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**IN THE SECOND JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA IN AND FOR THE
COUNTY OF WASHOE**

AMETHYST PAYNE, IRIS PODESTA-
MIRELES, ANTHONY NAPOLITANO,
ISAIAH PAVIA-CRUZ, VICTORIA
WAKED, CHARLES PLOSKI, DARIUSH
NAIMI, TABITHA ASARE, SCOTT
HOWARD, RALPH WYNCOOP,
ELAINA ABING, and WILLIAM
TURNLEY behalf of themselves and all
others similarly situated,

Plaintiffs-Petitioners,

v.

STATE OF NEVADA *ex rel* NEVADA
DEPARTMENT OF EMPLOYMENT,
TRAINING AND REHABILITATION
(DETR) HEATHER KORBULIC in her
official capacity only as Nevada Director of
Employment, Training and Rehabilitation,
DENNIS PEREA in his official capacity as
Deputy Director of DETR, and KIMBERLY
GAA in her official capacity only as the
Administrator for the Employment Security
Division (ESD); and DOES 1-100, inclusive,

Defendants-Respondents

Case No.: CV20-00755

Dept No.: 8

ORDER OF MANDATE

This matter came before the Court on July 7, 2020 and was continued to July 20, 2020
via a *First Amended Ex Parte Motion for An Order to Show Cause Why Writ of Mandamus*

1 *Should Not Issue* originally filed by Plaintiffs-Petitioners on June 22, 2020. Plaintiffs-
2 Petitioners were represented by their attorneys of record, Mark R. Thierman and Leah L. Jones
3 of Thierman Buck, LLP and Defendants-Respondents. (collectively referred to as “DETR”)
4 were represented by the Attorney General’s Office of the State of Nevada, Greg D. Ott and
5 Robert Whitney. The Court having received the Parties’ oral arguments, having reviewed the
6 Report by the Special Master, having reviewed the papers and pleadings in this action, and
7 having instructed Plaintiffs-Petitioners’ counsel to prepare a formal Order with appropriate
8 Findings of Fact and Conclusions of Law, and for good cause appearing, hereby FINDS and
9 CONCLUDES, and ORDERS as follows:

10 **I. PERTINENT PROCEDURAL POSTURE**

11 This matter originally came before the Court via a *First Amended Ex Parte Motion for*
12 *An Order to Show Cause Why Writ of Mandamus Should Not Issue* filed by Plaintiff on June
13 22, 2020. On June 24, 2020 this Court issued an *Order to Show Cause Why Writ of Mandamus*
14 *Should Not Issue*. After briefing, a hearing was held on July 7, 2020 wherein the Court
15 identified several matters requiring further investigation before the Court would be able to issue
16 a decision. Accordingly, the Court appointed as Special Master, Attorney Jason Guinasso
17 pursuant to WDCR 24(2); WDCR 25(1) and NRCP 53(a)(2)(B). In the Order Appointing
18 Special Master, dated July 10, 2020, the Court set forth twenty-three issues to be reported on
19 through the Special Master’s Report.

20 The Report by the Special Master was originally due Wednesday, July 15, 2020, but
21 due to the great breadth of information vital to the Special Master’s Report, the Court granted
22 an extension of time and reset the due date for the Special Master’s Report to Friday, July 17,
23 2020. The hearing originally scheduled for Thursday, July 16, 2020 was also reset to the
24 following Monday, July 20, 2020.

25 Plaintiffs-Petitioners original *Writ of Mandamus* sought relief for an uncertified putative
26 class of “self-employed individuals, independent contractors and/or the owners of sole
27 proprietorships located within the State of Nevada who do not pay their own wages as a W-2
28 employee (also referred to hereinafter as “gig workers”) and who worked within the State of

1 Nevada immediately prior to March 15, 2020, and who have suffered a significant reduction of
2 income, revenue and/ or earnings from said work as a result of Governor Sisolak’s Declaration
3 of Emergency For COVID-19 dated March 12, 2020 and effective March 15, 2020 or the
4 presence of Coronavirus 19 Pandemic in the State of Nevada, and who have on or after May
5 16, 2020 submitted to Defendant-Respondents DETR a prime facie eligible claim for
6 unemployment compensation pursuant to Coronavirus Aid, Relief, and Economic Security Act
7 (“CARES” Act) but who have not yet been paid the applicable amount of PUA program
8 funding, which is not more than 39 weeks of unemployment benefits on the same basis as
9 regular W-2 workers for every week unemployed or suffering economic harm due to the
10 COVID-19 Pandemic, retroactive to January 27, 2020 and ending on or before December 31,
11 2020, plus an additional \$600 per week to all eligible gig workers for every week after March
12 15, 2020 until July 31, 2020 (for a total of 24 weekly payments).”¹ Plaintiffs-Petitioners
13 sought relief in the form of an Order from the Court requiring DETR, in broad terms, to make
14 immediate payments to all those to whom payment is “due” for unemployment compensation
15 pursuant to Coronavirus Aid, Relief, and Economic Security Act (“CARES” Act), through the
16 Pandemic Unemployment Assistance (“PUA”) program, and who had not yet been paid the
17 applicable amount of PUA program benefit.. More specifically, Plaintiffs-Petitioners originally
18 alleged that unemployment compensation payments are “due” at the earliest of the following
19 times: (a) two weeks after April 11, 2020, if the gig class member would have been entitled to
20 payment of unemployment compensation if he or she had applied on April 11, 2020; (b) at the
21 time the gig worker class member first presents a prime facia valid application for
22 unemployment compensation to Defendant-Respondent DETR; and (c) at the first time the
23 claimant is issued a letter of Unemployment Qualifying Determination in which the claim is
24 approved, regardless of any other subsequent determinations.. In its renewed motion for writ of
25 mandate, Plaintiffs-Petitioners argued that this Court should issue a writ of mandate
26 commanding DETR to pay all members of the subclasses of gig worker claimants set forth in

27
28 ¹ Petitioner’s First Amended Petition for Writ of Mandamus page 4 line 23 through page 5 line 11.

1 Exhibit 1 “Plaintiff Proposed Order” filed with Plaintiff Renewed Motion and Supplement in
2 support of Writ of Mandamus, which was filed on July 16, 2020, the appropriate level of
3 unemployment compensation immediately. Defendants-Respondents opposed the motion for a
4 writ of mandate.

5 For reasons stated herein, Plaintiffs-Petitioners’ *Writ of Mandamus* is granted in part
6 and denied in part as follows:

7 **II. FINDINGS OF FACT**

8 THE COURT HERBY FINDS that the COVID-19 pandemic has caused unprecedented
9 economic harm in Nevada. Its scope, its depth, its swiftness has never been seen before in this
10 State or any other, and hopefully the likes of which will never be experienced again. Its effect
11 on Nevada has been especially devastating, created by a “perfect storm” consisting of many
12 things; including, but not limited to, an already decreased DETR and Employment Security
13 Division (“ESD”) staffing levels resulting from federal funding calculations made during the
14 previous year of Nevada’s robust economic position.

15 THE COURT FURTHER FINDS that the somewhat outdated or antiquated hardware
16 and/or software system being utilized to run the usual unemployment insurance program website
17 and attendant computer and technological needs contributed to this perfect storm.

18 THE COURT FURTHER FINDS that the need to create from scratch a pandemic
19 assistance benefit administration program rather than to incorporate the new program upon or
20 within the existing UI program existed and the decision to do that appears to have been made by
21 senior administration at DETR or ESD.

22 THE COURT FURTHER FINDS that the nature of Nevada's primary economic driver is
23 gaming and tourism, and the resulting almost total shutdown of huge sectors of the economy was
24 based on justifiable concerns for public health and safety.

25 THE COURT FURTHER TAKES JUDICIAL NOTICE that there is an especially large
26 English-as-a-second-language work force, with attendant difficulties navigating either or both of
27 the UI/PUA websites. Those websites appear to be user friendly to an extent, but the Court
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1 acknowledges that the claims process can be a bit confusing, particularly to someone who is not
2 familiar with all the language and all the requests being made of the claimants.

3 THE COURT FURTHER FINDS that the call center performance has experienced
4 serious challenges no doubt aggravated by the urgency of establishment which resulted in
5 significantly shortened agent training periods. Nonetheless, these facts do not relieve call center
6 representatives of the duty to show compassion and respect to those who call.

7 THE COURT FURTHER FINDS the nature of the work histories of many of the so-
8 called gig workers, hundreds of whom may reside outside Nevada, yet work inside Nevada, or
9 who worked intermittently, or who tried to work somewhat, and did not completely stop working
10 during the pandemic presented further difficulties in processing claims.

11 THE COURT FURTHER FINDS that in Nevada there is the likely presence of some
12 imposter or social media robotic influencers, designed not to share genuine experiences for
13 collaborative benefit, but rather to unduly pressure, harass or attempt to intimidate state
14 employees and or policy makers to act in a way consistent with their view.

15 THE COURT FURTHER FINDS the time it takes to train new hires or repurpose new
16 hires from within ESD to be in a position to provide clear, competent, knowledgeable assistance
17 to those seeking information or clarification of their benefit claim status, combined with the
18 sheer number and volume of applicants for benefits caused a tsunami of those seeking help for
19 which no state, particularly a state with all the other factors found above, could have been
20 properly prepared.

21 THE COURT FURTHER FINDS that this is a particularly challenging time for Nevada,
22 because the CARES Act administrative funding component requires pre-pay by the State actor,
23 which then seeks reimbursement. And while such funding is certainly appreciated, it does
24 require upwards of millions of dollars to be outlaid by the State in order to be in a position to
25 request recoupment. For a state that is already running thin with budgetary constraints and
26 staring down extremely large shortfalls, this fact must have contributed to concern and difficulty
27 for the State to be in a position to pre-fund the CARES Act Administration component, making
28 the challenges especially daunting.

1 THE COURT FURTHER FINDS the CARES Act and the unemployment benefit
2 component is designed to be remedial in nature. Its purpose is to remedy the pain and economic
3 harm that people in each state are experiencing that are legitimately pandemic-related. The
4 Court so finds for several reasons, first because under the CARES Act, the application for
5 benefits is allowed by self-attestation; CARES Act claimants self-attestation requires that among
6 other criteria, the applicant swear under penalty of perjury that the information that they are
7 supplying is accurate and honest, as opposed to the dual opportunity whereby an employer can
8 protest any inaccuracies. Accordingly, the reality, particularly for part-time, piecemeal, or gig
9 workers is that self-attestation allows these workers to apply for benefits on their own word and
10 is evidence that the CARES Act was designed in a way to assist people as quickly and
11 thoroughly as possible in their time of need. Moreover, the CARES Act has eliminated the
12 requirement of work search during the benefit period, a product of two issues: (1) the reality of
13 the difficulties and potential health and safety concerns of searching for work during a global
14 pandemic; and (2) the need to distribute benefits as promptly as possible. The CARES Act also
15 eliminated the one-week waiting period requirement. These facts all suggest that thoroughness,
16 but yet swiftness, is the goal.

17 THE COURT FURTHER FINDS that the CARES Act is particularly vulnerable to fraud,
18 evidenced by the Department of Labor Guidance, legislative history and the fact that other states
19 have experienced it in greater number and amount than that of Nevada, and contributing to the
20 emphasis and the seriousness with which United States Government takes the State's
21 responsibilities to take due care to limit and circumvent fraudulent applicants and safeguard and
22 ensure that benefits go to eligible claimants.

23 THE COURT FURTHER FINDS that the efforts of Administrator Gaa and her senior
24 staff have showed extraordinary vision and leadership in extremely difficult times. The Court
25 also notes that former Administrator Korbolic worked extremely hard under difficult
26 circumstances.

27 Nevertheless, THE COURT FINALLY FINDS THAT that benefits have been delayed,
28 delayed more than they should have been, for many people.

1 **III. APPLICABLE LAW**

2 Nevada Revised Statute (“NRS”) 34.160 empowers a District Court to issue a writ of
3 mandate directing another branch of government to perform an act which the law especially
4 enjoins as a duty resulting from an office. The usual usage of the term “enjoined” means stop or
5 prevent an act, but under NRS 34.160, the term “enjoin” means to compel to take action. *Id.*
6 The statute gives the district judge the authority, in certain cases to issue a writ directing a state
7 or, in this case, a department of the state, to take action. The law is clear, writs of mandate are
8 properly issued when there is a clear present duty to act. *Round Hill Gen. Improvement Dist. v.*
9 *Newman*, 97 Nev. 601 (1981), *citing Gill v. St. ex rel. Booher*, [75 Nev. 448](#), [345 P.2d 421](#) (1959).
10 Mandamus will not lie to control discretionary action, *Gragson v. Toco*, [90 Nev. 131](#), [520 P.2d](#)
11 [616](#) (1974), unless discretion is manifestly abused or is exercised arbitrarily or capriciously.
12 *Henderson v. Henderson Auto*, [77 Nev. 118](#), [359 P.2d 743](#) (1961). Furthermore, courts may
13 issue writs of mandate where there is not a plain, speedy and adequate remedy in the ordinary
14 course of law. *Bowler v. Vannoy*, 67 Nev. 80, 85 (1950). The Court finds that applies here.
15 There is no other approach petitioners could take to obtain the relief that they seek, at least under
16 the time periods involved here.

17 The Court notes that writs of mandate are extraordinary remedies. “Mandamus is an
18 extraordinary remedy.” *Bottorff v. O'Donnell*, 96 Nev. 606, 607 (1980). Writs of mandate are
19 normally only appropriate where the relevant facts are not in dispute, and the clear question of
20 law is presented. *Id.* at 608 (1980). In this case, the Plaintiffs-Petitioners, have the burden of
21 demonstrating that writ relief is appropriate” *Halverson v. Secretary of State*, 124 Nev. 484, 487
22 (2008). If a petitioner does not meet her burden, if it is 50-50, the writ does not issue.

23 Specific to this case, the terms arbitrary and capricious are defined as when an agency --
24 in this case DETR’s -- actions or decisions while based on consideration of relevant factors
25 suggests there has been a clear error in judgment. District courts may reverse or change an
26 agency’s determination if an agency relies on impermissible factors, fail to consider an important
27 aspect of the problem, offers explanations for its decision that run counter to the evidence, or is
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1 otherwise so implausible that it cannot be as described to a difference in view or the agency's
2 expertise.

3 **IV. CONCLUSIONS OF LAW**

4 THE COURT CONCLUDES that the Court has jurisdiction to hear this matter, and that
5 the claims are not moot because some claims are capable of repetition, but yet can evade review.

6 THE COURT FURTHER CONCLUDES that the decision by DETR to create from
7 scratch as opposed to stack the PUA program system onto the existing UI system was not an
8 abuse of discretion.

9 THE COURT FURTHER CONCLUDES that DETR's decision to stand up the PUA
10 appeals process protocol after the claims system was established was not an abuse of discretion.

11 THE COURT FURTHER CONCLUDES that specific to individuals who work as an
12 independent contractor with reportable income, and is either unemployed, partially employed, or
13 unable or unavailable to work because the COVID-19 public health emergency has severely
14 limited his or her ability to continue performing work activities and has therefore forced the
15 individual to suspend such activities is a covered individual. Suspend shall mean to have the
16 functional equivalent of substantially interfering with continued work activities.

17 THE COURT FURTHER CONCLUDES that pursuant to United States Supreme Court
18 case *California Department of Human Resources v. Java*, 402 U.S. 121, (1971) and guidance
19 from the Department of Labor for which it expands the view of *Java* relative to unemployment
20 benefits, to the extent DETR has started benefit payments to an applicant, then stopped them for
21 reasons other than the applicant did not weekly file, the applicant has earnings in excess of that
22 which would otherwise qualify the applicant for benefits, or if DETR has clear and convincing
23 evidence of fraud, then payments may not be stopped.

24 **V. ORDER**

25 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that once payments have
26 started, payments cannot be withheld and must be restarted UNLESS: (a) the applicant did not
27 file a weekly claim; or (b) the applicant has earnings in excess of that which would otherwise
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1 qualify the applicant for benefits; or (c) there is clear and convincing evidence of fraud by the
2 applicant; or (d) until such time as the applicant is afforded an opportunity to be heard.

3 IT IS ALSO HEREBY ORDERED, ADJUDGED, AND DECREED that payments to the
4 above individuals must commence on or before Tuesday, July 28, 2020.

5 IT IS ALSO HEREBY ORDERED, ADJUDGED, AND DECREED that a covered
6 individual for the purposes of the Pandemic Unemployment Assistance includes an individual
7 with reportable income, and is either unemployed, partially employed, or unable or unavailable
8 to work because the COVID-19 public health emergency has severely limited his or her ability to
9 continue performing work activities and has therefore caused substantial interference with his or
10 her work activities, payments are required.

11 IT IS ALSO HEREBY ORDERED, ADJUDGED, AND DECREED that a hearing will
12 be held on Thursday, July 30, 2020 at 10:00 a.m. P.S.T. to further address progress made on the
13 following issues:

14 (a) The status of resolving the “UI/PU loop” or UI/PUA dichotomy, including their
15 relationship to the FPUC payments;

16 (b) What steps DETR has made to move the first filers to the front of the line; and

17 (c) The “retroactivity” issue whereby people who sought benefits between February 29,
18 2020 and March 5, 2020 were determined not eligible for payments because the first confirmed
19 case of COVID-19 in Nevada did not occur until later. A review of the reason why those
20 people’s income appears to have been affected, particularly if they were working with people or
21 traveling to or dealing with businesses that had been affected already.

22 IT IS ALSO HEREBY ORDERED, ADJUDGED, AND DECREED that all other forms
23 of relief sought by Petitioners are denied with right to renew.

24 THE COURT RESERVES the right to modify *sua sponte* the relief ordered herein as a
25 result of facts presented at the July 30, 2020 hearing.

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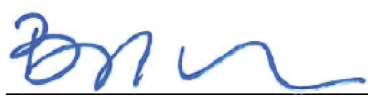
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IT IS ALSO HEREBY ORDERED, ADJUDGED, AND DECREED that Special Master, Jason Guinasso shall continue to serve as a resource, facilitate communication between Parties as needed, and answer any questions that the Court may ask.

IT IS SO ORDERED.

DATED: July 22, 2020



Honorable Barry L. Breslow
Judge of the District Court
County of Washoe, State of Nevada