

EXHIBIT 3

Plaintiffs Case Appeal Statement

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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**

Case No.: CV20-00755

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,

Plaintiffs-Petitioners,

v.

23 STATE OF NEVADA *ex rel* NEVADA
24 DEPARTMENT OF EMPLOYMENT,
25 TRAINING AND REHABILITATION
26 (DETR) HEATHER KORBULIC in her
27 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' CASE
APPEAL STATEMENT**

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CASE APPEAL STATEMENT PURSUANT TO NRAP 3(f)(3)

1) This Case Appeal Statement is filed by Plaintiffs-Petitioners-Appellants AMETHYST PAYNE, IRIS PODESTA-MIRELES, ANTHONY NAPOLITANO, ISIAIAH PAVIA-CRUZ, VICTORIA WAKED, CHARLES PLOSKI, DARIUSH NAIMI, TABITHA ASARE, SCOTT HOWARD, RALPH WYNCOOP, ELAINA ABING, and WILLIAM TURNLEY.

2) This appeal is from an Orders by the Honorable Barry L. Breslow, Judge of the District Court, Department 8, County of Washoe, State of Nevada. See Exhibit 1 August 28, 2020 Order and Exhibit 2 July 22, 2020 Order.

3) Plaintiffs-Petitioners-Appellants are represented by retained counsel:

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4) Defendant-Respondents-Appellees 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) were and are represented in the District Court by:

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1 5) All attorneys representing Plaintiffs-Petitioners-Appellants and Defendants-
2 Respondents-Appellees are licensed to practice law in the State of Nevada.

3 6) The attorneys on this appeal for Plaintiffs-Petitioners-Appellants are the same
4 attorneys who represented them in the District Court below.

5 7) Plaintiffs-Petitioners-Appellants have petitioned the District Court for leave to
6 continue in forma pauperis.

7 8) This suit was originally filed on May 12, 2020 to require Defendants-
8 Respondents-Appellees to open a website or some other way for self-employed individuals (also
9 called “gig workers”) to apply for unemployment compensation benefits after the passage of the
10 federal Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub.L. 116–136 (2020).
11 The lawsuit was amended on June 22, 2020 to require payment of unemployment compensation
12 benefits under the CARES Act “when due” as required by the federal Social Security Act, 42
13 U.S.C. § 503(a)(1) (3).

14 9) Plaintiffs’-Petitioners’-Appellants’ motion for writ of mandamus and
15 Defendants’-Respondents’-Appellees’ return on an order to show cause were first heard
16 by the District Court on July 7, 2020. During the July 7, 2020 hearing, the District Court
17 appointed a Special Master who submitted a 310 page report with thousands of pages of exhibits
18 to the District Court on July 17, 2020.¹ One day before receiving the Special Master’s final

19 _____
20 ¹ The Special Master’s report never answered its own question on page 54 of “When were
21 benefits due . . .” - perhaps because that was a legal matter for the court. However, the Special
22 Master did reference in a footnote United States Department of Labor Unemployment Insurance
23 Program Letter (“UIPL”) NO. 04-01 which states in part: “In the 1971 decision, *California*
24 *Department of Human Resources Development v. Java*, the Supreme Court interpreted “when
25 due” in Section 303(a)(1), SSA, to mean “at the earliest stage of unemployment that such
26 payments [are] administratively feasible after giving both the worker and the employer an
27 opportunity to be heard.” Although the specific holding in *Java* required the State to pay benefits
28 to claimants initially determined eligible pending an employer appeal, the Court’s reasoning was
broader, requiring promptness at all stages of the eligibility determination and payment
processes. *See* UIPL No. 1145, Attachment, page 1; *Fusari v. Steinberg*, 419 U.S. 379, 387-388
n.15 (1975); and *Pennington v. Didrickson*, 22 F.3d 1376, 1386 (7th Cir. 1994) (quoting *Jenkins*
v. Bowling, 691 F.2d 1225 (7th Cir. 1982)). The Department has issued regulations interpreting
the promptness requirement of Section 303(a)(1), SSA, to require payment of UC to eligible
claimants, and the making of determinations, “with the greatest promptness that is
administratively feasible.” 20 CFR 640.3(a). In addition, in the attachment to UIPL No. 1145,

1 report, on July 16, 2020, Plaintiffs-Petitioners-Appellants filed with the District Court a
 2 Renewed Motion And Supplemental Argument In Support Of Writ Of Mandamus. Among other
 3 things, the renewed motion at page 3 requested the District Court to mandate that Defendants-
 4 Respondents-Appellees pay unemployment benefits, in the proper amount, to “ALL
 5 INDIVIDUALS ONCE APPROVED UNTIL DISAPPROVED BY ADMINISTRATIVE LAW
 6 JUDGE AFTER FULL DUE PROCESS HEARING.” This request was further divided between
 7 those “once approved” but never paid (request number 4)² and those who actually began
 8 receiving payments, but whose payments stopped (group number 5).³

9 10) The next hearing before the District Court was held on July 22, 2020. The District
 10 Court announced its decision from the bench, and entered a written order on July 22, 2020
 11 mandating three specific actions by the State: (1) once payments have started, payments cannot
 12 be withheld and must be reinstated UNLESS: (a) the applicant did not file a weekly claim; or (b)
 13 the applicant has earnings in excess of that which would otherwise qualify the applicant for
 14 benefits; or (c) there is clear and convincing evidence of fraud by the applicant; or (d) until such
 15 time as the applicant is afforded an opportunity to be heard. (2) Payments to the above individuals

16
 17 the Department interpreted the promptness requirement of Section 303(a)(1), SSA, to require
 18 prompt determinations on individual claims. *See* pages 8 & 14, UIPL No. 1145, Attachment.

19 ² Relief requested for Group 4 stated: “As to all those class members for whom DETR has
 20 determined were eligible for benefits pursuant to the PUA program and/or any blocking program,
 21 as defined above, hereinafter referred to as the ‘once approved’ group, whether payment has been
 22 made or not, DETR shall pay immediately the amount the individual would be entitled to receive
 23 as if DETR had paid pursuant to that initial determination of eligibility, and DETR shall continue
 24 to pay the weekly benefits at the same or greater weekly rate according to the terms of the prior
 25 program approval pursuant to which the funds were determined to have been due initially,
 26 regardless of any prior or subsequent determination by DETR, unless and until an administrative
 27 law judge determines after a fair hearing that such payment was not initially due, or ceased to be
 28 due for some reason provided by law.”

³ Relief requested for Group 5 stated “As to all individuals who have started receiving or who
 have received one or more payments from DETR, but such payments ceased prior to a
 determination by an administrative law judge after a notice hearing with appropriate due process,
 DETR shall pay them in the same manner, and under the same conditions as any other “once
 approved” subgroup member, as stated immediately above. Claimants shall be entitled to update
 all weekly reports of seeking employment at any time without prejudice.”

1 must commence on or before Tuesday, July 28, 2020. And, (3) a covered individual for the
2 purpose of the Pandemic Unemployment Assistance includes individuals with reportable income,
3 and is either unemployed, partially employed, or unable or unavailable to work because the
4 COVID-19 public health emergency has severely limited his or her ability to continue performing
5 work activities and has therefore caused substantial interference with his or her work activities,
6 payments are required. This Order was consistent with paragraph 5 of the Plaintiffs-Petitioners-
7 Appellants requested relief in its renewed motion. Defendants-Respondents-Appellees
8 represented that this portion of the Court's Order resulted in payment to approximately 3,000
9 additional claimants.⁴ The Court refused to require payment to all claimants who had received a
10 written notice of eligibility determination stating either that: 1) the claimant was approved for
11 payment under the PUA program of unemployment compensation, or 2) the claimant was not
12 approved for payment under the PUA program because DETR had determined that the claimant
13 was eligible for benefits under the regular Unemployment Insurance (UI) or some other program,
14 all of which have the same weekly benefit amounts based upon the same formulae. Defendants-
15 Respondents-Appellees represented that this portion of Plaintiffs'-Petitioners'-Appellants'
16 Renewed Motion (requested relief paragraph number 4) would result in payment to
17 approximately 70,000 additional claimants.

18 11) On July 27, 2020 Plaintiffs-Petitioners-Appellants filed their first Motion in re
19 Contempt. And on July 30, Defendants-Respondents filed a Supplement for the July 30, 2020
20 hearing.

21 12) The District Court held a further hearing on July 30, 2020 regarding the status of
22 the above Order as well as to further address progress made on the following issues: (a) the status
23 of resolving the "UI/PU loop" or UI/PUA dichotomy, including their relationship to the FPUC
24 payments; (b) what steps DETR has made to move the first filers to the front of the line; and (c)
25 the "retroactivity" issue whereby people who sought benefits between February 29, 2020 and
26 March 5, 2020 were determined not eligible for payments because the first confirmed case of

27 _____
28 ⁴ Counsel estimates that the average payment would be about \$10,000 for each of the 3,000
claimants covered by this portion of the District Court's order. All the money for CARES Act
payments comes from the Federal Government only.

1 COVID-19 in Nevada did not occur until later. A review of the reasons why those people's
2 income appears to have been affected, particularly if they were working with people or traveling
3 to or dealing with businesses that had been affected already. The District Court also denied all
4 other forms of relief sought by Petitioners with no right to renew and reserved the right to modify
5 *sua sponte* the relief ordered.

6 13) The District Court set yet another hearing for August 20, 2020, retained the
7 Special Master and requested a supplemental report, and held Plaintiffs'-Petitioners' Motion in
8 re Contempt in abeyance.

9 14) Plaintiffs-Petitioners-Appellants filed an Appeal to this Supreme Court State of
10 Nevada on August 3, 2020, Case No. 81582. The issue on appeal was when must Defendants-
11 Respondents-Appellees start paying unemployment compensation benefits to claimants whom
12 Defendants-Respondents-Appellees have sent a favorable written determination of eligibility.
13 On August 6, 2020, Defendants-Respondents-Appellees appealed the Order of Mandate
14 compelling DETR to take certain action and to show progress on the additional issues as
15 described in the preceding paragraphs.

16 15) On August 10, 2020 Plaintiffs-Petitioners-Appellants filed an emergency motion
17 for immediate relief or in the alternative, an expedited briefing schedule pursuant to NRAP 27(e)
18 to which Defendants-Respondents-Appellees responded and Plaintiffs-Petitioners-Appellants
19 replied.

20 16) The Supreme Court of Nevada, in a Order Regarding Motion and To Show Cause
21 dated August 12, 2020, requested additional briefing on a potential jurisdictional defect specific
22 to the portions of the District Court's order that left some issues undecided and pending further
23 review. The Parties complied and agreed in principle that the Supreme Court of Nevada, at that
24 point in the procedural history, had jurisdiction.

25 17) Plaintiffs-Petitioners-Appellants filed their first motion in re contempt on July 29,
26 2020 and filed their second Motion in re Contempt on August 19, 2020 based on information
27 from putative class members that DETR was not fully complying with the District Court's Order.
28 Defendants-Respondents-Appellees opposed the second motion on August 31, 2020.

1 18) During the August 20, 2020 hearing the Court initially noted that the hearing was
2 set to review the District Court’s continuing or lack of jurisdiction to preside over the case since
3 competing appeals were pending. The Parties had supplied the District Court with briefing on
4 the issue prior to the hearing and heard argument.⁵ The District Court ruled from the bench
5 modifying its prior writ of mandate by denying the writ on all issues left open in the District
6 Court’s July 22, 2020 Order, severing pursuant to NRCPC 21 all remaining causes of action, and
7 also indicating, that the District Court retains jurisdiction only on the ancillary matters of the
8 Special Master’s fee and the ability to enforce its previous Order. The Order was not filed until
9 August 28, 2020.

10 19) This case has been previously subject to an appeal by Plaintiffs-Petitioners-
11 Appellants and cross appeal by Defendants-Respondents-Appellees, Case No. 81582 in the
12 Supreme Court State of Nevada, both of which were denied on August 26, 2020 on jurisdictional
13 grounds, two days prior to the entry of the District Court’s Order fully resolving Plaintiffs’-
14 Petitioners’ writ requests as final pursuant to NRCPC 54(b).

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21 ⁵ In addition, during the August 20, 2020 hearing the Special Master provided his second report
22 to the Court as well as provided his fees statement per the District Court’s request. In that report
23 the Special Master was tasked by the District Court to provide detailed factual analysis of the
24 processes and approaches being utilized by DETR in its efforts to comply. The District Court
25 noted that the Special Masters’ Second Report showed “substantial compliance” with the District
26 Court’s order but did not fully comply. Specifically, DETR reported that, subject to the Court’s
27 Order, some 30,647 claims had experienced a stop payment, with the highest portion of stopped
28 payments meeting clear and convincing evidence of fraud even though DETR’s subsequent
Declaration in support of its response to Plaintiffs’-Respondents’-Appellants’ motion in re
contempt by Economist Schmidt finds *only* 35 persons in a category listed as “fraud.” The
Special Master’s Report noted 3,500 claims were released from fraud holds in the three weeks
since the District Court’s Order. Specific to the fees request the Parties provided briefing, both
finding the fees reasonable but both asserting that 100% of the fees should be borne by their
respective clients. A hearing is set for September 10, 2020 on the Special Master’s fees.

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20) This case does not involve child custody or visitation.

21) The Parties are interested in Settlement and time is of the essence.

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: September 4, 2020

Respectfully Submitted,
THIERMAN BUCK LLP

/s/Mark R. Thierman
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