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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **COUNTY OF RIVERSIDE**

10
11 RAMONA RITA MORALES, on behalf of
herself and all others similarly situated,

12 Plaintiff,

13 v.

14 THE CITY OF INDIO; THE CITY OF
15 COACHELLA, and SILVER & WRIGHT
LLP, in its official capacity as City Prosecutor
16 for the City of Indio and City Prosecutor for
the City of Coachella,

17 Defendants.

Case No. RIC1803060

**SILVER & WRIGHT, LLP'S RESPONSE
TO PLAINTIFFS AND CITY OF INDIO'S
THIRD RENEWED JOINT MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT AND FOR
CERTIFICATION OF SETTLEMENT
CLASS**

Date: October 4, 2019
Time: 8:30 a.m.
Dept.: 6
Judge: Hon. Sunshine S. Sykes
Action Filed: February 13, 2018
Trial Date: None

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20 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

21 **PLEASE TAKE NOTICE** that Defendant SILVER & WRIGHT LLP ("S&W") submits
22 the following response to Plaintiffs' and City of Indio's Third Renewed Joint Motion for
23 Preliminary Approval of Class Action Settlement and for Certification of Settlement Class (the
24 "Renewed Settlement Approval Motion"), scheduled for hearing on October 4, 2019.

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1 As an initial matter, S&W was not properly served with the Renewed Settlement Approval
2 Motion. Counsel for S&W did not learn about the Motion until Monday, September 23, 2019,
3 when counsel for plaintiffs provided a draft joint status report for review. (See accompanying
4 Declaration of Robert M. Shaughnessy in Support of S&W’s Response to Third Renewed Joint
5 Motion for Preliminary Approval of Class Action Settlement and for Certification of Settlement
6 Class (“Shaughnessy Decl.”), ¶ 9.) Review of the draft report revealed that the Motion was
7 scheduled for hearing on October 1, 2019. (*Id.*) After reviewing the draft status report, and
8 confirming that no moving papers had been received by any attorney for S&W, my office
9 followed up with plaintiffs' counsel to obtain a copy of the pending Motion and supporting papers.

10 This is not the first time plaintiff's counsel failed to provide timely notice of a motion. (See
11 Shaughnessy Decl., ¶ 6.) S&W objects to plaintiffs' repeated failure to provide proper notice.

12 Aside from any due process issues arising from improper notice, S&W recognizes that the
13 City of Indio has the right to choose to settle a matter for the purpose of avoiding the fees and
14 costs associated with litigation on the merits.

15 S&W also appreciates that despite its decision to settle, the City of Indio vigorously
16 disputes plaintiffs’ allegations in this litigation, and disputes that its conduct was wrongful in any
17 way. S&W joins the City of Indio in disputing plaintiffs’ allegations. Moreover, S&W appreciates
18 that the settlement terms establish, even if by omission, that S&W did not operate under any
19 contingency fee arrangement, as originally asserted, nor did the firm collect fees for itself from
20 any criminal defendant. While the City of Indio’s cost concerns appear to have motivated an early
21 settlement, S&W asserts along with the City, consistent with the terms of the proposed Settlement
22 Agreement, that Indio and S&W did nothing wrong, and had no incentive to obtain any unjust
23 outcome in any of the underlying criminal cases at issue in this proceeding. (See Settlement
24 Agreement at Recital “H”; and at § IX(J), “No Admission of Liability.”)

25 In addition, S&W understands, and has previously received assurances from plaintiffs’
26 counsel as well as counsel for the City of Indio, that the proposed settlement between the plaintiffs
27 and the City of Indio would resolve all claims by the proposed settlement class arising from
28 S&W’s conduct in its official capacity as City Prosecutor for the City of Indio, and that upon final

1 approval, and resolution of the corum nobis claims, S&W would only remain in the case in its
2 capacity as City Prosecutor for the City of Coachella. (See Shaughnessy Decl., ¶¶ 3-5, and Exhibit
3 1 thereto.) This understanding is also consistent with the terms of the Settlement Agreement
4 lodged in support of the Renewed Settlement Approval Motion. (See Settlement Agreement, §
5 X(C), “This Agreement is binding on, and shall inure to the benefit of, the Parties in the Action
6 and the Class Members and their respective agents, employees, [and] representatives....”)

7 Based upon the above reasons and assurances, S&W does not oppose the Settlement
8 Approval Motion.

9 In addition, S&W asserts that, should the settlement be approved and completed, the Court
10 should dismiss and forever bar any and all claims against S&W that may be held by all parties,
11 and all members of the approved settlement class, to the extent those claims arise from any
12 conduct by S&W acting in its official capacity as the City Prosecutor for the City of Indio. This
13 should occur because of the assurances given by counsel for the moving parties, because of the
14 language in the Settlement Agreement stating that its benefits inure to the agents and
15 representatives of the settling parties, and because the operative pleading only names S&W as a
16 defendant in its official capacity as the City Prosecutor for the City of Indio, and the City of
17 Coachella. “When both a municipal officer and a local government entity are named, and the
18 officer is named only in an official capacity, the court may dismiss the officer as a redundant
19 defendant.” (*Pierce v. San Mateo County Sheriff's Dept.* (2014) 232 Cal.App.4th 995, 1018;
20 *Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dept.* (9th Cir. 2008) 533 F.3d
21 780, 799.) Because, the only relief that can be accorded to plaintiffs in this case is relief provided
22 by the City of Indio, (and the City of Coachella), a concluded settlement with the City of Indio
23 would bar plaintiffs from receiving further relief from S&W in this case, for actions taken by
24 S&W in its official capacity as the City Prosecutor for the City of Indio. (See e.g. *Larez v. City of*
25 *Los Angeles* (9th Cir.1991) 946 F.2d 630, 646 (suit against an officer in his official capacity is
26 equivalent to a suit against the governmental entity).)

27 Here, the City of Indio elected to settle its claims. Without admitting liability, Indio agreed
28 to return costs that S&W contends were legally and properly awarded to the City of Indio and

1 against the Indio Plaintiffs and members of the purported Indio settlement class. The City of Indio
2 also agreed to not oppose any efforts by the settlement class members to obtain writs of *coram*
3 *nobis*, and would reimburse amounts paid as fines by settlement class members, if they were not
4 successful in obtaining *coram nobis* relief.¹ Furthermore, Indio stated that it would no longer
5 allow cost recovery to proceed after criminal convictions for municipal violations even though
6 such a commitment is unnecessary in light of Penal Code section 688.5, effective January 1, 2019.
7 S&W, in its official capacity as the City Prosecutor can provide no additional relief to the
8 proposed settlement class. Indeed, plaintiffs concede, as they must, that the proposed settlement
9 would bar plaintiffs and class member’s claims against S&W to the extent they are based on the
10 firm’s actions as City Prosecutors for the City of Indio.

11 Dismissal of S&W is also consistent with the fact that, at all times alleged in the operative
12 Complaint, California law authorized the Cities of Indio and Coachella to seek recovery of their
13 internal staff costs and attorney’s fees in criminal nuisance abatement matters. The law has since
14 changed. But even before this lawsuit was filed, the Cities had ceased such cost recovery efforts.
15 Moreover, cost recovery is not “policing for profit” as the Institute for Justice (or “IJ”)—the
16 special interest group piloting this litigation—has intentionally and repeatedly argued. Cities
17 recovering any portion of the legal costs incurred to obtain compliance from admitted violators is
18 not profit, it is reimbursement. Further, these costs were incurred only after the representative
19 plaintiffs failed to comply with numerous notices and warnings from the Cities and continued to
20 violate ordinances. In addition, S&W was paid by the Cities on an hourly basis, without any
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22 ¹ This response and non-opposition is not intended to be, and should not be construed as, an
23 admission by S&W that the named plaintiffs or any putative class member could ever satisfy the
24 elements of *coram nobis*. S&W maintains that they cannot. Nor should S&W’s non-opposition to
25 the Settlement Approval Motion be construed as an admission that the proposed settlement class—
26 which greatly expands the class of Indio criminal defendants from the class as originally defined
27 in plaintiffs’ operative pleadings—is entitled to *coram nobis* relief or the reimbursement of fines
28 or penalties imposed by a court following a criminal trial on the merits. As noted above, S&W
appreciates that the City of Indio may agree not to oppose writ relief, and may agree to reimburse
amounts paid by settlement class members as fines, regardless of the meritless nature of the
plaintiffs’ *coram nobis* allegations, in order to avoid further litigation costs.

1 regard for the amount of cost recovery sought, obtained, or paid to the Cities. To the extent
2 plaintiffs' Renewed Settlement Approval Motion concludes that S&W engaged in "unlawful"
3 conduct, S&W emphatically denies the allegation.

4 The IJ has used this case to further a political agenda that is hostile to local governments
5 and their ability to better their communities through code enforcement. While the IJ claims to
6 protect the underprivileged, any benefit provided to these plaintiffs is ancillary to their broader
7 agenda to radically protect individual property rights by severely restricting the powers of local
8 governments to enforce ordinances enacted for the public good.²

9 In addition to attacking code enforcement in the two California Cities named in this case,
10 the IJ filed and publicized similar cases in many other states. Like the present case, these suits
11 recklessly allege "policing for profit," and even name the government entities and their attorneys
12 in court filings and other publications. The title irresponsibly implies that attorneys are making
13 large sums of money by enforcing laws unfairly against the poor, when the true facts are nothing
14 of the sort. The IJ's sensationalism in this case has already led to threats of violence and death
15 directed to S&W's attorneys and their families.

16 Despite IJ's allegations, S&W understands that both Cities together only collected a very
17 small amount in cost recovery from the criminal nuisance abatement cases at issue in this case.
18 Further, among the criminal cases these Cities brought, cost recovery was requested of S&W only
19 in a minority of cases, including cases where the violator's inaction in the face of multiple notices
20 forced the Cities to take legal action to enforce the laws.

21 The settlement makes clear that the Cities affirmatively dispute the IJ's claims, and
22 rightfully so – they were and are false. And to be clear, none of the Plaintiffs in this case were
23 innocent, or even claimed in this lawsuit to be innocent of the crimes for which they pleaded
24 guilty. The victims are the citizens of Indio and Coachella, who must again bear the substantial

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26 ² See e.g. https://www.sourcewatch.org/index.php/Institute_for_Justice;
27 [https://publicintegrity.org/federal-politics/kochs-key-among-small-group-quietly-funding-legal-](https://publicintegrity.org/federal-politics/kochs-key-among-small-group-quietly-funding-legal-assault-on-campaign-finance-regulation/)
28 [assault-on-campaign-finance-regulation/](https://publicintegrity.org/federal-politics/kochs-key-among-small-group-quietly-funding-legal-assault-on-campaign-finance-regulation/); and [https://www.newyorker.com/magazine/2010/08/30/](https://www.newyorker.com/magazine/2010/08/30/covert-operations)
[covert-operations](https://www.newyorker.com/magazine/2010/08/30/covert-operations), among others.)

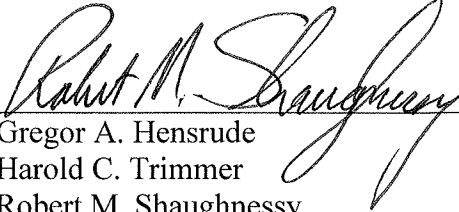
1 legal costs the Cities incurred, and will continue to incur, when enforcing ordinances like those the
2 plaintiffs admit they violated. These ordinances include very serious violations, like housing and
3 tenant victimization laws, which impact the most under-served members within the communities.
4 While the IJ strategically misrepresented and downplayed the nature of the violations committed
5 by the plaintiff class in this case, the reality is that many such cases involve dangerous and long-
6 standing violations that go unaddressed despite multiple warnings.

7 As a result of this lawsuit, tenants and other victims of the plaintiffs' admitted violations
8 will be victimized a second time—as taxpayers who must now fund the costs associated with
9 bringing violators to justice. Without the tool of cost recovery, violators can ignore local
10 governments' repeated warning notices, and hope that Cities like Indio will not have the funds to
11 take them to court.

12 Should the Court ultimately approve the settlement, it should, upon conclusion of the
13 settlement's terms, dismiss all remaining claims against S&W related to its conduct as the City
14 Prosecutor for the City of Indio no later than at the time it dismisses all claims against the City of
15 Indio. (*Center for Bio-Ethical Reform, supra*, 533 F.3d at 799.)

16 Respectfully submitted,
17 KLINEDINST PC

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19 DATED: September 30, 2019

20 By: 
21 Gregor A. Hensrude
22 Harold C. Trimmer
23 Robert M. Shaughnessy
24 Attorneys for Defendant SILVER & WRIGHT
25 LLP

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