not defer to the FID’s interpretation of the
16 statutes. The FID is not entitled to deference by this Court in determining the
17 meaning of the statutes’ plain language.

18 51. Moreover, the question here is whether the structure of the GPDA complies
19 with NRS 604A.445(3) and NRS 604A.210. That is a purely legal determination
20 upon which the Court owes no deference to the FID or to the ALJ. *Elizondo v. Hood*
21 *Mach., Inc.*, 129 Nev. Adv. Op. 84, 312 P.3d 479, 482 (2013) (courts decide “pure
22 legal questions without deference to an agency determination”) (internal quotation
23 marks and citation omitted); *Manke Truck Lines, Inc. v. Pub. Serv. Comm’n of Nev.*,
24 109 Nev. 1034, 1036–37, 862 P.2d 1201, 1203 (1993) (questions of statutory
25 construction are “purely legal issue[s] . . . reviewed without any deference
26 whatsoever to the conclusions of the agency”).

1 52. To the extent deference is owed to either the ALJ or the FID, the Court finds,
2 in the alternative, that the FID's and the ALJ's statutory interpretations are clearly
3 erroneous.

4 **B. The Requirements of NRS 604A.445(3)**
5 **Do Not Apply to Grace Periods**

6 53. NRS 604A.445 does not govern grace periods and thus does not apply to the
7 GPDA.

8 54. Under the plain language of NRS 604A.445(3), the 210-day limit applies only
9 to the original term of the loan; that subsection refers to and governs the original term
10 of the loan, not grace periods.

11 55. NRS 604A.445(3) does not set a maximum time period on a loan. It does not
12 say that a title loan can never be longer than 210 days.

13 56. Rather, by providing that the "original term" of a title loan can be up to 210
14 days, the statute contemplates that a title loan can be of longer duration if a grace
15 period is included. While NRS 604A.445(3) prohibits extensions of a 210-day title
16 loan, the definition of "extension" specifically excludes grace periods. NRS
17 604A.065(2).

18 57. TitleMax's GPDA complied with the statutory provisions regarding grace
19 periods (NRS 604A.070 and NRS 604A.210), and thus there was no basis for the ALJ
20 to conclude that the GPDA was an illegal extension.

21 58. Moreover, the FID conceded that a grace period could be of unlimited
22 duration and that the mere length of the repayment period under the GPDA was not a
23 violation of any law. (Hr'g Tr. 219:10-11; 279:11-280:10; 396:24-397:2; 398:8-11;
24 663:10-11.)

25 59. Under the plain language of the statutes, amortization is not a requirement for
26 grace periods. The amortization requirement in NRS 604A.445(3)(b) again applies to
27 the "original term" of the loan.
28

1 60. The FID also acknowledged that there was no amortization requirement for
2 grace periods. (Hr’g Tr. 84:17-19; 185:7-10; 298:24-299:1; 419:15-21.)

3 61. Indeed, as a grace period is by definition a period of deferment, it makes no
4 sense to require amortization during a grace period.

5 62. In light of the entire harmonized statutory scheme, TitleMax’s statutory
6 interpretation is the better-reasoned approach.

7 63. The requirements of NRS 604A.445(3) do not apply to grace periods, and
8 TitleMax did not violate NRS 604A.445(3) by offering the GPDA to its customers.

9 **C. Both the Plain Language and the Legislative History of NRS**
10 **604A.210 Establish That TitleMax Did Not Violate NRS 604A.210**

11 64. Under NRS 604A.070, a grace period is “any period of deferment offered
12 gratuitously by a licensee to a customer if the licensee complies with the provisions
13 of NRS 604A.210.”

14 65. The GPDA was comprised of a lawful grace period because it offered a
15 period of deferment on payments, was offered voluntarily and without charge (i.e.
16 gratuitously), and complied with NRS 604A.210.

17 66. Under NRS 604A.210, grace periods are permitted as long as the licensee
18 does not charge the customer “1. Any fees for granting such a grace period; or 2. Any
19 additional fees or additional interest on the outstanding loan during such a grace
20 period.”

21 67. It is undisputed that TitleMax did not charge any fees for customers entering
22 the GPDA. (ROA 010646-010648; Hr’g Tr. 74:25-75:12; 192:20-25; 398:12-17.)

23 68. Under the plain language of NRS 604A.210, which the Court finds
24 unambiguous, the word “additional” preceding “interest” means something more than
25 the original contract rate of interest provided for in the loan agreement.

26 69. Words in statutes must have meaning. *S. Nevada Homebuilders Ass’n v.*
27 *Clark Cty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (courts must interpret
28 statutes “in a way that would not render words or phrases superfluous or make a

1 provision nugatory”) (internal quotation marks and citation omitted); *Coast Hotels &*
2 *Casinos, Inc. v. Nevada State Labor Comm’n*, 117 Nev. 835, 841, 34 P.3d 546, 550
3 (2001) (“[T]his court will read each sentence, phrase, and word to render it
4 meaningful within the context of the purpose of the legislation.”).

5 70. The ALJ’s determination ignores the rule that each word must have meaning
6 and ignores the word “additional.” NRS 604A.210 must be interpreted to mean that
7 the licensee can charge interest at the original contract rate during the grace period.

8 71. If the legislature had intended that the total amount of interest charged in
9 conjunction with a grace period could not exceed the total amount of interest set forth
10 in the Truth-in-Lending Act Disclosures accompanying the original loan, it would
11 have said so. *See* NRS 604A.435(1)(e) (prohibiting a deferred deposit lender from
12 accepting a “check or written authorization for an electronic transfer of money for
13 any deferred deposit loan *in an amount which exceeds the total of payments set forth*
14 *in the disclosure statement required by the Truth in Lending Act and Regulation Z*
15 *that is provided to the customer*”) (emphasis added); *Dep’t of Taxation v.*
16 *DaimlerChrysler Servs. N. Am., LLC*, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005)
17 (“Here, the Legislature could have clearly provided [the contended result], but it did
18 not do so.”); *see also Jama v. Immigration & Customs Enf’t*, 543 U.S. 335, 341
19 (2005) (“We do not lightly assume that [the legislature] has omitted from its adopted
20 text requirements that it nonetheless intends to apply, and our reluctance is even
21 greater when [the legislature] has shown elsewhere in the same statute that it knows
22 how to make such a requirement manifest.”); *Russello v. U.S.*, 464 U.S. 16, 23 (1983)
23 (“Had Congress intended [the contended result], it presumably would have done so
24 expressly as it did in the immediately following subsection”).

25 72. The Court finds NRS 604A.210 to be unambiguous; the prohibition on
26 “additional interest” means a licensee cannot charge interest at a *rate* of interest
27 higher than that specified in the loan agreement.

28 73. However, even if NRS 604A.210 were ambiguous, the legislative history

1 supports TitleMax’s interpretation. The word “additional” was specifically added to
2 the original proposed statute as a clarification of what interest could be charged
3 during the grace period. (ROA 010261; ROA 010292.) This indicates that the
4 legislature chose not to prohibit “any interest” being charged during a grace period.
5 *In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1151 (9th Cir.
6 1991) (“As a general canon of statutory construction, where the final version of a
7 statute [changes] language contained in an earlier draft, a court may presume that the
8 earlier draft is inconsistent with ultimate congressional intentions.”).

9 74. Moreover, at a public workshop in 2012, the FID solicited comments in
10 relation to “POSSIBLE ACTION regarding whether the proposed regulations should
11 be amended to add a regulation to address accrual of contract interest during a grace
12 period.” (ROA 012394.)

13 75. Members of the lending industry proposed a regulation providing “a licensee
14 is permitted to continue to accrue interest at its contract rate during the term of any
15 grace period offered within the terms and conditions of its title loan agreement
16 provided the licensee does not charge any fees or any additional interest, such as a
17 penalty or higher rate of interest, during such grace period.” *See*
18 [http://fid.nv.gov/uploadedFiles/fidnvgov/content/Opinion/Propoosed_Regulations/20](http://fid.nv.gov/uploadedFiles/fidnvgov/content/Opinion/Propoosed_Regulations/2012-09-21_NoticeOfWorkshop604A.pdf)
19 [12-09-21_NoticeOfWorkshop604A.pdf](http://fid.nv.gov/uploadedFiles/fidnvgov/content/Opinion/Propoosed_Regulations/2012-09-21_NoticeOfWorkshop604A.pdf), Ex. C.

20 76. In contrast, the FID submitted proposed regulatory language stating that a
21 licensee could *collect* interest on the outstanding loan during a grace period “not to
22 exceed the amount of accrued interest and fees as disclosed in the loan agreement.
23 During a grace period, no interest shall accrue and no fees shall be charged after
24 expiration of the loan period.” (ROA 012397);
25 [http://fid.nv.gov/uploadedFiles/fidnvgov/content/Opinion/Propoosed_Regulations/20](http://fid.nv.gov/uploadedFiles/fidnvgov/content/Opinion/Propoosed_Regulations/2012-09-21_NoticeOfWorkshop604A.pdf)
26 [12-09-21_NoticeOfWorkshop604A.pdf](http://fid.nv.gov/uploadedFiles/fidnvgov/content/Opinion/Propoosed_Regulations/2012-09-21_NoticeOfWorkshop604A.pdf), Ex. D.

27 77. At the public hearing on the conflicting proposed regulations, the FID
28 acknowledged that NRS 604A.210 was at least ambiguous and that the industry

1 interpretation was plausible: “It was stated that the Division acknowledges some
2 ambiguity exists in the statutes, and that a possible interpretation would permit the
3 contract rate of interest to be charged during a grace period so long as it is not
4 considered ‘additional interest or fees’ on the loan.” (ROA 012402.)

5 78. In the end, neither the industry’s nor the FID’s proposed regulation was ever
6 adopted. (Hr’g Tr. 371:5-16.)

7 79. To the extent NRS 604A.210 is ambiguous, the FID engaged in proposed
8 rulemaking that would have clarified NRS 604A.210 to support the FID’s position in
9 this case, but the proposed regulation was not enacted. This too supports the
10 interpretation that NRS 604A.210 does not prohibit charging any interest during a
11 grace period. *See Horizons at Seven Hills v. Ikon Holdings*, 132 Nev. Adv. Op. 35,
12 373 P.3d 66, 71 (2016) (considering an introduced bill attempting to add “language
13 allowing the collection costs permitted under NRS 116.310313 to become part of the
14 HOA’s lien and the superpriority lien,” but pointing out this bill never passed and
15 concluding “we must presume the Legislature did not intend for such costs to be
16 included as part of an HOA’s superpriority lien”).

17 80. Under NRS 604A.210, licensees are allowed to charge simple interest at the
18 original contractual rate during a grace period, and TitleMax did not violate NRS
19 604A.210.

20 III.

21 **TITLEMAX ACTED REASONABLY, PRECLUDING A FINDING OF WILLFULNESS**

22
23 81. Alternatively, and at a minimum, the Court concludes that the ALJ’s
24 willfulness finding is clearly erroneous. Even assuming TitleMax’s statutory
25 interpretation were incorrect – which the Court does not believe it is – TitleMax’s
26 statutory interpretation was reasonable. There was no willful violation that could
27 possibly lead to the penalties the ALJ imposed.
28

1 **A. The Legislative History of NRS 604A.210 Confirms**
2 **TitleMax Acted on a Reasonable Interpretation of That Statute**

3 82. TitleMax cannot be found to have willfully violated NRS 604A.210 when the
4 FID’s interpretation of the statute was never codified or enacted. As described in
5 paragraphs 74-78 above, in its 2012 workshop, the FID acknowledged ambiguity in
6 NRS 604A.210 and recognized that TitleMax’s interpretation of the statute was
7 plausible. The rule the FID proposed to address the issue did not pass. Thus, there
8 can be no willfulness here.

9 83. The FID’s proposed, but never-passed regulation supports the Court’s
10 determination that the ALJ’s ruling was clearly erroneous and arbitrary and
11 capricious.

12 84. TitleMax’s statutory interpretation was not objectively unreasonable. That
13 TitleMax acted in accord with a reasonable and plausible interpretation means that
14 TitleMax did not engage in any willful violation. *See Safeco Ins. Co. of Am. v. Burr*,
15 551 U.S. 47, 70 (2007) (there was no willful violation where party’s reading of the
16 statute “was not objectively unreasonable”).

17 **B. TitleMax Acted Reasonably in Determining Its Legal Obligations,**
18 **Including by Relying on Counsel**

19 85. The Supreme Court has ruled that if a party “acts reasonably in determining
20 its legal obligation, its action cannot be deemed willful.” *McLaughlin v. Richland*
21 *Shoe Co.*, 486 U.S. 128, 135 n.13 (1988). Here, at the very least, TitleMax acted
22 reasonably in determining its legal obligations. Its actions cannot therefore be
23 deemed willful.

24 86. While consulting with counsel is not dispositive, it is certainly a relevant
25 factor and indicates here that TitleMax acted reasonably in determining its legal
26 obligations. *McLaughlin*, 486 U.S. at 135 n.13; *Trans World Airlines, Inc. v.*
27 *Thurston*, 469 U.S. 111, 129-30 (1985) (a violation is not willful where “officials
28 act[] reasonably and in good faith in attempting to determine whether their plan

1 would violate” the statutory requirements) (determining that employer did not
2 willfully violate statute where it “sought legal advice”); *Baker v. Delta Air Lines,*
3 *Inc.*, 6 F.3d 632, 645 (9th Cir. 1993) (analogizing reliance on previous opinion to
4 relying on legal advice and finding such reliance “constituted good faith as a matter
5 of law”); *City Council of City of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 894,
6 784 P.2d 974, 979 (1989) (finding no willful violation of the district court’s
7 preliminary injunction where city council members followed the advice of the city
8 attorney)

9 87. TitleMax’s consultation with counsel further supports the Court’s
10 determination that the ALJ’s ruling was clearly erroneous and arbitrary and
11 capricious.

12 **C. Disagreement with an Agency Does Not Constitute Willfulness**

13 88. Penalties for willful violations cannot be premised on TitleMax not changing
14 its business practices the moment a lay FID examiner levied a decision that it should.
15 Essentially the FID’s and the ALJ’s position is that the very moment a FID examiner
16 said that TitleMax should not offer the GPDA, everything subsequent to that was a
17 willful violation. That position is unfounded, and the Court rejects it.

18 89. As an initial matter, the lay FID examiners opined that TitleMax also violated
19 NAC 604A.230, but the ALJ rejected that position. (ROA 012290-012291.) The
20 ALJ never explained how refusing to follow the advice of lay FID examiners
21 constitutes a willful statutory violation when she herself found that the FID examiners
22 were sometimes wrong in their interpretation of the law.

23 90. The Court does not use the term “lay” in a pejorative way, but simply that lay
24 examiners at the FID were not attorneys and did not rely on an Attorney General
25 opinion or any similar legal authority. (Hr’g Tr. 391:18-392:5; 393:16-18, 396:20-
26 23.)

27 91. When TitleMax laid out its legal position in its February 9, 2015, letter and
28 explained why, in its analysis, the GPDA did not violate any part of NRS 604A

1 (ROA 009991-010000), the FID responded with a letter stating merely that “the FID
2 stands by its position.” (ROA 0100006.) TitleMax’s attempt to explain its position
3 to the FID and the FID’s lack of explanation or any meaningful response are yet
4 further indications that TitleMax did not willfully violate any statutory provision
5 here.

6 92. TitleMax’s failure to change its entire way of doing business immediately
7 when lay FID examiners stated it should, simply cannot equate to willfulness. The
8 ALJ necessarily concluded that TitleMax’s failure to cease offering the GPDA
9 immediately constituted willfulness, as evidenced by the penalty given and the way it
10 was given.

11 93. Using the closing date of the FID’s 2014 Report of Examination, the first
12 examination during which the FID took issue with the GPDA, the ALJ concluded that
13 every GPDA entered into after December 18, 2014, constituted a willful statutory
14 violation, “warranting the imposition of the civil penalty set forth in NRS
15 604A.900(1)(c). Accordingly, every [GPDA] entered into after December 18, 2014,
16 is void, and TitleMax is not entitled to collect, receive or retain any principal, interest
17 or other charges or fees with respect to those loans.” (ROA 012293.)

18 94. The ALJ found that the moment the FID’s lay examiners gave their opinion
19 that the GPDA violated NRS 604A.445(3) and NRS 604A.210, the penalty started
20 from then. But TitleMax’s failure to defer immediately to the FID’s lay examiners is
21 not evidence of willfulness.

22 95. Disagreement with an agency by itself without more, as is the case here, is not
23 willfulness. *See Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 680 (1st
24 Cir. 1998) (rejecting standard of willfulness that would “preclude[] legitimate
25 disagreement between a party and” an agency and place the private party in the
26 “untenable position” of either accepting the agency’s position “or risk a finding of a
27 willful violation of the Act”); *Brock v. Claridge Hotel & Casino*, 846 F.2d 180, 188
28 & n.9 (3d Cir. 1988) (rejecting Secretary of Labor’s reliance “on the fact that the

1 casino did not change its pay practices even after the Secretary declared them
2 improper,” noting that “*private parties must retain a right to disagree* with the
3 Secretary’s interpretation of the regulations *Such disagreement is not*
4 *willfulness.*”) (emphases added).

5 **D. The Civil Penalty the ALJ Imposed Should Be**
6 **Vacated Because TitleMax Had a Good Faith**
7 **and Reasonable Belief in the Legality of Its Actions**

8 96. Moreover, this is a case dealing with a civil penalty, and the case law supports
9 that “courts refuse to impose civil penalties against a party who acted with a good
10 faith and reasonable belief in the legality of his or her actions.” *Lusardi Constr. Co.*
11 *v. Aubry*, 824 P.2d 643, 655–56 (Cal. 1992); *see also State v. Harmon*, 35 Nev. 189,
12 127 P. 221, 223 (1912) (“Penalties and forfeitures are not favored, unless plainly
13 expressed.”).

14 97. That a severe penalty is at stake – requiring the forfeiture of not only interest,
15 but all *principal* collected under every GPDA – only confirms that the appropriate
16 course of action is to reverse and vacate the penalties issued by the ALJ.

17 98. “The law does not favor forfeitures and statutes imposing them must be
18 strictly construed.” *Wilshire Ins. Co. v. State*, 94 Nev. 546, 550, 582 P.2d 372, 375
19 (1978).

20 99. Given the punitive nature of the penalty at issue, it should “be construed as
21 calling for a substantial element of culpability.” *See No Oil, Inc. v. Occidental*
22 *Petroleum Corp.*, 50 Cal. App. 3d 8, 30-31, 123 Cal. Rptr. 589 (Cal. Ct. App. 1975).

23 100. As detailed above, TitleMax did not violate any statute, let alone do so
24 willfully. At a minimum, TitleMax acted on a reasonable interpretation of the
25 statutory provisions at issue.

26 101. As an alternative finding, the Court agrees with TitleMax that
27 TitleMax’s offering of statutorily compliant products (such as the original loan
28 agreement) is not proof that other products (such as the GPDA) were willfully non-

1 compliant. The evidence suggests that TitleMax always strove to be in compliance
2 with the law and that TitleMax believed the GPDA was statutorily compliant. (*See*,
3 *e.g.*, Hr’g Tr. 181:2-5 (FID witness agreeing that “whenever TitleMax has agreed
4 with the FID’s interpretation and application of the law, they fix – they fix the
5 issue”); 472:10-473:8; 488:23-489:3, 496:10-24, 509:13-17; 577:20-23.)

6 102. There is no evidence of any willful violation by TitleMax.

7 **IV.**

8 **RULING ON SUPPLEMENTS**

9 103. TitleMax submitted supplemental authorities comprised of Assembly
10 Bill 163 (amending NRS 604A) and *Henson v. Santander Consumer USA Inc.*, 137 S.
11 Ct. 1718 (2017). The parties submitted briefing on the import of Assembly Bill 163,
12 which was approved by the Governor on June 1, 2017.

13 104. The Court finds that it does not need any of the supplemental authorities
14 to reach its decision.

15 105. To the extent the Court should or does consider the supplements, *Henson*
16 is new case law, the recent revisions to NRS 604A are akin to new case law, and, to
17 the extent appropriate to consider, both support the Court’s ruling.

18 106. The FID submitted testimony indicating that some of the recent
19 proposed statutory changes were an attempt to close “loopholes.” Such testimony
20 supports the Court’s ruling here and indicates that the previous statutory language
21 was unambiguous and allowed “loopholes.” Whether or not one characterizes the
22 pre-2017 version of NRS 604A.210 as a “loophole,” the language prohibited only the
23 charging of “additional interest” during a grace period. TitleMax followed the plain
24 language of the statute.

25 107. Moreover, the 2017 bill as actually enacted varies from the original
26 proposal. The 2017 bill as enacted modifies NRS 604A.210 to provide in connection
27 with grace periods that a licensee shall not “[c]harge the customer interest at a rate in
28 excess of that described in the existing loan agreement.” NRS 604A.210(2)(b)

1 (2017). This conforms to TitleMax’s arguments and interpretation as to what
2 “additional interest” meant all along.

3 108. The United States Supreme Court’s recent decision in *Henson v.*
4 *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725–26 (2017) also supports the
5 Court’s ruling.

6 109. In *Henson*, the Supreme Court warned that courts “will not presume . .
7 that any result consistent with [party’s] account of the statute’s overarching goal must
8 be the law but will presume more modestly instead that the legislature says what it
9 means and means what it says.” 137 S. Ct. at 1725 (internal quotation marks and
10 citation omitted; alterations incorporated). *Henson* supports that the plain language
11 of the statutes controls.

12 110. Moreover, *Henson* supports the Court’s conclusion that disagreement
13 with the regulator does not constitute willfulness or culpable conduct:

14 After all, it’s hardly unknown for new business models to emerge in
15 response to regulation, and for regulation in turn to address new
16 business models. Constant competition between constable and quarry,
17 regulator and regulated, can come as no surprise in our changing
18 world. But neither should the proper role of the judiciary in that
19 process—to apply, not amend, the work of the People’s
20 representatives.

21 *Henson*, 137 S. Ct. at 1725-26.

22 111. Again, the Court finds that it does not need to reach or consider the
23 supplements, but to the extent it can or should, they support reversing and vacating
24 the ALJ’s order.

25 **V.**

26 **ORDER**

27 **IT IS THEREFORE ORDERED:**

28 A. That the ALJ’s Order is reversed and vacated;

1 B. That the FID must return to TitleMax the \$50,000 administrative fine already
2 paid by TitleMax. The FID shall refund the amount of the administrative fine
3 in accordance with standard agency process;

4 ~~C. That the FID, within 30 days of Notice of Entry of this Order, must return to~~
5 ~~TitleMax the costs for the court reporter and transcripts in the administrative~~
6 ~~proceedings paid by TitleMax; and~~ *SH*

7 ~~D. That the FID must issue reissue its Reports of Examination for TitleMax for~~
8 ~~2014 and 2015 and provide TitleMax with "Satisfactory" ratings, given that~~
9 ~~this Court has found that TitleMax did not violate NRS 604A.070, NRS~~
10 ~~604A.210, or NRS 604A.445 and the ALJ found that TitleMax did not violate~~
11 ~~NAC 604A.230 (a finding not challenged by the FID). The FID shall provide~~
12 ~~electronic and revised copies of the amended Reports of Examination to~~
13 ~~TitleMax within 30 days of Notice of Entry of this Order.~~ *SH*

14 *See minute order for details.*

15 IT IS SO ORDERED.

16 Dated this *20th* day of ~~August~~ ^{September}, 2017.

17 *[Signature]*
18 _____
DISTRICT COURT JUDGE
19 *ET*

19 Submitted by:
20 LEWIS ROCA ROTHGERBER CHRISTIE LLP

21 By */s/ Daniel F. Polsenberg*
22 DANIEL F. POLSENBERG (SBN 2376)
23 JOEL D. HENRIOD (SBN 8492)
24 MALANI DALE KOTCHKA-ALANES (SBN 13,168)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

25 PATRICK J. REILLY (SBN 6103)
26 ERICA C. SMIT (SBN 13,959)
27 HOLLAND AND HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
(702) 669-4600

28 *Attorneys for Petitioners*