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17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
18 **FOR THE COUNTY OF LOS ANGELES**

19 PICO NEIGHBORHOOD ASSOCIATION and
20 MARIA LOYA;

21 Plaintiffs,

22 v.

23 CITY OF SANTA MONICA; and DOES 1-100, in-
24 clusive,

25 Defendants.

CASE NO. BC616804

**DEFENDANT'S NOTICE OF MOTION
AND MOTION FOR ORDER (A)
REJECTING PLAINTIFFS' UNTIMELY
SERVICE ARGUMENT BASED ON
ABSENCE OF ANY PREJUDICE; AND/OR
(B) GRANTING RELIEF UNDER CODE
OF CIVIL PROCEDURE SECTION 473(b);
SUPPORTING MEMORANDUM OF
POINTS AND AUTHORITIES**

Complaint Filed: April 12, 2016
Hearing Date: June 19, 2018, 8:45 am

Assigned to Judge Yvette Palazuelos, Dep't 28

**DEFENDANT'S NOTICE OF MOTION AND MOTION FOR ORDER (A) REJECTING PLAINTIFFS'
UNTIMELY-SERVICE ARGUMENT BASED ON ABSENCE OF ANY PREJUDICE; AND/OR
(B) GRANTING RELIEF UNDER CODE OF CIVIL PROCEDURE SECTION 473(B)**

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on June 19, 2018, or as soon thereafter as the matter may be
3 heard in Department 28 of the Superior Court of the State of California for the County of Los Angeles,
4 located at 111 N. Hill St., Los Angeles, California 90012, defendant City of Santa Monica will, and
5 hereby does, move for an order (a) rejecting plaintiffs' untimely-service argument based on controlling
6 case law establishing that this argument has been waived given plaintiffs' response to the summary
7 judgment on the merits and the absence (and impossibility) of any showing of prejudice given plain-
8 tiffs' receipt of the summary judgment motion via email on the same day it was filed; and/or (b) to the
9 extent necessary, finding excusable neglect pursuant to Code of Civil Procedure section 473 for the
10 City's failure to cite in its reply brief the controlling case law regarding plaintiffs' waiver of their
11 untimely-service argument.

12 This motion is made pursuant to the Court's direction at the June 14, 2018 hearing on the City's
13 motion for summary judgment, at which no decision was rendered, and is based upon this notice of
14 motion and motion, the attached memorandum of points and authorities, the Declaration of Daniel R.
15 Adler, and other matters of which the Court may take judicial notice, the oral argument of counsel,
16 pleadings already on file with the Court, and all other evidence that may be presented at the hearing on
17 this matter. While the City offered to agree to briefing limited to two pages, plaintiffs never agreed to
18 that, the injection of Code of Civil Procedure section 473(b) rendered that unworkable, and the Court
19 at the end of the hearing appeared to require only that the brief be "similarly short."

20 DATED: June 15, 2018

21 Respectfully submitted,

22 GIBSON DUNN & CRUTCHER LLP

23 Theodore J. Boutros, Jr.

24 Marcellus McRae

25 William E. Thomson

26 Kahn Scolnick

27 Tiaunia N. Henry

28 By: 
William E. Thomson

Attorneys for Defendant,

City of Santa Monica

1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I. THE COURT SHOULD REJECT PLAINTIFFS’ UNTIMELY SERVICE**
3 **ARGUMENT BASED ON THE ABSENCE OF ANY PREJUDICE**

4 The City respectfully submits that this Court should follow controlling case law, which compels
5 the rejection of plaintiffs’ untimely-service argument. As the City explained at the hearing, this case
6 is on all fours with the Second Appellate District’s decision in *Carlton v. Quint* (2000) 77 Cal.App.4th
7 690, which held that the non-moving party had “waived any claim of inadequate service or notice,”
8 despite objecting in his written opposition brief and raising it again at the hearing, because he “*did* file
9 an opposition to the motion, appeared and argued at the hearing, never requested a continuance of the
10 hearing and never claimed prejudice by reason of insufficient notice of service.” (*Id.* at p. 697.) That
11 is precisely what happened here: Plaintiffs briefed the merits in full, filing no fewer than 856 pages,
12 including a thorough, substantive opposition; numerous declarations containing hundreds of pages of
13 exhibits; and lengthy responses to the City’s separate statement. Plaintiffs claimed no prejudice from
14 the City’s method of service and appeared at the hearing prepared to argue the merits of the City’s
15 motion.¹ Thus, *Carlton* controls, and requires this Court to reject plaintiffs’ untimely-service argument.

16 The Court’s tentative decision cited *Robinson v. Woods* (2008) 168 Cal.App.4th 1258 for the
17 proposition that “a party that files a written objection to the notice requirements does not need to es-
18 tablish prejudice” (Tentative at pp. 1–2.) But as the City explained at the June 14 hearing, whether
19 a non-moving party has waived the right to contest the adequacy of notice depends on *why* the notice
20 was supposedly inadequate. In *Robinson v. Woods*, the court clarified that if inadequate notice is the
21 result of the *court* shortening the statutory summary judgment notice period, a timeliness objection
22 cannot be waived. (168 Cal.App.4th at pp. 1266–1268.) By contrast, where inadequate notice is a
23 function of *the moving party’s* purported mistake in the timeliness of service—as is the case here and
24 as was the case in *Carlton*—a timeliness objection *can* be waived absent a showing of prejudice. (*Ibid.*;
25 see also *Urshan v. Musicians’ Credit Union* (2004) 120 Cal.App.4th 758, 768.)

26 ¹ Indeed, at the June 14 hearing, one of Plaintiffs’ counsel, Mr. Shenkman, argued the Court should
27 deny summary judgment if it reached the merits. The absence of any prejudice is further demonstrated
28 by the fact that Plaintiffs received the City’s motion via email on the day it was filed, received hard
copies by USPS Priority Mail the next day (Adler Decl., ¶¶ 2-4), and that they had more than two
months thereafter to draft the voluminous substantive opposition papers they filed.

1 In short, under *Robinson, Carlton*, and other controlling case law, Plaintiffs have waived their
2 timeliness objection by responding on the merits and making no showing of prejudice. A long line of
3 cases holds that “the appearance of a party at the hearing of a motion and his or her opposition to the
4 motion on its merits is a waiver of any defects or irregularities in the notice of motion”—in fact, “even
5 when no notice was given at all.” (*Tate v. Superior Court* (1975) 45 Cal.App.3d 925, 930 [collecting
6 cases].) It is not the moving party’s argument of waiver, but instead a *rule of law* that results in the
7 overruling of any timeliness objection. Indeed, these cases make clear that the only burden is on the
8 *non-moving party* (to demonstrate prejudice). (See, e.g., *Nat’l Grange of the Order of Patrons of Hus-*
9 *bandry v. California Guild* (2017) 17 Cal.App.5th 1130, 1146–1147; *Carlton*, 77 Cal.App.4th at p.
10 697; *Tate*, 45 Cal.App.3d at p. 930; *Kowalski v. Cohen* (1967) 252 Cal. App. 2d 977, 979; *McConaghy*
11 *v. McConaghy* (1966) 239 Cal.App.2d 601, 604; *Batchelor v. Finn* (1959) 169 Cal.App.2d 410, 428;
12 *Lacey v. Bertone* (1949) 33 Cal.2d 649, 652.)² Plaintiffs have shown no cognizable prejudice. (See,
13 e.g., *Nat’l Grange, supra*, 17 Cal.App.5th at p. 1146 [“And in voluminously opposing the motion,
14 defendants did not argue that they could have put on an even bigger or better showing in opposition”].)

15 **II. THE CITY DID NOT CITE THE BINDING CASE LAW ON WAIVER IN ITS REPLY**
16 **BRIEF DUE TO EXCUSABLE NEGLIGENCE**

17 As a procedural matter, the City should not be required to establish “excusable neglect” or
18 otherwise proceed under Civil Procedure Code section 473 because the Court has not yet issued any
19 ruling. At the June 14 summary-judgment hearing, Plaintiffs’ counsel suggested for the first time that
20 the City could brief this issue via “a motion under 473,” and the Court appeared to endorse this. But

21 ² Under *Robinson* and *Carlton*, where, as here, the non-moving party has an objection to the timeliness
22 of service of a summary-judgment motion, the non-moving party has two options to preserve that ob-
23 jection. First, it may object on timeliness grounds and say nothing on the merits. (*Robinson, supra*,
24 168 Cal.App.4th at p. 1259.) This was the strategy successfully employed in *Robinson*, where the court
25 noted that the non-moving plaintiff filed “a written opposition containing *only the notice objections*
26 and never argued the merits, unlike the opposing party in [*Carlton v. Quint*. Plaintiffs did not have to
27 claim or show prejudice because they did not address the merits, in writing or otherwise.” (*Id.* at
28 p. 1267.) Second, non-moving party may also follow the advice set out in *Carlton* and echoed in lead-
ing practice guides: “file the best opposition possible,” which must set out “a complete discussion of .
.. why a more complete opposition was not able to be filed,” and then, at the hearing, “again explain
to the court the prejudice that has been suffered by reason of the defective service and/or inadequate
notice.” (77 Cal.App.4th 690; see also Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The
Rutter Grp. 2018) ¶ 9:102.2.) Plaintiffs pursued neither of these options; they instead did exactly what
the non-moving party in *Carlton* did: raise the objection, fail to claim (much less show) any prejudice
from improper notice, and brief the merits in full. (*Carlton*, 77 Cal.App.4th at p. 697.)

1 on reflection it is not clear that the City needs to seek “relief” from a tentative ruling in this manner.
2 On the contrary, because the ruling is merely “tentative,” and the purpose of a tentative ruling is to
3 permit the parties to focus their arguments, the most efficient way to proceed is for each side to address
4 the legal authorities discussed above. This cures any disadvantage Plaintiffs may have experienced at
5 the hearing, where they said they were unaware of the cited controlling legal authority that directly
6 contradicts the argument they made in their Opposition. This permits the Court to fully consider bind-
7 ing legal authority before it issues its summary-judgment decision, and is, as a practical matter, pre-
8 cisely what the Court has authorized the parties to do.

9 Nonetheless, if the Court believes a showing of “excusable neglect” is needed to consider the
10 case law cited above, that showing is set forth here. The City failed to include *Carlton, Robinson*, or
11 the other cited authorities in its reply papers for the following reasons:

- 12 • Responding to plaintiffs’ substantive opposition, and supporting papers (a total of 856 pages
13 of materials), was a large undertaking completed within a short, six-day timeframe.
- 14 • In its ten-page reply brief, the City focused its attention on the merits—as did plaintiffs in
15 their opposition brief, which left only a few lines to address the timeliness objection.
- 16 • Under the plain language of section 437c, subd. (a)(2) of the Code of Civil Procedure, email
17 service appears to be sufficient to extend the notice period by two court days (vs. five for
18 service by mail), since email is “another method of delivery providing for overnight deliv-
19 ery,” and is the functional equivalent of—and as a practical matter far superior to—service
20 “by facsimile transmission.” Only during preparation for the hearing did the City’s counsel
21 discover Code of Civil Procedure section 1010.6, subd. (a)(2)(A)(i).

22 Simply put, there was no sandbagging by the City, as plaintiffs suggested. Rather, this was a case of
23 counsel neglecting to include certain key authorities in a reply brief—controlling authority that sup-
24 ports the City but was not cited by plaintiffs. That neglect was excusable under the circumstances.
25 (See *Bettencourt v. Los Rios Comm’ty College Dist.* (1986) 42 Cal.3d 270, 276 [“In determining
26 whether the attorney’s mistake or inadvertence was excusable, the court inquires whether a reasonably
27 prudent person under the same or similar circumstances might have made the same error.”].)³

28 ³ Although plaintiffs now insist that “rules are rules” to be followed without exception, it appears that they, too, made an error in serving their opposition papers. The Code required them to transmit those documents by “personal delivery, facsimile transmission, express mail,” or some other means “reasonably calculated to ensure delivery . . . not later than the close of the next business day.” (§ 1005, subd. (c).) But plaintiffs’ proof of service says that they served these papers by *regular mail*, rendering their opposition untimely. (In fact, the City *never* received any hard copy service documents from plaintiffs, despite repeated requests. (Adler Decl. ¶ 7.) The Court could strike the opposition as untimely. (See, e.g., *Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589, 1602 [affirming grant of summary

1 **III. Conclusion**

2 The Court should reject plaintiffs' untimely-service argument because plaintiffs waived it under
3 controlling case law. The parties have briefed and are prepared to argue the summary-judgment motion
4 on the merits, which may result in a dispositive ruling that renders the upcoming three-to-four week
5 trial entirely unnecessary. Thus, the Court should consider the authorities raised at the hearing and
6 discussed in this brief, reject plaintiffs' untimely-service argument, and schedule a hearing on or before
7 June 26, to address the City's summary-judgment motion on the merits.

8 DATED: June 15, 2018

Respectfully submitted,

9 GIBSON, DUNN & CRUTCHER LLP

10 By: 

11 William E. Thomson

12 Attorneys for Defendant, *City of Santa Monica*

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26 judgment where trial court struck opposition as untimely].) But the City does not believe that would
27 be a sensible or equitable result, given the important issues that are fully briefed.

1 **PROOF OF SERVICE**

2 I, Tiaunia Henry, declare:

3 I am employed in the County of Los Angeles, State of California. My business address is 333
4 South Grand Avenue, Los Angeles, California 90071. I am over the age of eighteen years and not a
party to the action in which this service is made.

5 On June 15, 2018, I served Defendant's Notice of Motion and Motion for Order (A) Rejecting
6 Plaintiffs' Untimely-Service Argument Based on Absence of Any Prejudice; and/or (B) Granting
Relief under Code of Civil Procedure Section 473(b) on the interested parties in this action by
7 causing the service delivery of the above document as follows:

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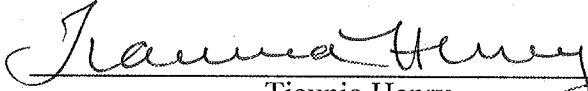
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- 14 **BY PERSONAL SERVICE:** A true and correct copy of the above document was provided
15 by Kahn Scolnick to R. Rex Parris on June 15, 2018.
- 16 **BY ELECTRONIC SERVICE:** I caused the documents to be emailed to the persons at the
17 electronic service addresses listed above.

18 I declare under penalty of perjury under the laws of the State of California that the foregoing
19 is true and correct.

20 Executed on June 15, 2018, in Los Angeles, California.

21 
22 _____
Tiaunia Henry