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13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **COUNTY OF RIVERSIDE**

15 RAMONA RITA MORALES, ISABELL
16 SANCHEZ, CESAR MANUEL GARCIA, and
INVESTMENT DEVELOPMENT GROUP,
17 LLC, on behalf of themselves and all others
similarly situated,

18 Plaintiff-Petitioners,

19 v.

20 THE CITY OF INDIO, THE CITY OF
21 COACHELLA, and SILVER & WRIGHT
LLP, in its official capacity as City Prosecutor
22 for the City of Indio and as City Prosecutor for
the City of Coachella,

23 Defendant-Respondents.

Case No. RIC1803060

CLASS ACTION

UNLIMITED JURISDICTION

Related Cases Nos. INM1505735,
INM1506090, PSC1704926, INM1509186

**NOTICE OF JOINT MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT AND
FOR CERTIFICATION OF
SETTLEMENT CLASS;
MEMORANDUM IN SUPPORT**

Date: January 24, 2019

Time: 8:30 a.m.

Hearing Judge: Hon. Craig G. Riemer

Dept: 5

Complaint Filed: February 13, 2018

[Proposed Order Lodged Herewith]

Reservation No: RES86009

1 **TO ALL PARTIES TO AND THE ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on January 24, 2019, at 8:30 a.m. or as soon thereafter as
3 the matter may be heard, before Hon. Craig G. Riemer in Department 5 of the above-entitled
4 Court, pursuant to Rule 3.769 of the California Rules of Court, Plaintiff-Petitioners Ramona Rita
5 Morales and Investment Development Group, LLC, (“Plaintiffs”) and Defendant the City of Indio
6 (“Indio”) (collectively “Parties”) will and hereby do move the Court for an order:

7 (1) Granting preliminary approval to the proposed class action settlement between
8 Plaintiffs and Indio, as set forth in the Settlement Agreement between Plaintiffs and Indio and
9 other Members of the Settlement Class, on the grounds set forth in the Joint Memorandum of
10 Points and Authorities attached hereto;

11 (2) Certifying the proposed Settlement Class, for settlement purposes only, consisting
12 of the following persons:

13 all natural and legal persons who were criminally prosecuted by
14 Silver & Wright LLP, or one or more of its agents, acting as City
15 Prosecutor for the City of Indio and who were subsequently
criminally convicted (whether by guilty plea or court trial).

16 **(Agreement I.CC)**

17 (3) Appointing Ramona Rita Morales and Investment Development Group, LLC, as
18 Class Representatives for settlement purposes;

19 (4) Appointing the Institute for Justice and O’Melveny & Myers LLP as Class
20 Counsel for settlement purposes;

21 (5) Approving the proposed forms of class notice and the notice plan, as set forth more
22 particularly in the accompanying Joint Memorandum of Points and Authorities and in the
23 Agreement filed with this Court, and directing that notice be provided to members of the class
24 substantially in the form described in the Joint Memorandum;

25 (6) Approving the opt-out and objection procedures provided in the Settlement
26 Agreement and set forth in the Notice;

27 (7) Setting dates for dissemination of the notices, for Class Members to exclude
28

1 themselves from or object to the proposed Settlement, and for a final approval hearing, as
2 follows:

3 60 days after preliminary	Deadline to mail Notice
4 approval	
5 90 days after notice mailed	Deadline to submit a Claim Form
6	Deadline to Opt Out
7	Deadline to submit Objection to Settlement

8 (8) Preliminarily approving the Class Settlement as fair, adequate, and reasonable
9 under Rule 3.769(g) of the California Rules of Court, and applicable law, and consistent with due
10 process; and

11 (9) Staying all proceedings in the Action against Indio until the Court renders a final
12 decision on approval of the Class Settlement.

13 The Joint Motion is made on the grounds that: (1) the proposed Settlement is within the
14 range of possible final approval, warranting dissemination of the notice of the proposed
15 settlement to class members; (2) for settlement purposes only, the proposed class is ascertainable
16 and there is a well-defined community of interest in the questions of law and fact affecting the
17 class members; and (3) the proposed forms of notice satisfy the requirements of Rule 3.766 of the
18 California Rules of Court, and the proposed plan for dissemination of the notices will reach a
19 substantial percentage of the potential members of the Settlement Class.

20 This Joint Motion is based on this Notice of Motion and Joint Motion, the accompanying
21 Joint Memorandum of Points and Authorities, the supporting Declaration of Jeffrey H. Redfern,
22 filed and served concurrently herewith, the supporting Declaration of T. Peter Pierce, filed and
23 served concurrently herewith, the Settlement Agreement filed and served concurrently herewith,
24 the files and records in this action, and any further evidence and argument that the Court may
25 receive at or before the hearing.

26 In support of this joint motion, the Parties state as follows:
27
28

1 1. On February 13, 2018, Plaintiff Morales filed her Complaint against Indio. On
2 April 9, she filed the First Amended Complaint, which added three additional plaintiffs-
3 petitioners, including Investment Development Group, LLC. On September 11, Plaintiffs filed
4 their Second Amended Complaint. The Second Amended Complaint alleged that Indio's policy
5 and practice of outsourcing property code enforcement prosecutions to a private law firm, and
6 having that same law firm file actions to recover its own attorneys' fees incurred in each
7 prosecution, violated the Due Process Clauses of the Fourteenth Amendment to the U.S.
8 Constitution and the California Constitution.

9 2. Plaintiffs sought relief on behalf of a proposed class of "all natural and legal
10 persons who pleaded guilty or no contest in a criminal case where Silver & Wright LLP, or one of
11 its agents, acted as prosecuting city attorney(s) for . . . the City of Indio." 2d Am. Compl. ¶ 218.

12 3. As fully set forth in the accompanying Joint Memorandum of Points and
13 Authorities in Support of Preliminary Approval of Class Action Settlement and for Certification
14 of Settlement Class (the "Memorandum"), the Parties have negotiated a Settlement Agreement
15 that, if entered, would resolve this case and provide significant benefits to the proposed class. It
16 would provide meaningful relief for Plaintiffs and the Settlement Class, and would reform Indio's
17 code enforcement practices. It would also foreclose further litigation expenses for Indio and
18 Plaintiffs.

19 4. The Settlement Agreement is fair, adequate, and reasonable within the meaning of
20 Rule 3.769(g) of the California Rules of Court and applicable law for the following reasons:

21 a. The Settlement Agreement is the product of extensive arms-length
22 bargaining between the parties. There is no evidence of collusion or uninformed decision-
23 making and the Settlement Agreement is not unduly favorable to the named Plaintiffs or
24 their lawyers.

25 b. Plaintiffs' claims are not frivolous and have been strong enough to survive
26 multiple demurrers and anti-SLAPP motions brought by defendants other than Indio.

27 c. The Settlement Agreement will foreclose expensive, complex, and time-
28 consuming litigation and save the resources of the Parties and this Court.

1 d. The Settlement Agreement entitles Plaintiffs to an amount in restitution
2 that is commensurate with their claims as well as significant prospective relief.

3 e. The Settlement Agreement also provides for notice to class members that is
4 both constitutionally sufficient and compliant with Rule 3.766 of the California Rules of
5 Court.

6 5. Plaintiffs satisfy the requirements for certification of a class for settlement
7 purposes. Specifically, Plaintiffs satisfy the class certification requirements of Code Civ. Proc.
8 § 382 for the following reasons:

9 a. In the context of the proposed settlement, the Settlement Class is
10 ascertainable because a single inquiry—whether potential class members were prosecuted
11 by Silver & Wright and subsequently pled guilty—suffices to demonstrate
12 ascertainability. This information is readily available in court records and Indio’s records.

13 b. The proposed class is sufficiently numerous such that joinder of all
14 members is impracticable. Silver & Wright has been employed by Indio since 2014 and
15 the proposed class would cover every individual criminally prosecuted by Silver & Wright
16 on behalf of Indio, and subsequently convicted, since then. In addition, public-interest
17 considerations weigh in favor of permitting a class action to proceed where class
18 representatives are represented by *pro bono* counsel. Finally, judicial economy is better
19 served where a single suit can decide the same constitutional claim.

20 c. In the context of the proposed settlement, there is a well-defined
21 community of interest in the questions of law and fact affecting all members of the
22 proposed Settlement Class.

23 d. In the context of the proposed settlement, common questions of law and
24 fact predominate over any facts pertaining to individual class members. Each member of
25 the proposed Settlement Class asserts the same constitutional claims against Indio. And
26 the operative facts—whether Silver & Wright possessed an illicit profit motive when it
27 criminally prosecuted the proposed class members on behalf of the city governments—
28 remain the same with respect to each proposed Class Member. That the amount of

1 restitution owed to individual Class Members may vary does not preclude certification for
2 the purpose of settlement.

3 e. Plaintiffs' claims are typical of the class they seek to represent. Plaintiffs,
4 along with every member of the proposed Settlement Class, have been prosecuted by
5 Silver & Wright, a law firm that has a profit motive in obtaining their convictions.
6 Plaintiffs are in the same position as every proposed class member: They have pleaded
7 guilty to a case in which they were prosecuted by Silver & Wright on behalf of Indio.

8 f. Plaintiffs will fairly and adequately protect the interests of the proposed
9 class. There are no conflicts of interest between Plaintiffs and the members of the
10 proposed Settlement Class. Plaintiffs will vigorously represent the Settlement Class's
11 interests. Plaintiffs and proposed class members will be ably represented, without cost, by
12 the Institute for Justice and by O'Melveny & Myers LLP.

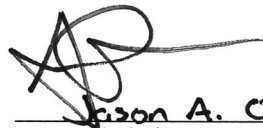
13 g. Settling Plaintiffs' claims on a classwide basis promotes equity and
14 efficiency. Because some members of the proposed Settlement Class may have paid little
15 in prosecution fees, and therefore may not be able to justify the costs of individual
16 litigation, certification of this class settlement will allow those class members to obtain
17 relief they might otherwise never receive. Likewise, classwide settlement will avoid the
18 inefficiencies that would result if individual Class Members were to independently litigate
19 their claims.

20
21 This motion is based on this notice, the attached memorandum and exhibits in support,
22 supporting declaration of Jeffrey H. Redfern, and supporting declaration of T. Peter Pierce, the
23 Settlement Agreement filed and served concurrently herewith, the files and records in this action,
24 and any further evidence and argument that the Court may receive at or before the hearing.
25
26
27
28

1 Dated: December 20, 2018

2 JEFFREY REDFERN (*pro hac vice*)
3 JOSHUA HOUSE
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6 JASON A. ORR
7 O'MELVENY & MYERS LLP

8 By:  Jason A. Orr
9 Sabrina H. Strong
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11 Ramona Rita Morales, Isabell Sanchez, Cesar
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13 Group, LLC

14 T. PETER PIERCE
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16 By:  T. Peter Pierce
17 T. Peter Pierce
18 Attorney for Defendant City of Indio

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1 **JOINT MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
2 **PRELIMINARY APPROVAL**

3 Plaintiff-Petitioners Ramona Rita Morales and Investment Development Group, LLC
4 (“Plaintiffs”), on behalf of themselves and a class of similarly situated individuals, and
5 Defendant, the City of Indio (“Indio”) (collectively, the “Parties”) jointly submit this
6 Memorandum of Points and Authorities in support of their Joint Motion for Preliminary Approval
7 of Class Action Settlement and Certification of Settlement Class (the “Motion”).

8 The Settlement Agreement, filed and served concurrently herewith,¹ was agreed to after
9 extensive and protracted arms-length negotiations. The Agreement provides substantial benefits
10 to members of the settlement class (“Class Members”), including the following:

- 11 • Indio will return all “cost-recovery” fees collected from Plaintiffs and class
12 members as a result of Silver & Wright’s unlawful prosecutions;
- 13 • Indio will remove any liens, and relinquish claims to liens, that were placed on
14 properties as a result of those prosecutions;
- 15 • Indio agrees not to oppose any efforts by Plaintiffs or class members to vacate
16 their criminal convictions through writs of *coram nobis*; and
- 17 • Indio will end its practice of seeking cost recovery in criminal cases, and will set
18 oversight benchmarks to monitor any attorneys who act as city prosecutor.

19 Accordingly, the Settlement Agreement plainly meets, and far exceeds, the standards for
20 both preliminary and final court approval.

21 **I. PROCEDURAL AND FACTUAL BACKGROUND**

22 Plaintiffs brought a class action on behalf of themselves and all others similarly situated
23 against Indio, for injuries stemming from Defendant Silver & Wright’s allegedly abusive and
24 unconstitutional code-enforcement prosecution model. Plaintiffs seek declaratory and injunctive

25 _____
26 ¹ Also concurrently filed and served herewith as exhibits to the Settlement Agreement are the
27 proposed Class Notices, and a [Proposed] Order Preliminarily Approving Class Action Settlement
28 and Certifying the Settlement Class. *See* Exs. 1–2, Declaration of Jeffrey H. Redfern in Support
of Preliminary Approval of Class Settlement, and Declaration of T. Peter Pierce in Support of
Preliminary Approval of Class Action Settlement.

1 relief, in addition to the issuance of a writ of *coram nobis* that would vacate their criminal
2 convictions. The following facts are alleged in Plaintiffs' second amended complaint. For
3 purposes of this joint motion, the parties agree that the following accurately summarizes
4 Plaintiffs' allegations in this case, though Indio does not concede the truth of those allegations.

5 For several years, Silver & Wright LLP prosecuted property code-enforcement actions on
6 behalf of Indio. Silver & Wright markets itself to cash-strapped cities across California as a
7 prepackaged code-enforcement department that can prosecute cases at little or no cost to the
8 cities. 2d Am. Compl. ¶ 158. Silver & Wright works with cities to put in place local ordinances
9 that allow the firm to recover its attorney fees from criminal defendants. 2d Am. Compl. ¶¶ 163–
10 65. The firm then pursues criminal convictions in code-enforcement cases, which allows it to
11 potentially recoup 100% of its attorneys' fees from those convicted. 2d Am. Compl. ¶¶ 156–84.
12 Although Indio pays the firm's fees up front, the Plaintiffs alleged that the clear expectation is
13 that the firm will pay back those fees to Indio after extracting its attorneys' fees in "cost
14 recovery" actions—thus fulfilling its promise of a "cost neutral or even revenue-producing"
15 compliance program. 2d Am. Compl. ¶¶ 160–61.

16 Plaintiffs are an individual and a limited liability company who pleaded guilty to allegedly
17 minor code violations after they were prosecuted by Silver & Wright on behalf of Indio. 2d Am.
18 Compl. ¶¶ 5–8. Months after paying relatively small fines to Indio, Silver & Wright sent Plaintiffs
19 bills for the attorney fees associated with Plaintiffs' own prosecution. 2d Am. Compl. ¶¶ 37, 73,
20 105, 136. Plaintiffs allege that at no point during the prosecution did Silver & Wright inform
21 Plaintiffs they would be on the hook for Silver & Wright's legal bills. And, critically, Plaintiffs
22 allege that they had no way of knowing that Silver & Wright had a direct financial stake in their
23 convictions. 2d Am. Compl. ¶ 250. That is, Plaintiffs had no way of knowing that their
24 prosecutions violated their fundamental right to due process, according to Plaintiffs'
25 interpretation of the leading California cases.

26 On May 4, 2018, counsel for Indio sent Plaintiffs' counsel a settlement offer. Redfern
27 Decl. ¶ 5. After additional settlement discussions, the Parties agreed to resolve this case in the
28 manner set forth in the Class Action Settlement Agreement (the "Agreement") filed concurrently

1 with this Motion.

2 **II. TERMS OF THE PROPOSED SETTLEMENT**

3 The key terms of the proposed Settlement are:

4 **Restitution**: Indio will return all fees collected from Plaintiffs and Class Members who
5 were criminally prosecuted by Silver & Wright, convicted, and subsequently paid what is referred
6 to as “cost recovery.” Additionally, as to those Class Members who were prosecuted subsequent
7 to the enactment of Indio’s cost-recovery ordinance, Indio promises to also reimburse such class
8 members for the cost of their criminal fines, in the event that such class members are unable to
9 obtain a return of their fines through the *coram nobis* process.

10 **Lien Removal**: Indio will remove any liens and relinquish any claim to any liens, placed
11 on Plaintiffs’ properties or the properties of potential class members as a result of criminal
12 prosecution by Silver & Wright.

13 **Coram Nobis**: Indio stipulates for purposes of settlement only that all elements of *coram*
14 *nobis* are met and that the proposed order could vacate the convictions of Investment
15 Development Group and Ramona Rita Morales.

16 **Reform**: Indio will no longer seek to recover its attorneys’ fees in criminal prosecutions.
17 It will also set oversight benchmarks to monitor the city prosecutor. For example,
18 the city prosecutor will be required to submit a monthly report to the City Manager, Chief of
19 Police, and City Council. Indio will also amend its municipal code with respect to the recovery of
20 attorneys’ fees so it is clear that such recovery is not available in the context of criminal
21 prosecutions.

22 **Class Notice**: Notice of the proposed Settlement will be sent to all persons criminally
23 prosecuted by Silver & Wright on behalf of the City of Indio. Indio will provide the Court and
24 Class Counsel with case information for all Class Members. The Notice will be sent to the
25 addresses associated with the prosecutions via first class mail. The costs of printing and mailing
26 class notices and all Settlement administration costs will be paid by Indio.

27 **Right of Exclusion**: Class Members will have the right to exclude themselves by
28 executing a request for exclusion and returning it by United States mail addressed to a post office

1 box established for that purpose and received on or before a deadline to be established by the
2 Court.

3 **Attorneys' Fees:** Finally, the proposed Settlement does not provide for attorneys' fees.

4 **ARGUMENT**

5 **I. THE COURT SHOULD CERTIFY THE CLASS FOR SETTLEMENT PURPOSES.**

6 The proposed Settlement Class satisfies the criteria for certification of a settlement class
7 under California law. (*7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85
8 Cal.App.4th 1135, 1160 n.3, 1165–66.) The parties jointly urge the Court to certify the class for
9 settlement purposes.² As detailed in the Agreement, the Parties have stipulated to the following
10 Settlement Class:

11 **all natural and legal persons who were criminally prosecuted by Silver &
12 Wright LLP, or one or more of its agents, acting as City Prosecutor for the
13 City of Indio and who were subsequently criminally convicted (whether by
guilty plea or court trial).**

14 **(Agreement I.CC)**

15 For settlement purposes, the proposed Settlement Class satisfies each of the requirements for
16 class certification: (1) “the existence of an ascertainable and sufficiently numerous class,” (2) “a
17 well-defined community of interest,” and (3) “substantial benefits from certification that render
18 proceeding as a class superior to the alternatives.” (Code Civ. Proc., § 382; *Brinker Restaurant
19 Corp. v. Superior Court (Hohnbaum)* (2012) 53 Cal.4th 1004, 1021.)

20 **A. The Proposed Class Is Ascertainable and Sufficiently Numerous.**

21 “As long as the potential class members may be identified without unreasonable expense
22 or time and given notice of the litigation, and the proposed class definition offers an objective
23 means of identifying those persons who will be bound by the results of the litigation, the
24 ascertainability requirement is met.” (*Medraza v. Honda of N. Hollywood* (2008) 166 Cal.App.4th
25 89, 101.) Here, the Settlement Class is ascertainable through a simple inquiry into (i) whether the
26 potential class members were prosecuted by Silver & Wright on behalf of Indio, and (ii) whether

27 _____
28 ² The City of Indio reserves its right to oppose certification in the event that this settlement is not
approved.

1 they were subsequently convicted by plea or trial. This information is readily available in court
2 records or Indio's records.

3 Section 382 also requires either that the case raise a question "of a common or general
4 interest, of many persons," or that the parties be so "numerous [that] it is impracticable to bring
5 them all before the court." (Code Civ. Proc. § 382.) Courts have construed this requirement
6 liberally. (*Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934.) Based on Indio's initial
7 assessment, the parties have identified between 100 and 150 Class Members who have been
8 prosecuted by Silver & Wright since 2014. The California Supreme Court has held that the term
9 "many" in Section 382 "clearly is sufficiently broad to cover" a class of ten individuals. (*Bowles*
10 *v. Superior Court of City & County of San Francisco* (1955) 44 Cal.2d 574, 587.) In addition,
11 considerations of equity weigh in favor of permitting a class action to proceed where individuals'
12 claims are small in relation to litigation costs and where class representatives are represented by
13 *pro bono* counsel. (Cf. *Rose*, *supra*, 179 Cal.App.3d at 934–35.)

14 For these reasons, the proposed class is both ascertainable and sufficiently numerous.

15 **B. There Is a Well-Defined Community of Interest in Questions of Fact and**
16 **Law.**

17 "The community of interest inquiry . . . depends on three criteria: (1) whether common
18 issues predominate over individual issues; (2) whether the plaintiff's claims are typical of the
19 class he or she seeks to represent; and (3) whether the plaintiff is an adequate class
20 representative." (*Noel v. Thrifty Payless, Inc.* (2017) 17 Cal.App.5th 1315, 1324.) The Settlement
21 Class easily satisfies each of these criteria.

22 **1. Common issues of law and fact predominate.**

23 The focus of certification is on the type of questions—common or individual—that are
24 likely to arise, rather than on the merits of the case. (*Sav-On Drug Stores, Inc. v. Superior Court*
25 (2004) 34 Cal.4th 319, 327.) Here, in the context of the proposed settlement common questions of
26 law and fact predominate over any facts pertaining to individual class members. Each member of
27 the Settlement Class possesses the exact same constitutional claim against Indio. (2d Am. Compl.
28 ¶¶ 229–51.) And the operative facts remain the same with respect to each Class Member: Silver

1 & Wright's allegedly unconstitutional conflict of interest was identical with respect to every class
2 member, and each of the Class Members' prosecutions flowed from the same contractual
3 arrangement between Indio and Silver & Wright.³ And although the particular alleged code
4 violations vary between Class Members, the prosecutions themselves were allegedly routine. (2d
5 Am. Compl. ¶ 166–84.) Indeed, Silver & Wright uses the same form documents in each
6 prosecution and when billing each individual defendant for prosecution fees. (2d Am. Compl. ¶
7 46.)

8 Although the restitution to which each Class Member is entitled is unique, determining the
9 precise amount is a straightforward and ministerial task because the amounts of fines and fees
10 paid by each Class Member are reflected in Indio's records or court records. The sort of
11 individualized inquiries present here do not preclude certification of the Settlement Class.
12 (*Nicodemus v. Saint Francis Mem'l Hosp.* (2016) 3 Cal.App.5th 1200, 1219 (acknowledging class
13 certification can be appropriate in cases with "some individualized inquiries").)

14 **2. Plaintiffs' claims are typical of the class.**

15 "The test of typicality 'is whether other members have the same or similar injury, whether
16 the action is based on conduct which is not unique to the named plaintiffs, and whether other
17 class members have been injured by the same course of conduct.'" (*Seastrom v. Newways, Inc.*
18 (2007) 149 Cal.App.4th 1496, 1502 (quoting *Hanon v. Dataproducts Corp.* (9th Cir. 1992) 976
19 F.2d 497, 508).) Plaintiffs' claims are typical of the class they seek to represent. As discussed
20 above, they have the exact same legal claim based on the same set of facts. Plaintiffs are in the
21 same position as every proposed Class Member: they have been convicted either by guilty plea or
22 court trial in cases prosecuted by Silver & Wright, and they had no practical way of knowing the
23 facts that, they allege, made Silver & Wright's prosecutions unlawful.

24 **3. Plaintiffs and Class Counsel will adequately represent the class.**

25 _____
26 ³ The Court has raised the question of whether Class Members' knowledge of Silver & Wright's
27 conflict of interest varied, potentially forming the basis of individualized defenses. Because the
28 City of Indio is not raising those defenses in the context of settlement, they are moot for the
present purposes and do not defeat a finding of predominance. The City of Indio reserves the right
to assert this and other defenses if the settlement is not approved by the Court.

1 “In order to be deemed an adequate class representative, the class action proponent must
2 show [that] it can adequately represent the class.” (*J.P. Morgan & Co. v. Superior Court* (2003)
3 113 Cal.App.4th 195, 212.) Plaintiffs will fairly and adequately protect the interests of the
4 Settlement Class. There are no conflicts of interest between Plaintiffs and the Class Members, and
5 Plaintiffs will vigorously represent the class’s interests. (Cf. *Seastrom*, supra, 149 Cal.App.4th at
6 1502 (affirming denial of certification where named plaintiff was potential defendant in the
7 proposed class action).) Plaintiffs and Class Members have the same stake in this litigation, and
8 Plaintiffs have not received any unique benefits from this litigation. (Cf. *La Sala v. American Sav.*
9 *& Loan Ass’n* (1971) 5 Cal.3d 864, 872 (“[T]he receipt of benefits by the named plaintiffs may
10 sometimes create a conflict of interest between the class and its would-be-representatives.”).)
11 Further, Plaintiffs and Class Members will be ably represented, at no cost to them, by the Institute
12 for Justice and O’Melveny & Myers LLP. Finally, the terms of the settlement agreement itself are
13 *prima facie* evidence of the adequacy of representation: Defendant has agreed to provide
14 Plaintiffs’ with all the relief that they have requested, and there are no incentive payments to the
15 named plaintiffs or fees for any attorneys. (See *Janik v. Rudy, Exelrod & Zieff* (2004) 119
16 Cal.App.4th 930, 944 (“When the trial court is requested to certify a class for the purpose of
17 settlement . . . the court must consider whether class counsel have in fact adequately protected the
18 interests of the class in the conduct of the litigation and in entering the proposed settlement
19 agreement.”).)

20 **C. A Class Action Is Superior to Individual Litigation.**

21 Certification is proper where proceeding as a class action is superior to alternative means
22 of adjudicating a dispute fairly and efficiently. (*Sav-on Drug Stores*, supra, 34 Cal.4th at 332.)
23 Here, proceeding as a class will confer substantial benefits that would otherwise be unavailable.
24 Because some individual Class Members may have paid relatively little in fines and fees, (see,
25 e.g., 2d. Am. Compl. ¶¶ 48, 145), and therefore may not be able to justify the costs of individual
26 litigation, class certification will allow those class members to litigate their claims efficiently and
27 economically. (See *Sav-on Drug Stores*, supra, 34 Cal.4th at 340 (“[T]he class suit both
28 eliminates the possibility of repetitious litigation and provides small claimants with a method of

1 obtaining redress for claims which would otherwise be too small to warrant individual
2 litigation.”)) Likewise, resolution of the same constitutional claims in a single case promotes
3 judicial economy and will avoid any potential for inconsistent outcomes arising from other cases
4 simultaneously raising the same issue. (See *Jasmine Networks, Inc. v. Superior Court* (2009) 180
5 Cal.App.4th 980, 995 (noting that class treatment is a tool to avoid inconsistent judgments).) The
6 proposed settlement will fairly and efficiently vindicate the rights of the entire class, and it is
7 superior to individual litigation.

8 **II. THE PROPOSED SETTLEMENT AGREEMENT SHOULD BE APPROVED**
9 **BECAUSE IT IS FAIR, ADEQUATE, AND REASONABLE.**

10 The proposed settlement between Plaintiffs and the City of Indio warrants approval by the
11 trial court because (1) the Parties reached the agreement under circumstances in which a
12 presumption of fairness applies, and (2) the agreement itself is fair, adequate, and reasonable. An
13 agreement to settle a class action requires the approval of the trial court. (Cal. Rule of Court
14 3.769.) The approval requirement “reflects concerns that the absent class members, whose rights
15 may not have been considered by the negotiating parties, be adequately protected against fraud
16 and collusion.” (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 240 (disapproved
17 of for other reasons in *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260).) “[W]hat
18 transpires in settlement negotiations is highly relevant to the assessment of a proposed
19 settlement’s fairness.” (*State of Cal. v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 482.) In order to
20 prevent fraud, collusion, or unfairness to the class, the court “must determine the settlement is
21 fair, adequate, and reasonable.” (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.)

22 **A. A Presumption of Fairness Applies to the Settlement Agreement.**

23 Courts afford settlement agreements a presumption of fairness where: “(1) the settlement
24 is reached through arm’s-length bargaining; (2) investigation and discovery are sufficient to allow
25 counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and
26 (4) the percentage of objectors is small.” (*Dunk*, supra, 48 Cal.App.4th at 1802.)

27 **1. The Settlement Was Reached Through Arm’s-Length Bargaining in**
28 **Which All Parties Were Represented by Experienced Counsel.**

1 Here, the Parties negotiated at arm's length and there is no evidence that the agreement is
2 a product of fraud, overreaching, or collusion. (See Redfern Decl. ¶ 5; cf. *7-Eleven Owners for*
3 *Fair Franchising*, supra, 85 Cal.App.4th at 1145 (the fairness inquiry "must be limited to the
4 extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
5 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a
6 whole, is fair, reasonable and adequate to all concerned.")). Preliminary approval is appropriate
7 where class counsel have prior experience in similar litigation. (See, e.g., *Chavez v. Netflix, Inc.*
8 (2008) 162 Cal.App.4th 43, 53 (finding that counsel were sufficiently experienced where both
9 class counsel and defendant's counsel had been involved in a substantial number of consumer
10 class actions and other complex cases); *Wershba*, supra, 91 Cal.App.4th at 245) (relying on
11 declarations submitted to the trial court to find that counsel had sufficient experience in class
12 action litigation).) Here, there is no doubt that class counsel are sufficiently experienced in similar
13 litigation for the court to approve the settlement. The attorneys from the Institute for Justice—
14 Jeffrey H. Redfern and Joshua A. House—have extensive experience in constitutional and class
15 action litigation. Co-counsel O'Melveny & Myers LLP has a renowned class actions practice, and
16 attorneys of record Sabrina H. Strong and Jason A. Orr specialize in complex litigation.

17 **2. Plaintiffs Have Conducted Sufficient Investigation and Discovery.**

18 Because settlement discussions began at so early a stage in this action, the parties have yet
19 to undertake formal discovery. For the purposes of settlement approval, however, "[d]iscovery is
20 required not to prepare the case for trial, but simply to provide sufficient information to permit an
21 intelligent evaluation of the terms on which the case is proposed to be settled." (*Kullar v. Foot*
22 *Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 132.) The Agreement readily meets this standard.
23 First, it provides detailed factual support for the Parties' position that settlement is in their best
24 interests. (Agreement, Recitals A–E.) Second, it provides a meaningful explanation as to how the
25 Parties evaluated the legal issues attending this action. (Agreement, Recitals F–I.) Most
26 importantly, it contains information that will enable the court to arrive at "an understanding of the
27 amount that is in controversy and the realistic range of outcomes of the litigation." (*Kullar*, supra,
28 168 Cal.App.4th at 120.) The materials that the Parties have produced thus far are more than

1 sufficient “to permit an intelligent evaluation of the terms on which” the settlement is proposed.
2 (*Id.* at 133–34.)

3 **B. The Proposed Settlement Agreement Is Fair, Adequate, and Reasonable.**

4 The trial court is vested with “broad discretion to determine whether a class action
5 settlement is fair.” (*Reed v. United Teachers Los Angeles* (2012) 208 Cal.App.4th 322, 336.) The
6 court should give “[d]ue regard . . . to what is otherwise a private consensual agreement between
7 the parties,” as public policy “generally favors the compromise of complex class action
8 litigation.” (*In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723, n.14.)

9 In exercising this discretion, federal circuit courts and California courts consider a number
10 of factors, which should be tailored to each case. (*Dunk*, *supra*, 48 Cal.App.4th at 1801.) Factors
11 relevant to this determination may include “strength of the plaintiffs’ case, the risk, expense,
12 complexity and duration of further litigation as a class action, the amount offered in settlement,
13 the extent of discovery completed and the stage of the proceedings, the experience and views of
14 counsel, the presence of a governmental participant, and the reaction of class members to the
15 proposed settlement.” (*In re Microsoft I-V Cases*, *supra*, 135 Cal.App.4th at 723.) This “list of
16 factors is not exclusive and the court is free to engage in a balancing and weighing of factors
17 depending on the circumstances of each case.” (*Wershba*, *supra*, 91 Cal.App.4th at 245.)

18 **3. The Proposed Settlement Is Reasonable Given the Strengths of**
19 **Plaintiffs’ Claims Balanced Against the Amount Offered in the**
20 **Settlement.**

21 Courts have recognized that “the most important factor is the strength of the case for
22 plaintiffs on the merits, balanced against the amount offered in the settlement.” (*Kullar*, *supra*,
23 168 Cal.App.4th at 130; *Clark v. American Residential Servs. LLC* (2009) 175 Cal.App.4th 785,
24 799.)

25 Plaintiffs’ claims are sufficiently strong on the merits, as shown by the court’s denial of
26 multiple demurrers and anti-SLAPP motions filed by Defendants Coachella and Silver & Wright,
27 and the amount offered by Indio in the Settlement Agreement is the full amount sought in
28 Plaintiffs’ Second Amended Complaint. Plaintiffs’ claims are not frivolous. For several decades,

1 *People v. Superior Court (Greer)*, ((1977) 19 Cal.3d 255), has stood for the proposition that a
2 conflict of interest may disqualify a prosecutor if it either “affects or appears to affect his ability
3 faithfully to perform the discretionary function of his office.” (*People v. Conner* (1983) 34 Cal.3d
4 141, 151.) The courts have consistently applied this standard. “When a government attorney has a
5 personal interest in the litigation, the neutrality so essential to the system is violated. For this
6 reason prosecutors and other government attorneys can be disqualified for having an interest in
7 the case extraneous to their official function.” (*People ex rel. Clancy v. Superior. Court* (1985) 39
8 Cal.3d 740, 746.) Even where a private attorney assumes a prosecutorial role without actually
9 serving as a public official, that “lawyer cannot escape the heightened ethical requirements of one
10 who performs governmental functions merely by declaring he is not a public official. The
11 responsibility follows the job[.]” (*Id.*) Plaintiffs have argued that the alleged facts in this case
12 demonstrate a violation of these neutrality principles.

13 In view of this Court’s denial of the demurrers and anti-SLAPP motions filed by
14 Defendants Coachella and Silver & Wright, and California courts’ long-standing position on
15 prosecutorial conflicts of interest, Plaintiffs’ claims are strong enough to warrant settlement
16 approval.

17 The California Supreme Court has long recognized the superior efficiency of settlement
18 agreements over trial. (See *McClure v. McClure* (1893) 100 Cal. 339, 343.) “Settlement is
19 perhaps most efficient the earlier the settlement comes in the litigation continuum.” (*Neary v.*
20 *Regents Univ. of Cal.* (1992) 3 Cal.4th 273, 277.) Courts have approved proposed settlements
21 where trial would have required preparation and testimony of witnesses, depositions, and the “not
22 insubstantial associated litigation costs,” and where “trial itself would have been lengthy and
23 complex.” (*7-Eleven Owners for Fair Franchising v. Southland Corp.*, supra, 85 Cal.App.4th at
24 1152.)

25 Proceeding to trial in this case would require substantial expenditures of time and
26 resources by both parties. Although class counsel are representing Plaintiffs on a *pro bono* basis,
27 the preparation and travel costs of attending trial would be sizeable. For Defendant, disapproving
28 the Agreement would mean increased legal costs borne by taxpayers. Because the Agreement

adequately avoids these risks and expenses, this factor supports preliminary approval.

4. The Amount Offered in Settlement Is Appropriate Given the Strength of Plaintiffs' Case.

The size of the settlement also merits preliminary approval. Plaintiffs will receive 100% of the relief requested in their complaint, which includes restitution “equal to the amount of fees collected from [each Plaintiff],” (Agreement § II(B)(6)), and substantial prospective relief. Courts have approved settlements as fair and reasonable even though monetary relief provided was “relatively paltry.” (*Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1139 (disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 271).) The proposed settlement is more than fair, adequate, and reasonable.

III. THE PROPOSED CLASS NOTICES AND METHODS OF DISSEMINATION ARE CONSTITUTIONALLY SOUND AND APPROPRIATE.

This Court has broad discretion to tailor the method of notice given to class members. (See *Wershba*, supra, 91 Cal.App.4th at 251; *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 973–74; *7-Eleven Owners*, supra, 85 Cal.App.4th at 1164 ([T]he trial court ‘has virtually complete discretion as to the manner of giving notice to class members.’) (quotation omitted).) There is no statutory or constitutional requirement that direct mail notice be provided in every case. (See *Wershba*, supra, 91 Cal.App.4th at 251; *Cooper v. American Sav. & Loan Ass’n* (1976) 55 Cal.App.3d 274, 285; Cal. Ct. R. 3.766(f).) Where class members are readily identifiable, however, direct mail notice more than suffices to satisfy notice and due-process requirements. (See *Romero v. Producers Dairy Foods, Inc.* (E.D. Cal. 2006) 235 F.R.D. 474, 492 (where class members can be identified through reasonable effort, direct notice to class members satisfies due process and Fed. R. Civ. P. 23 requirements); *In re Compact Disc Minimum Advertised Price Antitrust Litigation* (D. Me. 2003) 216 F.R.D. 197, 218 (stating that “individualized notice by first-class mail ordinarily satisfies the request that class members receive the best notice practicable under the circumstances.”))

The Court should order distribution by first-class United States Mail a copy of the

1 Settlement Notice and Forms to every potential members of the Settlement Class who can be
2 identified through reasonable effort. (See Agreement, § V.) This manner of providing notice
3 accords with due process because it “fairly apprise[s] the class members of the terms of the
4 proposed compromise and of the options open to the dissenting class members.” (*Litwin v.*
5 *iRenew Bio Energy Sols., LLC* (2014) 226 Cal.App.4th 877, 883.)

6 Here, the addresses of the Class Members should be available in Indio’s records. In the
7 event that Class Members’ addresses have changed, Indio will attempt to obtain address updates
8 using a national change of address database. Because of the size of the individual restitution
9 awards and the minimal burden of submitting the proposed claim form, the parties anticipate that
10 the claims rate for those who receive notice will be over 75%. At the same time, the size of the
11 awards and the likelihood of changed addresses counsels against distributing funds without a
12 claims process.

13 The content of the proposed Notice is consistent with Cal. Rule of Court 3.766(d) because
14 it appraises Class Members of the material terms of the Agreement, the appropriate means for
15 obtaining additional information regarding the Agreement and this lawsuit, and the appropriate
16 means for and information about obtaining a settlement payment pursuant to the Agreement. In
17 addition, the Agreement satisfies Cal. Rule of Court 3.766(e) as the most reliable and cost-
18 effective method of reaching Class Members.

19 For the reasons set forth above, the direct mail notice program is the best notice
20 practicable and satisfies all due-process requirements. (See *Cartt*, supra, 50 Cal.App. 3d at 960.)
21 As such, the notice plan should be approved.

22 **IV. THE COURT SHOULD SET A FINAL APPROVAL HEARING.**

23 Finally, the Court should set a hearing for final approval of the settlement on a date
24 following the deadline before which class members must file objections to the settlement or opt
25 out. (See Cal. Rule of Court 3.769(f).)

26 **CONCLUSION**

27
28 For the reasons set forth above, Plaintiffs and Defendant City of Indio respectfully request

1 that the Court: (1) preliminarily approve the proposed Agreement; (2) provisionally certify the
2 Settlement Class; (3) appoint Plaintiffs Morales and Investment Development Group as
3 representatives of the Settlement Class; (4) appoint the Institute for Justice and O'Melveny &
4 Myers LLP as Class Counsel; (5) schedule a final approval hearing; (6) direct that notice be
5 provided to class members substantially in the form of the Agreement and by the means described
6 above; and (7) stay all proceedings in the Action against Defendant City of Indio until the Court
7 renders a final decision on approval of the class settlement.

8
9
10 Dated: December 20, 2018


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