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9
10 **IN THE SECOND JUDICIAL DISTRICT COURT OF**
11 **THE STATE OF NEVADA IN AND FOR THE**
12 **COUNTY OF WASHOE**

12 Case No.: CV20-00775

13 AMETHYST PAYNE, IRIS PODESTA-
14 MIRELES, ANTHONY NAPOLITANO,
15 ISAIAH PAVIA-CRUZ, VICTORIA
16 WAKED, CHARLES PLOSKI,
17 DARIUSH NAIMI, TABITHA ASARE,
18 SCOTT HOWARD, RALPH
19 WYNCOOP, ELAINA ABING, and
20 WILLIAM TURNLEY behalf of
21 themselves and all others similarly
22 situated,
23
24 Plaintiffs-Petitioners,

25 v.

26 STATE OF NEVADA *ex rel* NEVADA
27 DEPARTMENT OF EMPLOYMENT,
28 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.

**PLAINTIFFS'-PETITIONERS'
FIRST MOTION
IN RE: CONTEMPT**

NRS 34.290

1 **PLAINTIFFS'-PETITIONERS'**

2 **SUPPLEMENT REQUEST TO TAKE JUDICIAL NOTICE**

3 COMES NOW Plaintiffs-Petitioners AMETHYST PAYNE, IRIS PODESTA-
4 MIRELES, ANTHONY NAPOLITANO, ISAAH PAVIA-CRUZ, VICTORIA WAKED,
5 CHARLES PLOSKI, DARIUSH NAIMI, TABITHA ASARE, SCOTT HOWARD, RALPH
6 WYNCOOP, ELAINA ABING, and WILLIAM TURNLEY (“Plaintiffs-Petitioners”) on behalf
7 of themselves and all others similarly situated, and pursuant to NRS 34.290 and Nevada Rule of
8 Civil Procedure 70(e) request that this Court enter an Order for contempt. :

- 9 1. Defendants, and each of them, have had notice of the Court’s July 22, 2020 Order;
10 2. Defendants, and each of them, have the ability to comply with the Court’s July
11 22, 2020;
12 3. Defendants, and each of them, have failed to comply with the terms of the Court’s
13 July 22, 2020 Order at Section V, specifically as follows:

14 A. Defendants-Respondents have failed to restart payments to
15 applicants who have received payment and who: (a) filed or
16 attempted to file a weekly claim but for DETR’s web site issues, (b)
17 the applicant does not have earnings in excess of that which would
18 otherwise qualify the applicant for benefits, or (c) there is no clear
19 and convincing evidence of fraud by the applicant, ***and*** the applicant
20 has not been provided due process whereby after a hearing and an
21 opportunity for the beneficiary to state their case and respond to the
22 reason that the State would like to stop their benefits and payment
23 of benefits must continue during the full eligibility period.

24 B. Defendants-Respondents have failed to commence, no later than
25 July 28, 2020 payments to the above identified individuals.

26 Plaintiffs-Petitioners request the Court consider the contents of the following Exhibits as
27 evidence of Defendants-Respondent’s failure to comply with this Court’s July 22, 2020 Order
28 and in the Court’s consideration of the testimony and argument now scheduled for July 30, 2020

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as well as reconsideration of the Court’s July 22, 2020 order herein. This Motion is based upon the First Amended Petition for Writ Of Mandamus and/or Class Action Complaint For Damages Pursuant To Nev. Const. Art. 6, § 6, NRS 41.031 and 42 U.S.C §1983, Memorandum of Points And Authorities In Support of Ex Parte Writ Of Mandamus, Plaintiffs-Petitioners’ Renewed Motion and Supplemental Argument In Support of Writ of Mandamus, the report of Special Master Jason D. Guinasso, Plaintiff-Petitioners’ Motion to Take Judicial Notice, any declarations and correspondence filed herewith, and all the other pleadings and files on record in this action. The Court should also put these facts in the record as support for a motion for reconsideration of its July 20, 2020 order and for purposes of appeal.

AFFIRMATION

The undersigned does hereby affirm that the proceeding document to be filed in the Second Judicial District Court in the State of Nevada, County of Washoe, does not contain the social security number of any person.

DATED: July 29, 2020

Respectfully Submitted,
THIERMAN BUCK LLP

/s/Mark R. Thierman
Mark R. Thierman
Joshua D. Buck
Leah L. Jones
Attorneys for Plaintiffs-Petitioners

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**MEMORANDUM IN SUPPORT OF PLAINTIFFS-PETITIONERS’
FIRST MOTION IN RE: CONTEMPT (NRS 34.290)**

I. Statement of Facts

This Court issued an Order on Mandate on July 22, 2020. Defendants were present at the time the order was read by the court and were electronically served with the final order. See, Transaction # 7983513 on 2020-07-22 02:28:14 PM. The proposed order was drafted by Counsel for Plaintiffs-Petitioners, approved as to form by counsel for Defendants-Respondents and submitted to the court. The final order from the court differed only slightly from the submitted order in ways not relevant herein.

The July 22, 2020 order is clear: Payments must resume to all those class members who have had their payments stopped without prior hearing. As the Courts Mandate Order states beginning on page 8:

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

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

II. Exhibit Index:¹

Exhibit 1: Stopped Payments – No Restart Per Court Order: Small sample of the multiple emails Counsel has received from claimants who had received at least

¹ Plaintiffs-Respondents’ Counsel has received well over 1,000 individual emails since the Court issued its Order, which have alerted Counsel to continued issues with DETR claims’ processing. The Exhibits attached are a small sampling of emails from actual claimants specific to this Motion for Contempt, are redacted to protect the claimants privacy interests, and are true and correct copies which have been sent to Counsel through the normal course of business.

1 one payment, but whose payments have stopped without due process (*see*
2 *California Department of Human Resources Development v. Java*, 402 U.S. 121
3 (1971) and in violation of this Court’s Order dated, July 22, 2020 requiring payment
4 to recommence as of July 28, 2020.²

5 **Exhibit 2: DETR Reduction in Benefit without Due Process/No Ability to**
6 **Continue to File Weekly Claims:** Small sample of multiple emails Counsel has
7 received from claimants who have received at least one payment but who have had
8 their benefits reduced to the minimum \$181 weekly amount from previous
9 eligibility determinations of much larger amounts and without due process. *see*
10 *California Department of Human Resources Development v. Java*, 402 U.S. 121
11 (1971) and in violation of this Court’s Order dated, July 22, 2020 requiring payment
12 to recommence as of July 28, 2020.

13 **Exhibit 3: Payments Stopped Due to Alleged Fraud – No Way to Cure:** Small
14 sample of multiple emails Counsel has received from claimants who have received
15 at least one payment but who have had payments stopped due to some “fraud” issue
16 without due process (*see California Department of Human Resources Development*
17 *v. Java*, 402 U.S. 121 (1971) and in violation of this Court’s Order dated, July 22,
18 2020 requiring payment to recommence as of July 28, 2020.

19 **III. Applicable Legal Standard**

20 Nevada Revised Statute (“NRS”) 34.290 provides as follows:

- 21
- 22 1. When a peremptory mandate has been issued and directed to any
23 inferior tribunal, corporation, board or person, if it appear to the court that
24 any member of such tribunal, corporation or board, or such person, upon
25 whom the writ has been personally served, has, without just excuse, refused
26 or neglected to obey the same, the court may, after notice and hearing,
27 adjudge the party guilty of contempt and upon motion impose a fine not
28 exceeding \$1,000.

² *See also*, Exhibit 3 to Plaintiffs-Petitioners’ Request to Take Judicial Notice for named Plaintiff Albring evidencing the fact that one of the named Plaintiffs have been adversely affected by DETR’s failure to comply with the Court’s Order.

1 2. In case of persistence in a refusal of obedience, the court may order
2 the party to be imprisoned for a period not exceeding 3 months and may
3 make any orders necessary and proper for the complete enforcement of the
4 writ.

5 By statute, the provisions of NRCPP 70(e) are applicable to and constitute the rules of
6 practice for proceedings for contempt under NRS 34.290. *Baby Tam & Co. v. City of Las Vegas*,
7 199 F.3d 1111 (9th Cir. 2000) citing NRS 34.300.³ In order for the defendant to be found in civil
8 contempt, Plaintiffs must show by clear and convincing evidence that there was a lawful decree,
9 that Defendants-Respondents had knowledge of the decree, and that the decree was violated.
10 *United States v. Greyhound Corp.*, 363 F. Supp. 525, 570 (N.D. Ill.), *aff'd*, 508 F.2d 529 (7th Cir.
11 1974). Evidence of intent or willfulness on the part of the defendant is not required for a finding
12 of civil contempt. *Greyhound Corp.*, 363 F. Supp. at 570; *McComb*, 336 U.S. at 191.

13 **IV. Analysis**

14 This Court issued an Order on Mandate on July 22, 2020 specifying that: (1) IT IS
15 HEREBY ORDERED, ADJUDGED, AND DECREED that once payments have started,
16 payments cannot be withheld and must be restarted UNLESS: (a) the applicant did not file a
17 weekly claim, (b) the applicant has earnings in excess of that which would otherwise qualify the
18 applicant for benefits, or (c) there is clear and convincing evidence of fraud by the applicant, and
19 until such time after a hearing and an opportunity for the beneficiary to state their case and respond
20 to the reason that the State would like to stop their benefits and payment of benefits must continue
21 during the full eligibility period, and (2) IT IS ALSO HEREBY ORDERED, ADJUDGED, AND
22 DECREED that payments to the above individuals will commence no later than five (5) business
23 days after the Court signs this Order, on or about Tuesday, July 28, 2020.

24 Here, there can be no dispute that this Court's July 22, 2020 Order was lawful and that
25 DETR had knowledge of it. This Court required the Parties to work together to provide a draft
26

27 ³ NRS 34.300 states: "Except as otherwise provided in NRS 34.150 to 34.290, inclusive, and
28 section 1 of this act, the provisions of NRS and Nevada Rules of Civil Procedure relative to civil
actions in the district court are applicable to and constitute the rules of practice in the
proceedings mentioned in NRS 34.150 to 34.290, inclusive [.] and section 1 of this act."

1 order to the Court. The draft order was electronically filed on July 21, 2020 as a [Proposed] Order
2 approved as to form and content by DETR Counsel, Greg D. Ott.

3 Additionally, the July 28, 2020 deadline to restart payments has since passed, however,
4 claimants who have received at least one payment but had payments stopped, have not be paid
5 according to the Court’s Order. *See generally*, Exhibits 1 through 3. and Likewise, as evidenced
6 by Exhibits 1 through 3, there is no issue that DETR has violated the Court’s Order. No claimant
7 has been provided due process because DETR’s appeal process has not yet commenced. Indeed,
8 DETR issued a press release dated July 18, 2020 stating that the on-line appeals process is
9 function **but that** the “appeal hearing schedule is forthcoming. DETR will announce in the
10 coming weeks when the scheduling component is launched in August.” Notwithstanding the
11 inability of claimants to engage in an appeal hearing, the sample of claimant emails shows that,
12 (a) claimants have continued to file or attempted to file a weekly claims, but DETR’s web site
13 blocks some claimants from continuing to file weekly claims, (b) the applicant does not have
14 earnings in excess of that which would otherwise qualify the applicant for benefits, or (c) there is
15 no clear and convincing evidence of fraud by the applicant. Each of the emails contained in the
16 Exhibits were sent after the July 28, 2020 payment deadline or have confirmed that as of the time
17 of filing, they have yet to be paid.

18 Accordingly, because these claimants had received at least one payment, but DETR has
19 failed to restart payments to claimants who have not received due process, DETR has failed to
20 comply with this Court’s July 22, 2020 Order and must be found in contempt pursuant to NRC
21 70(e). In addition, Plaintiffs-Petitioners believe based upon email submissions, that Defendants-
22 Respondents have failed to obey the above referenced provisions of the Court’s July 22, 2020
23 order in the case of over 1000 individuals. Therefore, Plaintiffs-Petitioners request payment of
24 the First Stage Sanction of \$1,000 to each such individual, in addition to following the Court’s
25 order.

26 **V. Conclusion**

27 For the reasons stated above, Plaintiffs-Petitioners request that this Court schedule a
28 hearing, before a jury to adjudge the Defendants-Respondents, and each of them, guilty of

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contempt for failing, refusing or neglecting to obey without just excuse the Court’s July 22, 2020 Order of Mandate, and to impose a fine of each of them in an amount not exceeding \$1,000. Furthermore, Plaintiffs-Petitioners request the court to publicly admonish Defendants-Respondents, and each of them, that if they fail for a second time to obey this Court’s July 22, 2020 Order, the court may order the party to be imprisoned for a period not exceeding 3 months and may make any orders necessary and proper for the complete enforcement of the writ.

DATED: July 29, 2020
Respectfully Submitted,
THIERMAN BUCK LLP
/s/Mark R. Thierman
Mark R. Thierman
Joshua D. Buck
Leah L. Jones
Attorneys for Plaintiffs

AFFIRMATION

The undersigned does hereby affirm that the proceeding document to be filed in the Second Judicial District Court in the State of Nevada, County of Washoe, does not contain the social security number of any person.

DATED: July 29, 2020
Respectfully Submitted,
THIERMAN BUCK LLP
/s/Mark R. Thierman
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CERTIFICATE OF SERVICE

I certify that I am an employee of Thierman Buck LLP, and that on this 29th day of July 2020 I certify that I electronically filed PLAINTIFFS-PETITIONERS' FIRST MOTION IN RE: CONTEMPT with the Clerk of the Court by using the electronic filing system.

/s/ Jennifer Edison-Strekal

Jennifer Edison-Strekal
An Employee of Thierman Buck, LLP