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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

CALMAT CO. dba VULCAN MATERIALS COMPANY, WESTERN DIVISION, a Delaware corporation,

Plaintiff,

v.

SAN GABRIEL VALLEY GUN CLUB, a non-profit California corporation, and DOES 1 through 10, inclusive,

Defendants.

SAN GABRIEL VALLEY GUN CLUB, a non-profit California corporation,

Counter-Claimant,

v.

CALMAT CO. dba VULCAN MATERIALS COMPANY, WESTERN DIVISION, a Delaware corporation,

Counter-Defendant.

CASE NO: EDCV08-01198 JLQ(OPx)

DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT OF UNCONTROVERTED FACTS

1. RESPONSES TO UNCONTROVERTED FACTS

STATEMENT OF UNCONTROVERTED FACTS	SAN GABRIEL VALLEY GUN CLUB'S RESPONSE
1. Vulcan produces various types of building aggregates and construction materials. Among other enterprises, it operates the Azusa Rock Quarry in Azusa, California where it mines aggregate for use in construction projects. Linton Decl., ¶ 2.	***Undisputed*** but immaterial.
2. From 1947 through 2006 Vulcan, or its predecessor entities, leased a portion of its property immediately adjacent to the quarry (the "Property") to the Gun Club for use as a pistol, rifle, and skeet shooting range (the remaining portion of the Gun Club's range was leased from the Army Corps of Engineers (the "Corps") and is not part of this litigation). Linton Decl., ¶ 3; Kroeger Decl., Ex. K (Gore depo.) at 16:22-18:4, Ex. 3; Ex. P (Bock depo.) at 19:19-22:3.	***Objections*** to "From 1947 through 2006": legal conclusion, lacks foundation. The cited portion of the Linton Decl. does not state how Linton acquired the personal knowledge that would serve as the foundation for this purported fact. The cited paragraph refers to a series of written leases, but does not provide a foundation because it does not state how Linton acquired his purported knowledge of the period those leases was in effect or the legal effect of those agreements. The Gore and Bock Deps. are not cited for this issue. ***Disputed***: The first contracts between the Club and Vulcan and/or its predecessors in interest ("Vulcan"), dated January 1, 1947, September 1, 1950, and January 1, 1958, are license agreements, not leases. And there are periods of time between January 1947 and November 2006 when there was no lease in place for the Property, including December 11, 1987 to February 3, 1988. (Compl. Exs. A, B, C, G at 1, H at 1-2.) It is ***undisputed*** that, as to the majority

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	of time between January 1, 1947, and November 6, 2006, there was some kind of lease or license agreement in place between Vulcan and the Club regarding the Property, that the lease allowed the property to be used as a pistol, rifle and skeet shooting range, and that the remaining portion of the Club's range was leased from the Corps.
3. Over the decades of the Gun Club's operations, the Gun Club and Vulcan, or its predecessors, entered into a number of the leases for the Property. Linton Decl., ¶¶ 3-13, Exs. A-J.	***Undisputed.***
4. The operative lease on the date the Gun Club vacated the Property is dated May 20, 1992 (the "Lease"). Linton Decl., ¶ 14, Exs. H-I.	***Objection***: UF 4 is a legal conclusion. Whether or not a lease is "operative" at a given time is question of contractual interpretation, which is a question of law, not fact.
5. Vulcan performed all of its obligations under the Lease, and, other than the claimed breaches alleged by the Gun Club in its Counterclaim, the Gun Club never claimed that Vulcan or its predecessors breached the Lease at any time. Linton Decl., ¶ 16.	***Objections***: UF 5 is, in part, a legal conclusion; lack of foundation. Determining if a party has "performed all of its obligations under" a lease requires contractual interpretation, which is a question of law (or perhaps a mixed question of fact and law), but not a pure question fact. Further, Linton started working for Vulcan (specifically its predecessor) in 1997, so he has no basis for determining what compliance, if any, occurred in the first half of the Lease's term. (Declaration of Scott M. Franklin in Support of Defendant's Response to Plaintiff's Separate Statement ("Franklin Decl."), Ex. C (Linto Dep.) at 24:6-7). Further, in the cited material (the Linton Decl., ¶ 16),

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	Linton states that Vulcan performed its obligations and the Club never claimed otherwise, not that the Vulcan never breached the lease. It is ***undisputed*** that the Club is not currently raising any argument herein regarding conduct by Vulcan (or a predecessor thereof) as being a breach or potential breach of any lease with the Club excepting issues related to: 1) the placement of the Waste Pile on the Property, 2) preventing Fred Wooldridge from performing reclamation activities (and the costs related thereto), 3) Vulcan's conduct regarding the "negotiation" of portions of ¶¶ 9 and 32 of the Lease.
6. Vulcan terminated the Gun Club's Lease in 2005 and the Gun Club ceased operations in November 2006. Linton Decl., ¶ 15, Ex. J; Kroeger Decl., Ex. L (Armato depo.) at 85:24-86:3.	***Undisputed*** assuming 1) the term "terminated" is understood as giving notice of termination and 2) the phrase "ceased operations" means ceased being used as a firing range.
7. Pursuant to the May 4, 2005 Termination of Lease notice, the Gun Club's leasehold interest in any portion of the Property terminated on November 6, 2006. Linton Decl., ¶ 15, Ex. J.	***Objection***: legal conclusion. Whether or not a leasehold interest is "terminated" at a given time is question of contractual interpretation, which is a question of law, not fact.
8. The Gun Club has not reformed or reopened, and essentially constitutes a defunct organization. Kroeger Decl., Ex. V at 2.	***Objection***: vague, lacks foundation in cited material. Without defining what an "essentially defunct organization," the Club cannot determine if it falls within such category. It is ***undisputed*** that the Club has not reformed (as it never became non-

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	existent) or reopened (as Vulcan is plainly in control of the Property), and that the Club has no current intention of obtaining real property for use as a shooting range.
9. The primary impact area for the Gun Club's shooting ranges on the Property (i.e. where the bullets landed) comprised of the face of a hill consisting primarily of earthen soil; this hill was a part of Vulcan's nearby mining operations. Anderson Decl., ¶ 3; Kroeger Decl., Ex. M (Phillips depo.) at 31:24-32:2, 59:6-11.	***Disputed in part***. ***Objection***: lacks foundation in material cited. This UF is really two UFs, 1) The primary impact area for the Gun Club's shooting ranges on the Property (i.e. where the bullets landed) comprised of the face of a hill consisting primarily of earthen soil, and 2) this hill was a part of Vulcan's nearby mining operations. As to the first part of UF 9, assuming Vulcan is including the Waste Pile it placed on the Property as part of the face of the hill, it is ***undisputed*** that the hillside running along the northwestern boarder of the Property was the primary impact area for all of the ranges at the Property excluding any shotgun ranges (e.g., trap and skeet ranges) that might have been partially or wholly located on the Property at one time. As to the second part of UF 9, that assertion is ***disputed***, as the cited material (Anderson Decl., ¶ 3) does not state that "this hill was a part of Vulcan's nearby mining operations[,]" it actually states that the "hill was adjacent to Vulcan's nearby mining operations." It is ***undisputed*** that the hill that functioned as the primary impact area for the non-shotgun ranges at the Property "was adjacent to Vulcan's nearby mining operations."

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10. During the time the Gun Club occupied the Property, the club patrons' shooting activities resulted in the deposit of bullet fragments, debris and waste, including hazardous waste, being deposited throughout the Property, including lead, which is a "hazardous substance" under the law. Anderson Decl., ¶¶ 4-7; Linton Decl., ¶ 17; Kroeger Decl., Ex. L (Armato depo.) at Ex. 17, Ex. S (Hoenig depo.) at 139:22-141:25, Ex. T (Peddicord Report) at pp. 5-6.	***Objections***: vague, legal conclusion. The terms debris and waste are vague and ambiguous and subject to multiple reasonable interpretations. Whether or not a certain material is a hazardous waste or hazardous substance under any law is a question of law, meaning the Club need not respond thereto herein. It is ***undisputed*** that during the time the Club occupied the Property, the Club patrons' shooting activities resulted in the deposit of bullets and bullet fragments (including lead bullets and fragments), primer powder, and casings on certain portions of the Property.
11. Under the Lease, the Gun Club agreed to clean up all of its debris and rubbish at its own cost, including any bullet fragments, upon Lease termination before returning the Property to Vulcan. Linton Decl., Ex. H at ¶¶ 9-10.	***Objection***: legal conclusion. What the Club was required to do before returning the Property to Vulcan requires contractual interpretation, which is a question of law, not fact. ***Disputed*** ; the Lease cited makes no mention of "bullet fragments."
12. Paragraph 9 of the Lease provides, in part, that: "Tenant agrees, at its own cost and expense, to comply with all laws, rules, regulations, ordinances and statutes of any and all municipal, county, State and federal authorities which are now in effect or which may hereafter become effective pertaining to the use of the Premises and its occupancy by Tenant. Tenant shall not commit, or suffer to be committed, any waste upon the Premises, or any public or private nuisance. Tenant shall not occupy or use the Premises during the term of this Lease in such a manner as to interfere with the use of the	***Undisputed*.**

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Premises or an part thereof after termination of this Lease." Linton Decl., Ex. H at ¶ 9.	
13. Paragraph 10 of the Lease provides, in part, that: "[u]pon the expiration of this Lease or upon any termination herein provided, Tenant shall at its sole cost and expense remove from the Premises all Tenant's personal property, and clean up and remove from the Premises all rubbish and debris and turn over the Premises to Landlord in good order and in a safe, sanitary condition. Should tenant fail to do so, Landlord may at its option make those removals required above or do such work as shall be required to return the Premises to an orderly and safe, sanitary condition and the cost thereof to Landlord shall be immediately repaid by Tenant to Landlord." Linton Decl., Ex. H at ¶ 10.	***Undisputed*.**
14. John Armato, a former Gun Club president, testified on behalf of the Gun Club, and asserted that the Gun Club Board of Directors believed that, under the Lease, the Gun Club had the obligation to return the property to a "pristine condition." Kroeger Decl., Ex. L (Armato depo.) at 133:3-9.	***Disputed*. *Objection***: misstates testimony; irrelevant. The cited testimony is: "Q: "During these discussions [of the Club Board] was the concept ever raised that the Gun Club had the obligation to return the property to a pristine condition? A: Yeah. It was all part of the general conversation . . ." This testimony shows merely that the Club Board considered the concept of being required to return the property in pristine condition, which is a far cry from believing they had the obligation.

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	Furthermore, it is irrelevant what Armato or the other directors thought the Club's duties were under a lease (a question of law), especially *the* Lease, which makes no mention of "pristine condition." Further, UF 14 is phrased so as to indicate the fact at issue is that Armato made certain statements when deposed, not the fact(s) described in those statements. In the context of a summary judgment motion, material facts are those facts that are "necessary to the proof or defense of a claim[.]" *Nat'l Am. Ins. Co. of Cal. v. Certain Underwriters at Lloyd's London*, 93 F.3d 529, 533 (9th Cir. 1996) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)). Deposition testimony may be evidence of facts, but that does not make it "necessary to the proof or defense of a claim[,]" and it is thus not a material fact for the purpose of summary judgment.
15. The Gun Club had no regular process of cleaning the range or the hill of the bullets and bullet fragments deposited as part of the Gun Club's operations. Kroeger Decl., Ex. L (Armato depo.) at 26:4-35:17, 70:23-25, Ex. M (Phillips depo.) at 28:2-34:11, Ex. P (Bock depo.) at 43:4-45:5, 48:17-50:21.	***Disputed.*** Contradicted by portions of the cited evidence – (Franklin Decl. Ex. E (Armato Dep.) at 26:10-16 (lead bullets from black powder shooters were swept up every day after the range was closed, recycled), 28:16-19, 29:11-30:24, 33:15-34:11 (regular program of allowing outsiders to clean the range of bullets and bullet fragments); Franklin Dec. Ex. B (Bock Dep.) at 43:16-44:1 (regular program of picking up or mining lead from impact areas on the rifle range), 44:10-17 (program to use

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	private contractors to mine lead on the shotgun field, though it wasn't "ongoing"), 49:15-50:21 (outside company would mine lead from the rifle and shotgun fields)). The Club had lead removed as needed, and when it was economically viable.
16. Although the Gun Club occasionally "swept" the area in front of the firing lines for shell casings, and, on an inconsistent and irregular basis, caused a lead recycler to recycle some of the lead from the hill for its economic value, the Gun Club never attempted to remediate or clean up the hill or the ranges of environmental hazards during the entirety of the time it leased the Property. Kroeger Decl., Ex. L (Armato depo.) at 26:4-35:17, 70:23-25, Ex. M (Phillips depo.) at 28:2-34:11, Ex. P (Bock depo.) at 43:4-45:5, 48:17-50:21, 85:8-11.	***Objection***: vague. UF 16 uses several terms that are susceptible to several reasonable interpretations and the Club would have to speculate as to their meaning in attempting to provide a response ("inconsistent," "irregular," "remediate," and "environmental hazard"). Regardless, this UF is ***disputed***. David Smith clearly testified that material from the rifle and pistol range firing lines was hauled away to a certified site. (Franklin Decl. Ex. NN (Smith Dep.) at 39:16-40:1) It is ***undisputed*** that the Club lead removed as needed, and when it was economically viable, but that the Club did not adhere to a specific timetable for such removal.
17. The Gun Club and its leadership knew that the lead bullet debris constitutes "hazardous" material under the law, but still failed to make regular or thorough efforts to remediate the waste. Kroeger Decl., Ex. L (Armato depo.) at 66:10-20, 133:10-136:21, Ex. 17, Ex. P (Bock depo.) at 42:5-10, 43:4-45:5, 48:17- 50:21, 56:25-57:2, Ex. M	***Objection***: vague; lacks foundation. The term "hazardous material" is not a term of art under environmental law. Likewise, "remediate" is vague. UF17 is also vague as to time. The Club is not required to respond to the extent this UF calls requires speculation. ***Disputed.*** Since the cited sources do not support UF17, the Club need offer no evidence to controvert the fact. The Armato Dep. (Franklin Decl.

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(Phillips depo.) at 29:18-34:11, 59:21-61:16, Ex. O (Cowan depo.) at 60:9-61:10.	Ex E) at 66:10-20 merely states that Armato was not aware of any Club remediation effort prior to 2005. There is nothing in this testimony to indicate that the Club knew that lead bullet debris constituted "hazardous material." Likewise, in Armato's testimony at 133:10-136:2, the only discussion of "hazardous materials" is Vulcan's counsel quoting from a letter written by the Club's counsel to Vulcan claiming that the mining tailings Vulcan had deposited on the Site contained "hazardous materials". (Ex. 17). The Bock Dep. (Franklin Decl. Ex. B) at 42:5-10 shows Vulcan's counsel instructing Bock on the definition of "remediation" to be used during the deposition, i.e. returning the property to a pristine condition. There is no mention of "hazardous material" in the Bock Depo at 43:4-45:5, 48:17-50:21 or 56:256-57:2. The closest the Phillips Dep. (Franklin Decl. Ex. L) comes to mentioning "hazardous material" is Phillips' answer of "yes" to Vulcan's counsel's question: "Every once in a while throughout your employ, the concept that lead may be a potential environmental hazard was discussed?" This testimony does not show that the Club leadership knew lead was a "hazardous material." Similarly, the cited portions of Cowan's Dep. (Franklin Decl. Ex. M) do not mention "hazardous materials."
18. When the Gun Club ultimately vacated the Property, the Property was	***Objection***: vague; legal conclusion. The phrase "extremely poor condition" and

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in extremely poor condition, and overrun with bullet shell casings and hazardous materials, including lead. Anderson Decl., ¶¶ 4-7; Linton Decl., ¶ 17; Kroeger Decl., Ex. S (Hoenig depo.) at 141:21-25, Ex. T (Peddicord Report), Ex. W (David Liu Expert Report).	the term "overrun" are subjective, and providing a response to a UF using those terms/phrases would impermissibly require the Club to speculate in formulating its response. Whether or not a certain material is a hazardous material under any law is a question of law, meaning the Club need not respond thereto herein. Anderson's cited testimony is essentially equivalent to UF18, a vague conclusion. The other citations do not directly support UF18. Linton's cited testimony is the effect that Vulcan has preserved the Site in the same condition it was in when the Club vacated it. Hoenig's testimony is simply that lead could be seen on the berms with the naked eye. Peddicord's 29-page report and Liu's 7-page report (cited in their entirety with no pin cite) confirm that there are casings and spent bullets on the Site. It is ***undisputed*** that when the Club turned the Property over to Vulcan, the there were casings and spent bullets (including spent lead bullets and portions thereof) present at the Property.
19. Due to the Gun Club's activities, lead (and other heavy metal) contamination has been deposited at the Property, and such contamination remains on the Property to this day. Anderson Decl., ¶¶ 4-7; Linton Decl., ¶ 17; Kroeger Decl., Ex. L (Armato depo.) at Ex. 17, Ex. P (Bock depo.) at 43:4-45:5, Ex. S (Hoenig depo.) at	***Objection***: vague. The term "contamination" is subjective, and providing a response to a UF using those terms/phrases would impermissibly require the Club to speculate in formulating its response. The term "heavy metal" is vague and undefined. ***Disputed*** as to "contamination and "other heavy metal."

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139:22-141:25, Ex. T (Peddicord Report) at pp. 5-6, Ex. W (David Liu Expert Report).	It is ***undisputed*** that lead was deposited at the Property due to the Club's activities thereat, and that some of the lead deposited as a result of the Club's activities remain at the Property currently.
20. There are hundreds of thousands, if not more, of ammunition shell casings and bullets on the ground of the various former shooting ranges in between the firing line and the impact area. The Property is strewn with casings and bullets from a variety of different caliber firearms, including shot gun casings and other larger ordinance. A large majority of these bullets are made of lead. Anderson Decl., ¶¶ 4-7; Linton Decl., ¶ 17; Kroeger Decl., Ex. S (Hoenig depo.) at 141:21-25, Ex. T (Peddicord Report), Ex. W (David Liu Expert Report).	***Objection***: lacks foundation. This UF is quoted from Anderson's Decl., but that source contains no information on how Anderson developed his conclusion that there are "hundreds of thousands" of shell casings and bullets. It seems unlikely that Anderson could make that estimate by just observing the Site; some sort of calculation procedure would be required. The estimate of "hundreds of thousands" is not supported by any of the other cited sources. Once again, Vulcan cites to the entirety of the Peddicord and Liu reports; the lack of a pin cite makes it difficult to check whether these reports directly support the UF. ***Disputed***, as to the number of ammunition shell casings and bullets on the Site.
21. The former gun range also remains littered with other metals, including brass and copper. Kroeger Decl., Ex. W (David Liu Expert Report).	***Objection***: vague. The term "littered" is subjective, and providing a response to a UF using that terms would impermissibly require the Club to speculate in formulating its response. Further, the Club is not required to evaluate which metals are present at the Property. It is ***undisputed*** that brass and copper are present at the Property. ***Disputed*** as to any metallic material other than brass, copper, and lead.
22. A recent inspection of the earthen soil berm along the face of the hill	***Objections***: vague, lacks foundation. Same objection to "hundreds of

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revealed potentially hundreds of thousands, if not more, of bullets, bullet fragments, and shell casings readily visible from the face of the hill. Anderson Decl., ¶¶ 4-7; Linton Decl., ¶ 17; Kroeger Decl., Ex. S (Hoenig depo.) at 141:21-25, Ex. T (Peddicord Report), Ex. W (David Liu Expert Report).	thousands" as for UF 20. It will be assumed that "the earthern soil berm along the face of the hill" (though there is no evidence the material is "soil" as opposed to crushed rock) is intended to refer to the Waste Pile, which was deposited there by Vulcan. ***Disputed***, as to the number of ammunition shell casings and bullets in the berm.
23. Mr. Armato, a former Gun Club president, testified that HCI, an environmental clean-up service, performed remediation services on the Property after the Lease was terminated; HCI's employees who performed the work, confirmed that any clean-up work HCI performed at the Property was done only on the portion of the Gun Club premises owned by the Corps -- not Vulcan. Kroeger Decl., Ex. Q (Olsen depo.) at 20:21-21:24, Ex. 107, Ex. R (Livingston depo.) at 16:11-18, 19:11-15.	***Objection***: vague, lacks foundation, hearsay. The term "remediation" was defined, for purposes of Armato's Dep. as an operation whose purpose is to "bring the property back to its original state or pristine state." (Franklin Decl Ex E (Armato Dep.) at 24:20-25:1). The only sources cited to show what Armato testified to are the depositions of Olsen and Livingston. There is no foundation in these depositions to show that they were aware of Armato's testimony. Even if they were, Armato's testimony would be hearsay if it was used to show the truth of Armato's testimony. Neither of the cited sources establishes the time frame of HCI's activities. ***Disputed*** as to time frame, and that HCI's did no work on Vulcan's portion of the property. HCI did clean-up work on the rifle range. (Armato Dep. at 78:1-5, 79:3-10).
24. The work done by HCI was limited to "collection and disposal of lead shot contaminated on the outside boundaries of shotgun range," and it entailed only vacuuming and disposing	***Disputed***. HCI's work was not so limited. The activities were performed on the skeet range and near the combat range. (Franklin Decl. Ex. I (Olsen Dep.) at 30:16-19; Ex. J (Livingston

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the visible lead shots from the skeet and trap range on the Property and "removing some stockpiling." Kroeger Decl., Ex. L (Armato depo.) at Ex. 19, Ex. Q (Olsen depo.) at 22:7-23:7, 29:3-30:23, 32:6-11, 37:11-38:8, Ex. R (Livingston depo.) at 16:11-18, 19:11-15.	Dep.) at 19:13;14.). It also appears HCI may have been responsible for hauling material offsite for disposal that the Club had collected from the rifle and pistol range firing lines. (Franklin Decl. Ex. NN (Smith Dep.) at 39:16-40:1)
25. In or about May 2007, after the Lease was terminated, the Gun Club attempted to hire a Fred Wooldridge, an independent contractor, to remove and recycle bullet fragments on the Property. Kroeger Decl., Ex. L (Armato depo.) at 26:7-28:15, 35:2-7.	***Undisputed*** that Fred Wooldridge, not an employee of the Club, was hired by the Club in early 2007 to remove bullets and bullet fragments from the Property and to arrange for the sale of the same.
26. The Gun Club attempted to hire Wooldridge after the Lease was terminated and the Gun Club ceased operations. Counterclaim ¶ 76; Linton Decl., ¶ 15; Kroeger Decl., Ex. L (Armato depo.) at 26:7-28:15, 35:2-7, Ex. U, Ex. V at 3.	***Undisputed*** that Wolldridge's hiring took place in early 2007 after the Lease's ten-year term had expired. Determining when a Lease is terminated is a question of law that does not require a response.
27. Mr. Wooldridge was not properly licensed or insured and had not obtained the permits necessary to perform any work on the Property. Kroeger Decl., Ex. U, Ex. N (Wooldridge depo.) at 32:17-22.	***Objection***: Legal conclusion; vague; lacks foundation, assumes facts not in evidence. The phrase "properly licensed or insured" is a legal conclusion, not a fact. This UF assumes that a license was required for the actions Wooldridge was hired to perform, and that fact has not been established. The UF assumes that insurance was required for the actions Wooldridge was hired to perform, and that fact has not been established. The UF The phrase "permits necessary to

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	perform any work on the Property" assumes that permits were required for the actions Wooldridge was hired to perform, and that fact has not been established. ***Disputed*** because the documents cited either show a lack foundation or do not support the assertions made in UF 27. Ex. U to the Kroeger Decl. is a letter from Vulcan's counsel arguing that Mr. Wooldridge was not properly licensed or insured and had not obtained the permits necessary to perform any work on the Property. The letter does not demonstrate any foundational knowledge on the part of Vulcan's counsel's and is therefore insufficient to support this UF. And as to the citation to the deposition of Fred Wooldridge, the cited material says *nothing about* what "proper" licensing and insuring would be, that proposition is simply not supported by the cited text, and is at least partially rebutted by the portion of the cited document Vulcan omits (in italics): Q Prior to commencing work on the site, had you obtained any licenses? A No. Q And was Lead Reclamation Services licensed in the State of California to do business at the time of this? A I don't think so. *Q Do you know whether a license -- strike that. Did you have any understanding as to whether a license was*

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	required to do this kind of work? A I don't believe it is. (Franklin Decl. Ex. K (Wooldridge Dep.)at 31:17-33:1). Finally, aside from the assertion that a particular permit was "necessary" being a legal contention requiring no response, Vulcan cavalierly argues UF 27 without mentioning that Vulcan *expressly instructed Wooldridge not to apply for an air quality permit*. Wooldridge had obtained an application for an air quality permit, intending to send it in with the required fees, but "some individual at Vulcan had almost had a coronary over the fact we were going to apply for a permit . . . . I know they said, 'No.'" (*Id.*at 33:2-25).
28. Wooldridge's proposed work was not within the scope of work that Vulcan had requested. Kroeger Decl., Ex. U	Objection: Vague, lacks foundation, assumes facts not in evidence. Ex. U to the Kroeger Decl. is a letter from Vulcan's counsel. It does not state that Wooldrige's proposed work is not within the scope of work that Vulcan requested. It does not state that Vulcan requested any particular scope of work. It does not state how Vulcan's counsel knew the supposedly request scope of work. ***Disputed.*** Wooldridge's job was to remove lead from the Property. (Franklin Decl. Ex. E (Armato Dep.) at 26:24-27:7). Removal of lead is consistent with the EPA's guidance in the Best Management Practices for Outdoor Shooting Ranges, revised 2005, and its is undeniable that clean up the property could reasonably have been

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	reclamation-based.
29. Wooldridge was not hired to perform "remediation" services on the Property. He was hired to perform reclamation and recycling services only. Kroeger Decl., Ex. L (Armato depo.) at 26:25-28:15, 76:24-77:25, 131:20-22.	***Objection***: Vague. Obviously Vulcan intends the term "remediation" to have a special definition (as the phrase is placed in quotation marks); without providing that definition, however, the Club would have to speculate to provide a response, which it is not required to do. ***Disputed***. Reclamation and recycling of lead are likely to be part of a remediation effort, depending on how the latter term is defined. It is ***undisputed*** that Fred Wooldridge, not an employee of the Club, was hired by the Club in early 2007 to remove bullets and bullet fragments from the Property and to arrange for the sale of the same. Removal of lead is consistent with the EPA's guidance in the Best Management Practices for Outdoor Shooting Ranges, revised 2005.
30. By the time the Lease was terminated, the Gun Club "was broke." Kroeger Decl., Ex. L (Armato depo.) at 78:1-9.	Objection: vague; lacks foundation. First, it is assumed the term "terminated" is understood to refer to the date 18 months after the Club received Vulcan's notice of termination dated May 4, 2005, i.e. approximately Nov. 6, 2006, the date which the Club's holdover tenancy started. It is ***undisputed*** that, as of either the date Vulcan gave notice of termination to the Club, or when the Club actually vacated the Property at the end of the holdover period, the Club did not have funds sufficient to pay for more than a small fraction of the cleanup costs for the cheapest cleanup

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	alternative proposed herein by Vulcan. (Franklin Decl. Ex. H (Liu Report) at 4-6).
31. Armato testified that the Gun Club's obligations to clean up the Property "always came down to what the reality of the situation was and the reality was [] that the Club had extremely limited resources." Kroeger Decl., Ex. L (Armato depo.) at 132:9-133:9. 32.	Though not a material fact, it is ***undisputed*** that Armato so testified; in all other respects, ***disputed.*** Objection: lacks foundation; legal conclusion. It is irrelevant what Armato thought the Club's obligation were under the Lease in hindsight; aside from the fact the issue of contract interpretation is a question of law, Armato was not involved in the negotiation of the relevant lease, so he cannot give testimony as to contractual intent. Specifically, the cited testimony clearly refers to Armato looking an executed lease *in response to* Vulcan having requested remediation of the Property. Further, Armato expressly stated he had no role in negotiating any lease for the Property. (Franklin Decl. Ex E (Armato Dep.) at 68:11-13). In fact, the Club identified Bock as its "person most knowledgeable" about lease negotiations (*see* Franklin Decl. Ex. F (Club's Objection to Vulcan's Notice of Deposition of the Club Pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure) at 4:14-26; Franklin Decl. Ex B (Bock Dep.) at 14:12-25 to 15:2-5), and he stated that he does not recall "any conversations" during negotiations wherein "Vulcan said they were concerned about . . . hazardous materials being on the [P]roperty[.]" (Bock Dep. at 56:2-6). Specifically, Bock deposition testimony indicates that he does not recall the concept of returning

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	the Property to a "pristine condition" being discussed. (*Id.* at 42:5-10) (Q . . . Remediation we mean to be we mean basically the concept of returning the property to sort of a pristine condition, so getting rid of all the contaminants from the area. Do you understand that? A 1 understand that, but 1 don't know if that was ever discussed."). Further, UF 31 is phrased so as to indicate the fact at issue is that Armato made certain statements when deposed, not the fact(s) described in those statements. In the context of a summary judgment motion, material facts are those facts that are "necessary to the proof or defense of a claim[.]" *Nat'l Am. Ins. Co. of Cal. v. Certain Underwriters at Lloyd's London*, 93 F.3d 529, 533 (9th Cir. 1996) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)). Deposition testimony may be evidence of facts, but that does not make it "necessary to the proof or defense of a claim[,]" and it is thus not a material fact for the purpose of summary judgment. It is ***undisputed*** that as of either the time Vulcan gave notice of lease termination or at the end of the holdover period thereafter, the Club had insufficient funds to perform the amount of cleanup Vulcan indicated it desired.
32. Armato testified that, "[the Gun Club was] aware what the obligations were according to the [Lease], but [the Gun Club had to consider] what can we get done with what we have? That was always the question was the fact	Though not a material fact, it is ***undisputed*** that Armato so testified; in all other respects, ***disputed.*** Objection: lacks foundation; legal conclusion. It is irrelevant what Armato might have understood the Club's obligation were

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they we were so limited in our resources." Kroeger Decl., Ex. L (Armato depo.) at 132:14-133:9; see also id. at 73:4-74:24, 140:1-12.	under the Lease in hindsight; aside from the fact the issue of contract interpretation is a question of law, Armato was not involved in the negotiation of the relevant lease, so he cannot give testimony as to contractual intent. Specifically, the cited testimony clearly refers to Armato looking at an executed lease *in response to* Vulcan having requested remediation of the Property. Further, Armato expressly stated he had no role in negotiating any lease for the Property. (Franklin Decl. Ex E (Armato Dep.) at 68:11-13). In fact, the Club identified Bock as its "person most knowledgeable" about lease negotiations (*see* Franklin Decl. Ex. F (Club's Objection to Vulcan's Notice of Deposition of the Club Pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure) at 4:14-26; Franklin Decl. Ex. B (Bock Dep.) at 14:12-25 to 15:2-5), and he stated that he does not recall "any conversations" during negotiations wherein "Vulcan said they were concerned about . . . hazardous materials being on the [P]roperty[.]" (Bock Depo. at 56:2-6). Specifically, Bock deposition testimony indicates that he does not recall the concept of returning the Property to a "pristine condition" being discussed. (*Id.* at 42:5-10) (Q . . . Remediation we mean to be we mean basically the concept of returning the property to sort of a pristine condition, so getting rid of all the contaminants from the area. Do you understand that? A 1 understand that, but 1 don't know if that was ever

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	discussed."). Further, UF 32 is phrased so as to indicate the fact at issue is that Armato made certain statements when deposed, not the fact(s) described in those statements. In the context of a summary judgment motion, material facts are those facts that are "necessary to the proof or defense of a claim[.]" *Nat'l Am. Ins. Co. of Cal. v. Certain Underwriters at Lloyd's London*, 93 F.3d 529, 533 (9th Cir. 1996) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)). Deposition testimony may be evidence of facts, but that does not make it "necessary to the proof or defense of a claim[,]" and it is thus not a material fact for the purpose of summary judgment. It is ***undisputed*** that as of either the time Vulcan gave notice of lease termination or at the end of the holdover tenancy thereafter), the Club had insufficient funds to perform the amount of cleanup Vulcan indicated it desired.
33. When asked if the Gun Club ever discussed its responsibility to clean up the hazardous materials on the Property, Armato testified that, "[the board of the Gun Club] was saying it was eating into a lot of the funds, and our concern was that we would only be able to do what we could do until we ran out of money. We had a commitment on that. We had started it. It was being hauled out along with the lead shot that was taken from the skeet fields, and we were quickly approaching a point where we were	Though not a material fact, it is ***undisputed*** that Armato so testified in response the question: "[d]uring the board meetings, was it ever discussed that the Club should only be responsible for cleaning up materials, hazardous materials, it deposited on the site?[;]" in all other respects, ***disputed.*** Objection: lacks foundation; legal conclusion. It is irrelevant what Armato thought the Club's responsibilities were under the Lease in hindsight; aside from the fact the issue of contract interpretation is a question of law, Armato was not

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just - - we were going broke." Kroeger Decl., Ex. L (Armato depo.) at 135:7-20.	involved in the negotiation of the relevant lease, so he cannot give testimony as to contractual intent. Specifically, the cited testimony clearly refers to Armato looking an executed lease *in response to* Vulcan having requested remediation of the Property. Further, Armato expressly stated he had no role in negotiating any lease for the Property. (Armato Depo. at 68:11-13). In fact, the Club identified Bock as its "person most knowledgeable" about lease negotiations (*see* Franklin Decl. Ex. F (Club's Objection to Vulcan's Notice of Deposition of the Club Pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure) at 4:14-26; Franklin Decl. Ex. B (Bock Dep.) at 14:12-25 to 15:2-5), and he stated that he does not recall "any conversations" during negotiations wherein "Vulcan said they were concerned about . . . hazardous materials being on the [P]roperty[.]" (Bock Depo. at 56:2-6). Specifically, Bock deposition testimony indicates that he does not recall the concept of returning the Property to a "pristine condition" being discussed. (*Id.* at 42:5-10) (Q . . . Remediation we mean to be we mean basically the concept of returning the property to sort of a pristine condition, so getting rid of all the contaminants from the area. Do you understand that? A 1 understand that, but 1 don't know if that was ever discussed."). Further, UF 33 is phrased so as to indicate the fact at issue is that Armato made certain statements when deposed, not the fact(s) described in those

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	statements. In the context of a summary judgment motion, material facts are those facts that are "necessary to the proof or defense of a claim[.]" *Nat'l Am. Ins. Co. of Cal. v. Certain Underwriters at Lloyd's London*, 93 F.3d 529, 533 (9th Cir. 1996) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)). Deposition testimony may be evidence of facts, but that does not make it "necessary to the proof or defense of a claim[,]" and it is thus not a material fact for the purpose of summary judgment. It is ***undisputed*** that as of either the time Vulcan gave notice of lease termination or the end of the holdover period thereafter, the Club had insufficient funds to perform the amount of cleanup Vulcan indicated it desired.
34. Armato testified that, even though environmental test results identified heavy metals on the Property, ". . . it was becoming a moot question anyway because [the Gun Club] [was] running out of money." Kroeger Decl., Ex. L (Armato depo.) at 136:14-21.	Though not a material fact, it is ***undisputed*** that Armato so testified; in all other respects, ***disputed.*** Objection: lacks foundation. Vulcan's selective quotation in this UF is misleading: the testimony given by Armato was that he believed there was environmental testing showing heavy metals on the Property, but that resolving where the heavy metal came from (Vulcan or the Club) would become moot because the Club was running out of money ("the question of heavy metals was such that was that material already in the tailings when it was dumped, or how did we [i.e., the Club] put it in[.]") (Franklin Decl. Ex E (Armato Dep.) at 136:1-21). Armato's cited (or any other) testimony does not establish his knowledge of test

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	results. To the degree this UF is being used to establish that tests showed heavy metals are present in the soil on the Property, it is therefore ***disputed.*** Further, UF 34 is phrased so as to indicate the fact at issue is that Armato made certain statements when deposed, not the fact(s) described in those statements. In the context of a summary judgment motion, material facts are those facts that are "necessary to the proof or defense of a claim[.]" *Nat'l Am. Ins. Co. of Cal. v. Certain Underwriters at Lloyd's London*, 93 F.3d 529, 533 (9th Cir. 1996) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)). Deposition testimony may be evidence of facts, but that does not make it "necessary to the proof or defense of a claim[,]" and it is thus not a material fact for the purpose of summary judgment. It is ***undisputed*** that as of either the time Vulcan gave notice of lease termination or the end of the holdover period thereafter, the Club had insufficient funds to perform the amount of cleanup Vulcan indicated it desired.
35. Armato testified that, even if the Gun Club was required to clean up the Property before vacating it, it never took that obligation into real consideration because it never planned on leaving the Property; it believed the Lease would never be terminated. Kroeger Decl., Ex. M (Phillps depo.) at 39:14-40:10.	***Disputed.*** Objection: Lacks foundation. The document cited is the transcript of the Deposition of Rick Phillips, and has to do with Phillips' opinions and recollections. It does not refer to any opinions or recollections obtained from Armato – and those would be hearsay. In addition, nothing in Armato's deposition supports the statement that the Club did not take any alleged cleanup obligation "into real

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	consideration." Further, UF 35 is phrased so as to indicate the fact at issue is that Armato (or possibly Phillips) made certain statements when deposed, not the fact(s) described in those statements. In the context of a summary judgment motion, material facts are those facts that are "necessary to the proof or defense of a claim[.]" *Nat'l Am. Ins. Co. of Cal. v. Certain Underwriters at Lloyd's London*, 93 F.3d 529, 533 (9th Cir. 1996) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)). Deposition testimony may be evidence of facts, but that does not make it "necessary to the proof or defense of a claim[,]" and it is thus not a material fact for the purpose of summary judgment. It is ***undisputed*** that as of either the time Vulcan gave notice of lease termination or the end of the holdover period thereafter, the Club had insufficient funds to perform the amount of cleanup Vulcan indicated it desired.
36. Prior to the date when Vulcan terminated the Lease, the Gun Club never anticipated remediating the Property. Kroeger Decl., Ex. P (Bock depo.) at 88:19-22; Ex. L (Armato depo.) at 62:14-63:9.	***Undisputed*** assuming Vulcan is referring to the definition it has used herein referring to remediation as restoring property to "pristine" condition. ***Disputed*** otherwise, as the Club had in the past, and intended to engage in further recycling until Vulcan precluded Wooldridge's work.It is assumed that "the date when Vulcan terminated the lease" refers to November 6, 2006, and not the later date when the holdover tenancy ended. (The second source cited does not

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	support this UF).
37. Paragraph 35 of the Lease provides that "Landlord reserves the right to use and landscape the stockpile area in the back of the range area of the Premises, as illustrated on the landscape plan attached hereto as Exhibit 'B.'" Linton Decl., Ex. H at ¶ 35 and Ex. B thereto.	It is ***Undisputed*** that the cited document includes the quoted portion of ¶ 35.

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38. In the early or mid 1990's, to protect Vulcan workers from ricochets, Vulcan deposited inert mining tailings (fines and small rocks left over after the aggregate was crushed) in front of the toe of hill, creating a "berm" in front of the impact area for the rifle and pistol ranges. Kroeger Decl., Ex. L (Armato depo.) at 38:13-41:20, Ex. M (Phillips depo.) at 96:17-97:8, Ex. P (Bock depo.) at 77:17- 78:25, Ex. O (Cowan depo.) at 38:11-23, 59:4-7.	***Disputed***. Objection: lacks foundation, cited evidence does not support UF. This UF is a complete fabrication. 1) *None* of the deponents has the requisite relationship with Vulcan to make a statement based on personal knowledge of why Vulcan did something that only a member of Vulcan's control group (e.g., an executive) would have the personal knowledge to make. Three of the deponents at issue are affiliated with the Club, and the fourth was the heavy equipment operator (not an executive) who oversaw the placement of overburden (i.e., the Waste Pile) on the Property. (Franklin Decl. Ex. E (Armato Dep.) at 7:5-10; Ex. L (Phillips Dep.) at 6:5-6; Ex. B (Bock Dep.) at 13:14-15:19, 24:11-19; Ex. M (Cowan Dep.) at 14:20-19:25). Vulcan is avoiding providing *any* testimony of an executive on this issue, perhaps because that would show (as discussed in part 3 below), that Vulcan is intentionally misrepresenting facts. Vulcan's assertions on this point are bluntly refuted by the deposition testimony of Tom Sheedy, an executive who no longer works for Vulcan and thus has no reason to make misrepresentations that favor Vulcan. (*See* Franklin Decl. Ex. N (Sheedy Decl.) at ¶¶ 11, 10, 14). (At some time between approximately 1990 and 1995, I determined Azusa Rock had run out of space at the Fish Canyon Quarry regarding the storage of tailings . . . . [S]omething had to be done to get the tailings off the Fish Canyon Quarry site[;] Azusa Rock management recommended storing tailings on the property leased by the San Gabriel Valley Gun Club, [and] [o]ver the course of approximately 12 months

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	(such period occurring at some time between 1990 and 1995), [Sheedy] oversaw Azusa Rock's transfer of at least 500,000 tons of tailings from the Fish Canyon Quarry to the property leased by the San Gabriel Valley Gun Club.). *(See also* Franklin Decl. Ex. O (Sheedy Dep.) at 40:2-15 ("Q. So why was it decided to place material onto the gun club property [in the early 90s]? A. To create additional storage for the mining tailings . . . . We needed more room just to continue mining.")). 2) *None* of the cited material refers to deposited material as "inert." 3) Most importantly, Vulcan is intentionally confusing three separate issues: a) the use of rock dust on the floor of the range to reduce ricochets, b) Vulcan's extension of its mining operation that encroached on the pistol range (including the placement of "base" which spilled onto the pistol range), and c) the creation of a Waste Pile. *Each and every one of the depositions cited to by Vulcan in support of UF 38* contradicts Vulcan's misrepresentation about the purpose of the creation of the Waste Pile (i.e., what Vulcan refers to as "a 'berm' in front of the impact area for the rifle and pistol ranges"). In fact, three of the four deponent citations have *nothing to do* with ricochet's or safety, and the fourth expressly distinguishes the creation of the Waste Pile from a

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	different location where rock dust was placed to help reduce ricochets. a) *Armato*. The portion of the Armato deposition cited makes no mention of ricochets or protecting workers; in fact Armato's testimony is that he did not know why the mining tailings (i.e., the Waste Pile) was brought onto the Property, though he did note the mining tailings were "like waste" and that he didn't think the mining tailings were brought in at the request of the Club. (Franklin Decl. Ex. E (Armato Dep.) at 44:6-25 to 45:1-24). b) *Phillips*. Vulcan's citation to Phillips' deposition is the most disconcerting of the bunch. Phillips plainly does give testimony that "rock dust was placed on the property as a way to try to mitigate those ricochets[.]" (Franklin Decl. Ex. L (Phillips Dep.) at 96:17-97:8). Vulcan fails to cite, however, the portions of the Phillips deposition wherein he explains that, contrary to Vulcan's attempt to graft the ricochet issue on to the Waste Pile issue, the two issue were completely separate. Q . . . you mentioned the placement of rock dust. Had you requested that Vulcan place rock dust on the property? A We requested the material itself, the rock dust, which we were given the rock dust to place in areas where it would be an impact area, and it would cut down on ricochets in doing so. . . . Q Did the Club physically pick up the rock dust from the quarry? A Sometimes or we would hire [a dump truck owner/operator] to come with the dump truck and pick up the rock dust and spread it for us.

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	[¶¶] Q Did Vulcan . . . ever bring the rock dust down on the property for the Club? A The rock dust, no. Q And do you have any estimate as to the quantity that may have been brought down . . .? Would it have been in the tons? A Yes. Q The hundreds of tons? A Yes. Q Thousands of tons? A No. [¶¶] [As to the] ***elevation in the 2005 photo that's not there in the 1980 photo, sort of along the base of the hill*** . . . Do you have any knowledge as to whether the placement of the rock dust could have been one of thethings that contributed to the new elevation there in 2005 that wasn't there in 1980? A No. [sic, the punctuation should clearly be a comma, not a period] [t]he placement of the rock dust was right across the front . . . ***Q The rock dust was never placed along sort of the impact berms up here? A No. The area you're referring to, that was put there by Vulcan or then Calmat with their vehicles and their employees. That was not requested by the Gun Club.*** (Phillips Dep. at 69:22-74:24) (emphasis added). Phillips' Deposition Transcript also

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	shows that the pistol range encroachment issue and the placement of the Waste Pile are two different things. > [as to the mining tailings located on "haul roads" seen on aerial photos] Q. . . [D]id Mr. Cow[a]n express to you one of the reasons they were causing the tailings on the property was because Vulcan was in the process of installing the conveyor and needed to make room? A. ***The material that we are talking about*** [i.e., the mining tailings on the haul roads], ***there is a separate -- it was a separate deal.*** They needed to encroach on the pistol range, so they deposited material to build the conveyor and the tunnel. The tunnel required a certain amount of base over the top of it which was going to spill over onto the pistol range. They basically took part of the pistol range away in order to be able to build the tunnel. [¶¶] Q. Did Mr. Cow[a]n say any other reason why they wanted to move the mining tailings onto the property? A. I don't remember his comment exactly, but I was led to believe it was just a lower grade of material. They didn't have a sale for the material and had to have a place to put it. (Phillips Dep. at 179:1-25 to 180:1-25, 182:1-7).

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	c) *Bock*. Just like Vulcan's citation to Armato's deposition testimony, the portion of the Bock deposition cited makes no mention of ricochets or protecting workers. It discusses one topic: Bock's memory concerning discussions as to the placement of mining tailings at the Site. Therefore, it appears Vulcan is citing to Bock's deposition regarding only the time frame the mining tailings (i.e., the Waste Pile) was deposited. Bock's deposition fails to provide any reliable evidence on that point, however, both in and of itself and when compared to the other evidence in this case. Aside from the fact that Bock said he was "not positive" about the time frame (Franklin Decl. Ex. B (Bock Dep.) at 77:17-25 to 78:1-5), the testimony (which is admittedly unclear) indicates that Bock was trying to set a time frame based on a conversation he had with Harry Sanford (who died in 1996) wherein Mr. Sanford "complained to me [i.e., Bock] about them putting those tailings up there . . . ." (*Id.*). Thus, the recollection Bock was relying on in attempting to set the time frame of the deposition was not a memory regarding of the Waste Pile being placed, but a memory that he had discussed the presence of the pile in 1995-96, i.e., he was trying to remember when a *discussion* about the Waste Pile occurred, not when the Waste Pile was placed (preventing Bock's testimony from being based on personal knowledge, making it inadmissible). In fact, Bock's first comment on this topic during deposition was that he had "no recollection of that at all" when he asked if the Waste Pile was transported onto the property at issue before or after May 20, 1992 (the effective date of the 1992 lease). (*Id.* at 61:12-15). Further, Bock stated definitively that Rick Phillips would be the most knowledgeable person associated with

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	the Club vis-a-vis the creation of the Waste Pile. (*Id.* at 155:15-24). Phillips testified the Waste Pile was placed in the early to mid-1990s. (Franklin Decl. Ex. L (Phillips Dep.) at 82:20-25). Cowan, who was responsible for the pile's creation, states it occurred in the late 1980s to early 1990s (Franklin Decl. Ex. M (Cowan Dep.)at 37:20-38:15 (Waste pile material was taken to the gun club facility starting when Kirst still owned the quarry), 17:2-4 (CalMat and Owl Rock acquired Kirst in the late '80s)). But in actuality, no deposition testimony is needed to establish when the pile was created: an interoffice memo from Vulcan's predecessor dated December 5, ***1991***, clearly states the need to "Decide what to do with bullet problem in waste pile on rifle range." (Franklin Decl. Ex. P at VUL00816). Plaintiff has also provided hauling records showing material for the pile being transferred to the property at issue prior to the execution of the 1992 lease. (Franklin Decl. Ex. LL). Finally, the Waste Pile, in an incomplete condition, is present and easily visible in a photo taken ***January 13, 1992***, (*before* the execution of the Lease), which was provided to Vulcan prior to filing of Vulcan's Motion for Summary Judgment. (See I.D. supplement served by the Club May 10, 2011). Even if Bock's testimony clearly indicated a belief that Vulcan commenced creation of the Waste Pile in 1994 or 1995 (which it does not), that alone would not be sufficient to create a genuine issue of fact; i.e., no reasonable trier of fact could find Bock's memory is of sufficient weight to refute the internal memo and photo (not to mention Phillips' memory, which Bock states is better than his own on this issue) that definitively prove the Waste Pile was created prior to May 20, 1992. d) <u>*Cowan*</u>. The portion of the Cowan deposition transcript cited by Vulcan indicates that *prior to* Krist being taken over by a joint venture (which occurred

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	in *1989*, *see* Franklin Decl. Ex. O (Sheedy Dep.) at 31:2-25), that overburden (i.e., non-saleable "rock dust and sand") was taken to the Site. The cited material also refers to the fact that Cowan used the terms overburden, mining tailings, ans "rock dust and sand" interchangeably when discussing the issue of the Waste Pile. What the quoted material *does not* address, however, is ricochets or protecting workers. Because Vulcan offers only bald misinterpretations and inadmissible material, it states no facts upon which UF 38 can stand. The photo, memo, and deposition testimony cited herein proves UF 38 is utterly untrue. Finally, the Club objects to this UF as it refers to an alleged fact (i.e., that the placement of materials was done to protect Vulcan employees) never raised in the motion at issue, an objection that will be raised again if this alleged fact is referred to by Vulcan in its upcoming reply.
39. At all relevant times, the berm existed at only a portion of the Gun Club Property. Anderson Decl., ¶¶ 4-6, 10; Kroeger Decl., Ex. T (Peddicord Report) at 4-6.	Objection: vague. First, Vulcan and the Club likely have different definitions of the what the "relevant times" are in this case. Vulcan's use of a subjective term would require the Club to speculate as the intended meaning of that term to respond, meaning the Club has no duty to respond. Similarly, the use of the undefined term "berm" is vague and subject to multiple reasonable interpretations, and the Club is not required to select one such interpretation in responding to this UF. It is ***undisputed*** that the Waste Pile on the Property (i.e., the "approximately 600,000 tons of waste material on the CalMat (Gun Club) property" as of December 14, 1994) (Franklin Decl. Ex. R at VU101661) was in existence from some point prior to December 12, 1991 (Franklin Decl. Ex. P at VUL00816), to the present, though it obviously grew

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	from less than 600,000 tons to that size (if not larger) over the course of its existence. The Waste Pile is and has always been located "in back of pistol/rifle range" (*id.*), i.e., the area behind the targets on those ranges, and the Waste Pile does not cover the entirety of the Property.
40. From the time the berm was created until the Gun Club closed in 2006, the Gun Club users fired bullets into the face of the berm. Anderson Decl., ¶ 4; Kroeger Decl., Ex. M (Phillips depo.) at 31:24-32:2, Ex. T (Peddicord Report) at 4.	***Undisputed***, assuming the vague term "berm" is understood to mean the Waste Pile.
41. The Gun Club made no effort to assess or remediate the area prior to or during the time that the berm existed. Kroeger Decl., Ex. M (Phillips depo.) at 31:24-33:6, 156:16-158:25, 182:23-183:4.	***Disputed***. Objection: Vague; lacks foundation. The UF fails to explain what "area" is at issue. Further, the terms "assess," "berm," and "remediate" are vague and subject to multiple reasonable interpretations. The Club is not required to speculate as to what the abovementioned terms mean. Assuming Vulcan is referring to the definition it has used herein referring to remediation as restoring property to "pristine" condition, it is ***undisputed*** that, in light of the fact that Vulcan never asked the Club to perform any cleanup in the area where the Waste Pile was created before or during the creation of the Waste Pile, no such cleanup occurred. ***Disputed*** otherwise, as the Club had in the past recycled from the impact area at issue, and intended to engage in further recycling until Vulcan precluded Wooldridge's work. (Franklin Decl. Ex. E (Armato Dep.) at 26:24-27:7).
42. The Gun Club did not make any efforts to clean up shell casings, bullet fragments, or other materials deposited at or about the time that Vulcan commenced placing material at the Property.	Objection: vague. The phrase "other materials" and the term "berm" are vague and cannot be interpreted without speculation, and the Club is not required to speculate in responding to a UF. Assuming Vulcan is referring to the

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Kroeger Decl., Ex. M (Phillips depo.) at 156:16-158:25; 182:23-183:4; *see also*, Ex. O (Cowan depo.) at 62:4-10.	definition it has used herein referring to remediation as restoring property to "pristine" condition, it is ***undisputed*** that, in light of the fact that Vulcan never asked the Club to perform any cleanup in the area where the Waste Pile was created before or during the creation of the Waste Pile, no such cleanup occurred. ***Disputed*** otherwise, as the Club had in the past recycled from the impact area at issue, and intended to engage in further recycling until Vulcan precluded Wooldridge's work. (Franklin Decl. Ex. E (Armato Dep.) at 26:24-27:7). Further, as simple matter of physics, there would be no casings in the area where the Waste Pile was placed, it is simply too far away from the relevant firing positions for any signficiant amount of casings to get near or on the Waste Pile area.
43. At no time did the Gun Club attempt to clean the bullet debris surrounding or in the berm areas. Kroeger Decl., Ex. L (Armato depo.) at 70:23-25, Ex. M (Phillips depo.) at 31:24-33:6, 156:16-158:25, 182:23-183:4.	Objection: vague. The phrase "bullet debris" and the term "berm areas" are vague and cannot be interpreted without speculation, and the Club is not required to speculate in responding to a UF. It is ***undisputed*** that, in light of the fact that Vulcan never asked the Club to perform any cleanup in the area the Waste Pile was created before or during the creation of the Waste Pile, no such cleanup occurred. To the extent this UF is not limited to period of time immediately proceeding the establishment of the Waste Pile until its completion, it is ***disputed*.** The Club hired Fred Wolldridge in early 2007 to remove bullets and bullet fragments from the Property, including the Waste Pile. (Franklin Decl. Ex. E (Armato Dep.) at 26:24-27:7).
44. As a result, by the time the Gun Club vacated the Property, thousands of bullets and bullet fragments littered the entire face of the berm, and on top of the berm.	Objection: vague. The terms "berm" and littered are vague and subjective, and the Club would have to speculate as to the intended meaning of those terms to respond, something the Club is not required to do.

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Anderson Decl., ¶¶ 4-5; Linton Decl., ¶ 17; Kroeger Decl., Ex. T (Peddicord Report) at 5.	Because the cited information provides no sampling data or computations to support this assertion, it is ***disputed***. It is ***undisputed*** that, when the Club vacated the Property, what appear to be lead bullets or bullet fragments visible on the face and the top of the Waste Pile.
45. Vulcan deposited the mining tailings berm in the stock pile area identified in Exhibit B to the Lease. Kroeger Decl., Ex. P (Bock depo.) at 58:20-61:13.	***Disputed***. Vulcan never deposited a "mining tailing berm" on the Site, nor does the cited deposition transcript say so. That document addresses Vulcan's expressed intent to landscape the Waste Pile. Further, the Exhibit referred to in the UF does not identify a stockpile, at least not expressly. It is ***undisputed*** that the area between the "toe of slope" indication and the hill/mountain indication on the document at issue (i.e., Exhibit B to the Lease) is the general area where the Waste Pile is located.
46. The berm was installed in the early or mid-1990's, and no other mining tailings were deposited on the Property after that time. Kroeger Decl., Ex. L (Armato depo.) at 41:12-20, Ex. P (Bock depo.) at 77:17-78:25, 80:18-81:25, Ex. T (Peddicord Report) at 4.	***Disputed in part.*** Objections: vague; lacks foundation. Assuming the term "berm" refers to the Waste Pile, the creation of the Waste Pile appears to have started in the late 1980s or early 1990s, but no later than December 4, 1991; to that extent, this UF is ***undisputed***. As to the supporting documents, none of them state or even indicate that "no other mining tailings were deposited on the Property after" the creation of the Waste Pile. At most, the cited material generally discusses when the Waste Pile was created. Vulcan cites no evidence that the creation of the Waste Pile was the only placement of waste material on the Property. That portion of this UF is ***disputed.***
47. Herb Bock testified that the berm was installed in 1994-95. Bock's testimony was based on his recollection that his predecessor as Gun Club President died around the time that the berm was installed -- and thus he was able to link the berm	***Disputed.*** UF 47 is phrased so as to indicate the fact at issue is that Bock made certain statements when deposed, not the fact(s) described in those statements. In the context of a summary judgment motion, material facts are those facts

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installation to a specific date. Kroeger Decl., Ex. P (Bock depo.) at 77:17-78:25.	that are "necessary to the proof or defense of a claim[.]" *Nat'l Am. Ins. Co. of Cal. v. Certain Underwriters at Lloyd's London*, 93 F.3d 529, 533 (9th Cir. 1996) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)). Deposition testimony may be evidence of facts, but that does not make it "necessary to the proof or defense of a claim[,]" and it is thus not a material fact for the purpose of summary judgment. Regardless, Bock's deposition fails to provide reliable evidence as to when the "berm" (presumed to be the Waste Pile) was created. Aside from the fact that Bock said he was "not positive" about the time frame (Franklin Decl. Ex. B (Bock Dep.) at 77:17-25 to 78:1-5), the testimony (which is unclear) indicates that Bock was trying to set a time frame based on a conversation he had with Harry Sanford (who died in 1996) wherein Mr. Sanford "complained to me [i.e., Bock] about them putting those tailings up there . . . ." (*Id.*). Thus, Bock was relying on his recollection of a conversation he had with Sanford 15 years ago, which took place some indeterminate amount of time before Sanford's death, and in the conversation Sanford complained to Bock about the mining tailings, which had been placed on the Site another indeterminate amount of time before the conversation. Because of the difficulty of remembering the duration of these two spans of time fifteen years later, little weight can be given to Bock's testimony if it is being used, as it is here, to show that the Waste Pile was created in 1994 or 1995, as opposed to the late 1980s to 1991. In fact, Bock's first comment on this topic during deposition was that he had "no recollection of that at all" when he asked if the Waste Pile was transported onto the property at issue before or after May 20, 1992 (the effective date of the 1992 lease). (*Id.* at 61:12-15).

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	Further, Bock stated definitively that Rick Phillips would be the most knowledgeable person associated with the Club vis-a-vis the creation of the Waste Pile. (*Id.* at 155:15-24). Mr. Phillips testified the Waste Pile was placed in the early to mid-1990s. (Franklin Decl. Ex. L (Phillips Dep.) at 82:20-25). Cowan, who was responsible for the pile's creation, states it occurred in the late 1980s or early 1990s. (Franklin Decl. Ex. M (Cowan Dep.) at 37:20-38:15 (Waste pile material was taken to the gun club facility starting when Kirst still owned the quarry), 17:2-4 (CalMat and Owl Rock acquired Kirst in the late '80s))) But no deposition testimony is really needed to establish when the pile was created: an interoffice memo from Vulcan's predecessor dated December 5, ***1991***, clearly states the need to "Decide what to do with bullet problem in waste pile on rifle range." (Franklin Decl. Ex P at VUL00816). Plaintiff has also provided hauling records showing material for the pile being transferred to the property at issue prior to the execution of the 1992 lease. (Franklin Decl. Ex. LL). Finally, the Waste Pile, in an incomplete condition, is present and easily visible in a photo taken ***January 13, 1992***, (*before* the execution of the Lease), which was provided to Vulcan prior to filing of Vulcan's Motion for Summary Judgment. (See Franklin Decl. Ex. Q (Club's Supplemental Disclosures, Set 5) at SGVGC.011508). Even if Bock's testimony clearly indicated a belief that Vulcan commenced creation of the Waste Pile in 1994 or 1995 (which it does not), that alone would not be sufficient to create a genuine issue of fact; i.e., no reasonable trier of fact could find Bock's memory is sufficient to trump the internal memo and photo (not to mention Phillips' memory, which Bock states is better than his own on this issue) that definitively prove the Waste Pile was created prior to May 20,

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	1992.
48. The Gun Club did not object to Paragraph 35 of the Lease or request that Vulcan be made liable for cleaning up the stockpile area before, during, or after it was created. Kroeger Decl., Ex. P (Bock depo.) at 64:11-68:23, Ex. M (Phillips depo.) at 79:22-80:4; 138:11-139:11.	***Disputed in part***. Objection: lacks foundation, vague. The Club interprets the vague and undefined term "stockpile area" to mean the area where the Waste Pile was placed on the Property. This UF is really two UFs: 1) The Gun Club did not object to Paragraph 35 of the Lease and 2) [the Club did not] request that Vulcan be made liable for cleaning up the stockpile area before, during, or after it was created. 1) The Club presumes the use of the term "object" herein is intended to refer to the act of expressly making opposition known. Bock's testimony regarding the addition of Paragraph 35 is as follows. "There was a discussion about it because we were losing a good portion of the pistol range, but once again, since [Vulcan] were our landlord, we felt we had no recourse." This plainly does not support the assertion made in UF 48. In fact, Bock's deposition testimony on th is point is clear. "A . . . there was some discussion about how the rock company could just arbitrarily cover up that area that we lease from them with dirt. . . . [¶¶] The only concession [Vulcan] made is that they wouldn't go beyond 100 meters . . . . It would remain a hundred meters at the least [from the firing area], and they accepted that, but they did cover it up, and they covered all the impact area along that hundred yard line. Q And so do you recall these discussions in the context of the lease negotiations for [the

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	Lease]? A ***No. They didn't come up during lease - - I recall they didn't come up during lease negotiation*** . . . . [¶¶] ***I think was the midterm of a lease, you know, but I can't be sure.*** (Franklin Decl. Ex. B (Bock Dep.) at 61:18-25 to 62:1-20) (emphasis added). Additionally, Phillips's testimony is misused by Vulcan, as he states that "Nobody raised any objections to [the deposition of the Waste Pile] that I recall[,] *not* that the Club did not object to Paragraph 35. This distinction is key when it is remembered that Vulcan had *already* started the Waste Pile by the time the Lease was being negotiated (see response to UF 47). And it should be noted that Cowan actually recalls Phillips raising an objection, and that Cowan in turn raised the issue to Sheedy. (Franklin Decl. Ex. M (Cowan Dep.) at 59:1-25 to 63:1-25). 2) Bock's testimony is not a broad as would be required to support Vulcan's assertion. That is, Bock testified that he did not recall *during the negotiation for the Lease*, the Club ever requesting "that Vulcan be responsible for remediation of any soil, dirt that they [sic] brought on to the . . . Property." Phillips testimony not only fails to support Vulcan's assertion on UF 48 part 2), it explains why there would have been no reason for the Club to make a clean up request. "Q Did you ever alert Vulcan of the fact when they started allegedly depositing the mining tailings that we've discussed? A ***Wasn't an issue at the time***." (Emphasis added). It wasn't an issue because the Club did not expect to to be required to remediate the Site. (See UF 36 above.)

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	It is ***undisputed*** that, in light of the fact that, prior to the completion of the Waste Pile, Vulcan never indicated an intent that the Club would be responsible for cleaning up the area under and including the Waste Pile, the Club assumed that Vulcan would be responsible for any required cleanup of the Site.
49. The Gun Club consented to Vulcan's depositing of the mining tailings on the Property. Linton Decl., Ex. H at ¶ 35 and Ex. B; Kroeger Decl., Ex. P (Bock depo.) at 79:8-20, 87:19-88:18, Ex. M (Phillips depo.) at 80:2-4, 182:8-22, Ex. O (Cowan depo.) at 59:1-63:18.	***Disputed in part***. Objection: vague, legal conclusion, lacks foundation. The Club presumes the reference to "depositing of the mining tailings" refers to the creation of the Waste Pile. This UF states a legal conclusion as to the interpretation of a contract, something the Club is not required to provide a response to. Vulcan's citation to the Lease is unavailing for at least two reasons. 1) the Waste Pile was created starting *well before* the execution of the Lease (See response to UF 47), and 2) the Lease makes no mention of absolving Vulcan for creating the Waste Pile without a contractual right to do so. The entirety of the Lease's discussion regarding the reservation of the "stockpile" (i.e., Waste Pile) is as follows: Landlord reserves the right to use and landscape the stockpile area in back of the range area of the Premises, as illustrated on the landscape plan attached hereto as Exhibit 'B'.". Similarly Bock does not testify regarding any consent; in fact, he testifies that the Club *did* contact Vulcan about limiting the size of the Waste Pile. Finally, Vulcan citation to the deposition testimony given by Cowan supports that the Club *did* object to the placement of the Waste Pile. Q . . . . At any point was an objection ever raised by the

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	[Club] concerning the - - depositing of the - - rock dust and sand [i.e., what Cowan testified the Waste Pile was composed of] on the [P]roperty? A Yes . . . . [Phillips stated] he was concerned of what we were doing and what we were burying . . . . [¶¶] Q So . . . Phillips raised a concern to you that you [i.e., Vulcan] were burying lead. A Yes. (Franklin Decl. Ex. M (Cowan Dep.) at 59:1-25 to 63:1-25). Thus, it is ***undisputed*** that *after* the execution of the Lease, Vulcan had the right to use the already extant stockpile (i.e., Waste Pile), though it is ***disputed*** that the Club consented to the creation or use of the Waste Pile prior to the execution of the Lease.
50. The Gun Club knew that Vulcan was depositing the mining tailings, and the Gun Club arranged with Vulcan to make the deposits when the Gun Club was closed for safety reasons and in order to avoid disturbing the club's operations. Kroeger Decl., Ex. P (Bock depo.) at 79:8-20, 85:12-86:3, 87:19-88:18, Ex. M (Phillips depo.) at 80:2-4, 182:8-22, Ex. O (Cowan depo.) at 59:1-63:18.	***Undisputed***, assuming the phrase "depositing the mining tailings" refers to the placement of the Waste Pile.
51. The Gun Club's designated expert, Richard K. Peddicord, Ph.D, estimated that properly remediating the contamination caused by the Gun Club at Property would cost between $405,018 and $1.5 million. Kroeger Decl., Ex. T (Peddicord Report) at 12, 17.	***Disputed in part.*** Objection: vague, lacks foundation. The meaning of "properly" is subject to multiple interpretations. The cited document does not support the specific assertion made. It is ***undisputed*** that, subject to several specific limitations, and as a part of "necessarily somewhat general discussion of management alternatives[,]" Dr. Peddicord *estimated* costs for certain alternatives from $405,018 to $1,571,061.

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52. Due to the current condition of the Property, Vulcan cannot use the Property or lease it to another tenant. Vulcan will not be able to re-release the Property until the Gun Club's debris has been cleaned and the Property has been remediated. Anderson Decl., ¶ 10; Linton Decl., ¶ 17.	***Disputed.*** Objection. Lacks foundation, legal conclusion. The cited declarations state the following. > Due to the current condition of the Property, Vulcan is unable to lease the property to another tenant, and it will not be able to lease the Property until the . . . Club's debris has been cleared and the Property has been remediated. [Anderson Decl., ¶ 10] > Since the . . . Club vacated the Property, Vulcan has undertaken to preserve it in its original condition as much as possible, including keeping all public access to the Property locked. Vulcan has demolished certain structures to prevent nuisance, but has preserved the area in front of the firing lines of the pistol and rifle ranges, as well as the impact areas, as near as possible to the condition they were in when the . . . Club left. (Franklin Decl. Ex. D (Linton Decl.), ¶ 17). The citation to Linton's declaration has nothing to do with the assertion that Vulcan cannot use the Property or lease it to another tenant. Assuming that the term "original condition" refers to the condition of the Property when the Club vacated the same, the substance of the quotation from Linton's declaration at ¶ 17 is ***undisputed.*** Anderson's Decl. fails to provide a sufficient foundation for UF 52. Anderson does not state that Vulcan has

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	even attempted to lease the Property (let alone that such attempt was thwarted solely because of the presence of Spent Ammunition on the Property), or that he is an expert in real estate qualified to determine that the Property cannot be leased. Indeed, Anderson does not even state a basis for why Vulcan allegedly can't use the Property, probably because the presence of Spent Ammunition on a portion of the Property simply does not prevent use. It is undisputed that the Property contains a blacktop-covered parking lot; that lot could be used to store heavy equipment or other mining-related material. There is no reason to believe that alleged contamination on one portion of the Property effects the use of others. Furthermore, Vulcan has admitted that it does not intend to remove the Waste Pile from the Site at any specific time in the future. (Vulcan's Resp. To RFA Set No. 4 Propounded by the Club, RFA 65.) Therefore the Site is being used right now to store mining tailings and other waste. Though Anderson's testimony is not sufficient to support UF 52 and UF 52 fails for that reason, for the avoidance of doubt, the Club will state UF 52 is ***disputed.***

2. ADDITIONAL FACTS

ADDITIONAL FACTS	EVIDENCE
1. When Vulcan created the Waste Pile on the Property, bullets were obviously present on the Property, and Vulcan had actual knowledge of such presence at that time.	(Franklin Decl. Ex. O (Sheedy Dep.) at 91:2-21.)
2. Thomas Sheedy was General Manager of the Fish Canyon Quarry who oversaw the intentional transfer of at least 500,000 tons of tailing from the Fish Canyon Quarry to the property Leased by the San Gabriel Valley Gun Club.	(Franklin Decl. Ex. N (Sheedy Decl.) at ¶¶ 8, 14).

ADDITIONAL FACTS	EVIDENCE
3. Vulcan created the "Waste Pile" (referred to by Vulcan itself as either a "waste pile" or "stockpile") at the Property.	(Franklin Decl.: Ex. T (Vulcan's Response to the Fourth Set of Requests for Admissions propounded by the Club) at 7:1-13; Ex. R (Minutes of the Regular Meeting of the Executive Committee of Crystal a California General Partnership, dated 12/14/94) at 2 (VU101661); Ex. P (Calmat Memo, Summary of Gun Club Decisions, dated 12/05/91); Ex. Z (Calmat Memo, Gun Club Rent Summary, dated 12/05/91); Ex. AA (Calmat Memo, Gun Club Environmental Status, dated 12/05/91)).
4. The creation of the Waste Pile started prior to May 20, 1992.	(Franklin Decl.: Ex. U (Photograph of June 17, 1987); Ex. V (Plf's. Resp. to RFA3) at 6:20-28 (admitting the photograph of June 17, 1987, accurately depicts the Leased Property as of June 17, 1987); Ex. W (Photograph of January 13, 1992); Ex. P (Calmat Memo, Summary of Gun Club Decisions, dated 12/05/91); Ex. Z (Calmat Memo, Gun Club Rent Summary, dated 12/05/91); Ex. AA (Calmat Memo, Gun Club Environmental Status, dated 12/05/91); Ex. Q (Gun Club's Supplemental Disclosure, Set 5)).
5. Vulcan did not seek permission from the Club to create the Waste Pile	(Franklin Decl. Ex. N (Sheedy Decl.) ¶ 16).
6. The terms of Vulcan's then-current lease with the Club were not discussed during Vulcan's internal meetings concerning the creation of the Waste Pile.	(Franklin Decl. Ex. O (Sheedy Dep.) at 46:14-25).
7. The Lease is the first Lease/License between the Parties that mentions the Waste Pile, referred to as a "stockpile" therein.	(Compl. Exs. A-I.)
8. Herb Bock's has "no recollection of that at all" as to if the Waste Pile was transported onto the Property before or after May 20, 1992.	(Franklin Decl. Ex. B (Bock Dep.) at 61:12-15).
9. Rick Phillips is the most knowledgeable person associated with the Club vis-à-vis the creation of the Waste Pile.	(Franklin Decl. Ex. B (Bock Dep.) at 155:15-24).

ADDITIONAL FACTS	EVIDENCE
10. The Waste Pile was placed in the early to mid-1990s.	(Franklin Decl. Ex. L (Phillips Dep.) at 82:20-25)
11. Preston Cowan directed the equipment operators who made the Waste Pile.	(Franklin Decl., Ex FF (Cowan Decl.) at 15).
12. The Waste Pile was placed in the early 1990s.	(Franklin Decl., Ex FF (Cowan Decl.) at 14).
13. The Waste Pile existed as of 1994.	(Franklin Decl. Ex. B (Bock Dep.) at 77:17 to 78:1-25).
14. The Waste Pile was created because Vulcan had run out of space at the Fish Canyon Quarry (i.e., Azusa Rock) to store mining tailings Vulcan was unable to sell.	(Franklin Decl.: Ex. N (Sheedy Decl.) ¶¶ 10-14; Ex O (Sheedy Dep.) at 140:2-15; Ex. FF (Cowan Decl.) ¶¶ 8-15; L (Phillips Depo) at 182:1-7).
15. The placement of rock dust to prevent ricochets at the Property did not occur in the area where the Waste Pile was dumped..	(Franklin Decl. Ex. L (Phillips Dep.) at 6:5-6, 69:22-74:24, 96:17-97:8 179:1-25 to 180:1-25, 182:1-7).
16. Paul Kroeger, counsel for Vulcan, attended and participated in the deposition of Preston Cowan.	(Franklin Decl. Ex. M (Cowan Dep.) at 2)
17. Phillips expressed concern to Cowan that Vulcan was burying lead by placing the Waste Pile at the Property, and Cowan mentioned the Concern to Sheedy.	(Franklin Decl. Ex. M (Cowan Dep.) at 59:1-25 to 63:1-25).
18. Sheedy was Cowan's supervisor when the Waste Pile was created.	(*see* Franklin Decl. Ex. M (Cowan Dep.) at 10).
19. The concept of having an obligation to return te Property to pristne condition was raised in the Club's internal discussions occuring after Vulcan made a request for remediation.	(Franklin Decl. Ex. E (Armato Dep.) at 132:3-25 to 133:3-9).
20. Armato did not have any role in negotiating any of the leases between Vulcan and the Club.	(Franklin Decl. Ex. E (Armato Dep.) at 68:11-13).
21.Bock was designated by the Club as the person most knowldgable regarding lease negotiations between Vulcan and the Club.	(Franklin Decl. Ex. F (Objection to PMK Depo) at 4, ¶ 4).
22. At no time during the negotiation of the Lease were there discussions between Vulcan and the Club about the use of lead.	(Franklin Decl. Ex. B (Bock Dep.) at 52:5-25 to 57:1).

ADDITIONAL FACTS	EVIDENCE
23. Vulcan specifically told Wooldridge "no" as to getting an air quality permit for the work he intended to perform at the Club.	(Franklin Decl. Ex. K (Wooldridge Dep.) at 33:1-23).
24. A Vulcan representative stated that Vulcan had "a lot of problems with air quality now and 'You're [i.e., Wooldridge] not going to add to it."	(Franklin Decl. Ex. K (Wooldridge Dep.) at 33:1-23).
25. Vulcan is currently using the Property to store the Waste Pile.	(*see* Franklin Decl. Ex. T (Vulcan's Resp. to Requests for Admissions Set Four), No. 65).
26. Brian Ferris, an attorney working for Vulcan, created the first draft of the Lease.	(Franklin Decl. Ex. X (Transcript [not signed]) of Dep. of Brian Ferris taken May 10, 2011) at 18:6-12; 44:2-14; 47:5-14).
27. The Lease includes an integration clause.	(Compl. Ex. H, at 20 ¶ 37).
28. The following text is included in the Lease. 9. Use of Premises. Tenant agrees that the Premises shall not be used for any purpose except as a pistol, rifle, and trap and skeet range . . . . Tenant agrees, at its own cost and expense, to comply with all laws, rules, regulations, ordinances and statutes of any and all municipal, county, State and federal authorities which are now in effect or which may hereafter become effective pertaining to the use of the Premises and its occupancy by Tenant. Tenant shall not commit, or suffer to be committed, any waste upon the Premises, or any public or private nuisance. Tenant shall not occupy or use the Premises during the term of this Lease in such a manner as to interfere with the use . . . of the Premises or a part thereof after termination of this Lease. . . . . 10. Maintenance and Repair . . . . Upon the expiration of this Lease or any termination herein provided, Tenant shall at its sole cost and expense remove from the Premises all Tenant's	(Compl. Ex. H, ¶¶ 9, 10).

ADDITIONAL FACTS	EVIDENCE
personal property, and clean up and remove from the premises all rubbish and debris and turn over the premises to Landlord in good order and in a safe, sanitary condition. Should Tenant fail to do so, Landlord may at its option make those removals required above or do such work as shall be required to return the Premises to an orderly and safe, sanitary condition and the cost thereof to landlord shall be immediately repaid to Landlord.	
29. The term of the Lease commenced May 20, 1992, and expired May 20, 2002.	(Compl. Ex. H, at 1).
30. The "First Amendment to Lease" had a an eighteen (18) month rolling term, starting May 20, 2002, and stated "except as otherwise specifically set forth herein, all of the terms and conditions of the lease shall remain in full force and effect[,] and "[e]ffective May 20, 2002, the term of the Lease shall be an eighteen (18) month rolling term."	(Compl. Ex. I)
31. The presence of Spent Ammunition on the Property was clearly considered by Vulcan *internally* regarding the negotiation of the Lease, though Vulcan never expressed this to the Club prior to execution of the Lease.	(Franklin Decl.: Ex. Y (Davis Dep.) at 68:21-69:2, 72:16-18, 75:9-11, 77:6-13; Ex. P (Calmat Memo, Summary of Gun Club Decisions, dated 12/05/91); Ex. Z (Calmat Memo, Gun Club Rent Summary, dated 12/05/91);Ex. AA (Calmat Memo, Gun Club Environmental Status, dated 12/05/91)).
32. Spent Ammunition (bullet fragments or otherwise) is never mentioned in any of the leases/licenses that were in place between 1947 and 2006 regarding the Property.	(Compl. Ex. A-I).
33. Between 1947 and 2006, Vulcan was contemporaneously aware that Spent Ammunition was being used at the Property, and Vulcan believed that, for that entire period, the Club made no attempt to clean up the effects of lead ammunition use.	(Franklin Decl.: Ex. BB (Vulcan's Supplemental Response to the First Set of Requests for Admissions Propounded by the Club) at 6:23-7:15; Ex CC (Vulcan's Response to the First Set of Interrogatories Propounded by the Club) at 21:19-22).
34. Prior to 2004, Vulcan never contacted the Club regarding a contention that the presence of Spent	(Franklin Decl. Ex. DD (Vulcan's Response to the Second Set of Interrogatories propounded by the

ADDITIONAL FACTS	EVIDENCE
Ammunition at the Property was causing or could cause damage.	Club) at 5:25-28 to 7:1-9, 8:1-28 to 9:1-2, and documents cited therein).
35. there were periods of time between January 1947 and November 2006 when there was no lease in place (i.e., a term expired),but Vulcan *did not* sue the Club regarding (let alone complain about) the presence of Spent Ammunition at the Club.	(Compl. Exs. G, at 1, H, at 1-2; Franklin Decl. Ex. DD (Vulcan's Response to the Second Set of Interrogatories propounded by the Club) at 5:25-28 to 7:1-9, 8:1-28 to 9:1-2, and documents cited therein).
36. None of the negotiation communications regarding what would eventually become the Lease mentions the possibility of the Club being responsible for cleaning up Spent Ammunition at the Property.	(Franklin Decl.: Ex. GG (Marked up early version of 1992 lease); Ex. HH (Letter from Robert Carter to Brian Ferris, dated February 24, 1992, with handwritten annotations); Ex, II (Letter from Brian Ferris to Robert E. Carter, dated March 5, 1992 with handwritten annotations); Ex. JJ (Letter from Robert Carter to Brian Ferris, dated April 17, 1992, with handwritten annotations)).
37. Bock signed the Lease for the Club; Ferris signed the Lease.	(Compl. Ex. H at 21).
38. The negotiation of the Lease did not include a conversation between Vulcan and the Club regarding cleanup of the Property.	(Franklin Decl.: Ex. B (Bock Dep). at 41:14-19; Ex. X (Ferris Dep.) at 60:4-7, 49:16-25 to 51:1-13).
39. Prior to and continuing after the execution of the Lease, Vulcan intentionally placed a total of approximately 600,000 tons of waste material on top of the area that had been shot into for more than forty years prior thereto, a fact of which Vulcan was obviously aware.	(Franklin Decl.: Ex. BB (Vulcan's Supplemental Response to the First Set of Requests for Admission propounded by the Club) at 6:23-28 to 7:1-15; Ex. CC (Vulcan's Response to the First Set of Interrogatories Propounded by the Club) at 21:19-22; Ex. T (Vulcan's Response to the Fourth Set of Requests for Admissions propounded by the Club) at 7:1-13; Ex. EE (ENV America Workplan dated February 10, 2005) at VMC-0132, VMC-0156; Ex. U (Photograph of June 17, 1987); Ex. V (Plf's. Resp. to RFA3) at 6:20-28 (admitting the photograph of June 17, 1987, accurately depicts the Leased Property as of June 17, 1987);Ex. W (Photograph of January 13, 1992); Ex B (Bock Dep.) at 46:17-19 to 47:1-12; Ex. L (Phillips Dep.) at 138:22-25;Ex. FF (Cowan Decl.) ¶ 11; Ex. N (Sheedy Decl.) ¶¶ 18, 19.

ADDITIONAL FACTS	EVIDENCE
40. Prior to Vulcan's first request that the Club remediate the Property, Vulcan knowingly buried Spent Ammunition under a vast quantity of material that Vulcan does not intend to move.	(Franklin Decl.: Ex. N (Sheedy Decl.) ¶¶ 18, 19; Ex. T (Vulcan's Responses to the Club's Fourth Set of Requests for Admission) Response No. 65 at 9; Ex. E ((Armato Dep.) at 41:12-20; Ex. B (Bock Dep.) at 77:17- 78:25, 80:18-81:25; Ex. G (Peddicord Report) at 4; Ex. DD (Vulcan's Response to the Second Set of Interrogatories propounded by the Club) at 5:25-28 to 7:1-9, 8:1-28 to 9:1-2, and documents cited therein).
41. The Lease has a hold over provision that states "holding over shall be tenancy from month to month" and the Club heldover pursuant thereto.	(Compl Ex. H at 14, ¶ 20; (Franklin Decl. Ex. KK (November 6, 2006, letter from Ehrlich).
42. Spent Ammunition can potentially be excluded from classification as hazardous waste under the Resource Conservation and Recovery Act if it is recycled.	(*See* Franklin Dec. Ex. MM (Best Management Practices for Lead at Outdoor Shooting Ranges, created by EPA region 2, revised 2005) at I-8).

CONCLUSIONS OF LAW

CONCLUSIONS OF LAW	RESPONSE
1. "In a contract dispute, 'summary judgment is appropriate when the contract terms are clear and unambiguous, even if the parties disagree as to their meaning.'" *United Brotherhood of Carpenters & Joiners of America*, 73 F.3d 958, 961 (9th Cir. 1996) (quoting *United States v. King Features Ent'mt, Inc.*, 843 F.2d 394, 398 (9th Cir. 1988)); Cal. Civ. Code § 1638 ("The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.").	***Undisputed.***
2. A contract must be interpreted "to give effect to the mutual intention of the parties at the time of contracting." Cal. Civ. Code, § 1636; *Ticor Title Ins. Co. v. Employers Ins. of Wausau* 40 Cal.App.4th 1699, 1707 (1995).	***Undisputed.***

"When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone. . . ." Cal. Civ. Code § 1639.	
3. Where a contract is not "reasonably susceptible" to the interpretation urged by a party to the dispute "the case is over." *Southern Cal. Edison Co. v. Superior Court*, 37 Cal.App.4th 839, 847-848, (1995).	***Disputed in part.*** The quote is taken out of context. In the cited opinion, the Court is setting out a procedure for construing contract language when two parties have differing interpretations. *Southern Cal. Edison*, 37 Cal. App. 4th at 847-48. The procedure begins with a threshold analysis of each party's interpretation - is the contract reasonably susceptible to the interpretation? If the contract is reasonably susceptible to the interpretation advanced by each party, the court proceeds to a plain-meaning analysis. *Id.*In context, the language quoted from Southern Cal. Edison means that the court will not do a deeper analysis if the interpretation offered by a party does not appear to be a reasonable construction of the contract.
4. Any breach, total or partial, which causes a measurable injury, gives the injured party a right to recover damages as compensation therefore. *Borgonovo v. Henderson*, 182 Cal.App.2d 220, 231 (1960).	***Undisputed.***
5. A Breach of Contract claim has four elements: "(1) a contract, (2) plaintiff's performance, (3) defendant's breach, and (4) damages." *Poseidon Development, Inc. v. Woodland Lane Estates, LLC*, 152 Cal.App.4th 1106, 1111 (2007); see also *Careau & Co. v. Security Pacific Business Credit, Inc.*, 222 Cal.App.3d 1371, 1388 (1990) ("A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff.").	***Undisputed.***
6. In a breach of contract action, "the general rule [is] that a party may offset monies owed under a contract by the amount of damages suffered."	***Undisputed.***

Pacific Employers Ins. Co. v. City of Berkeley, 158 Cal.App.3d 145, 157 (1984) (allowing city to deduct liquidating damages from amounts owed to contractor pursuant to contract); *Burnett & Doty Development Co. v. Phillips*, 84 Cal.App.3d 384, 391 (1978) ("When a plaintiff sues for a liquidated sum and the defendant establishes an offsetting claim based upon defective performance of the same contract by the plaintiff, the amount of the plaintiff's liquidated sum must be offset against the defendant's unliquidated sum as of the due date . . . .").	
7. A claim for breach of "an instrument in writing" is four years. Cal. Code Civ. Proc. § 337(1).	Vulcan presumably meant to say that the statute of limitations for breach of an instrument in writing is four years. If so, ***undisputed.***
8. "A cause of action for breach of contract accrues at the time of the breach of contract, and the statute of limitations begins to run at that time regardless whether any damage is apparent or whether the injured party is aware of his right to sue." *Perez-Encinas v. Amerus Life Ins. Co.*, 468 F.Supp.2d 1127, 1134 (N.D. Cal. 2006) ().	***Undisputed***, though the discovery rule may apply, depending on the factual situation.
9. The purpose of a statute of limitations is "to protect defendants from the stale claims of dilatory plaintiffs." *Norgart v. Upjohn Co.*, 21 Cal.4th 383, 395 (1999); Regents of *University of California v. Superior Court*, 20 Cal.4th 509, 532 (1999). It is a "favored" defense, and it is considered to be on equal footing with resolution of claims on the merits, as both support important public policy considerations. Norgart, 21 Cal.4th at 395.	***Undisputed.***
10. A party to lease no longer has the contractual right to use the leased property after the lease is terminated.	***Undisputed*** as a general principle, but not absolute, because of law relating to holdover tenants.

See, e.g., *Rossetto v. Barross*, 90 Cal.App.4th Supp. 1, 5 (2001) (leases are contractual in nature, and the tenant's right to use the property is limited to such terms).	
11. A party may not be held liable for breach of a written lease based on conduct that occurred after the lease was terminated and the tenant was evicted. *Rosano v. Superior Court*, 147 Cal.App.3d 92, 96 (1983) (right to possession expires on agreed-upon date of eviction; holding that former tenant could not recover forcible entry damages from landlord for landlord's conduct that occurred after eviction date).	***Disputed.*** Vulcan is generalizing too broadly from *Rosano*. In that case, the tenant sought lost-profit damages for wrongful eviction from the landlord. *Rosano*, 147 Cal. App. 3d at 94. The trial court granted a motion in limine excluding evidence of lost-profit damages for the period after the tenant no longer had any right of possession of the premises. This decision was upheld by the Court of Appeal. *Id.* at 97. In reaching this decision, the Rosano court held that the tenant had no right to lost-profit damages for any time after his right to possession terminated. *Id.* The opinion does not contain any ruling nearly as broad as the statement in Conclusion of Law ("COL") 11. And Vulcan's parenthetical summary mischaracterizes the case because the summary states that the issue in Rosano is whether the tenant could recover damages for conduct of the landlord occurring after the tenant's right to possession ended. That is not the issue in *Rosano* because the *Rosano* landlord evicted the tenant on the exact day when the tenant's right to possession ended, and there was no post-eviction landlord conduct at issue. The question was whether the period for which the tenant could collect damages for wrongful eviction could extend past the period when the tenant had lawful possession. That factual scenario is to far from anything in this case to be applicable.
12. California law defines "nuisance" as "[a]nything which is injurious to health, . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . ." Cal. Civ. Code § 3479.	COL 12 and 13 together provide a high-level summary of California nuisance law; to that extent, ***undisputed.***
13. A claim for nuisance exists where	COL 12 and 13 together provide a high-

there is a substantial and unreasonable invasion in the plaintiff's interest in the use and enjoyment of its property. *San Diego Gas and Elec. Co. v. Superior Court*, 13 Cal.4th 893 (1996).	level summary of California nuisance law; to that extent, ***undisputed.***
14. "[T]hose who create or assist in . . . hazardous wastes to be disposed of improperly . . . can be liable under the law of nuisance. *City of Modesto Redevelopment Agency v. Superior Court*, 119 Cal.App.4th 28 (2004).	***Disputed in part.*** The rule as stated by the court applies to those who create a system for improperly disposing of hazardous wastes, not to those who themselves dispose of hazardous wastes: "[T]hose who create or assist in creating a system that causes hazardous wastes to be disposed of improperly, or who instruct users to dispose of wastes improperly, can be liable under the law of nuisance." *City of Modesto Redevelopment Agency v. Superior Court*, 119 Cal. App. 4th 28, 40-41 (2004).
15. Numerous California courts have ruled that property contamination serves as a basis for nuisance claims brought against a former tenant by a current property owner. *Mangini v. Aerojet-General Corp.*, 230 Cal.App.3d 1125 (1991); *Newhall Land & Farming Co. v. Superior Court*, 19 Cal.App.4th 334, 341-346 (1993).	***Disputed in part.*** Vulcan is mischaracterising the cited cases. In both *Mangini* and *Newhall*, the plaintiff was the current owner of the property, suing the lessee of the previous owner. These cases do not directly hold that a property owner can sue a tenant for nuisance once the lease has been terminated. It should also be noted that the main issue in both the cited cases was the landlord's consent to the conduct that purportedly created the nuisance. Both courts held that the landlord's consent to the tenant's lawful behavior is a defense to a nuisance claim. *Mangini*, 230 Cal. App. 3d at 1138-39; *Newhall*, 19 Cal. App. 4th at 345. Finally, whether "numerous courts" have reached any particular conclusion is not itself a conclusion of law.
16. The same standard for liability for both types claims applies to a continuing or permanent nuisance. See *Bartleson v. United States*, 96 F.3d 1270, 1275 (1996) (the issue of whether a nuisance is continuing or permanent depends on if the nuisance can be discontinued or abated).	The same liability standard may apply to continuing and permanent nuisance, but the operation of the statute of limitations and the discovery rule may be different for the two types. Furthermore, the test of whether a nuisance is continuing or permanent is much more complicated than is implied by Vulcan's parenthetical summary of *Bartleson*. There is no single overriding test, and

	the determination whether a particular nuisance is continuing or permanent "must be made on the facts and circumstances of each case with guidance from the various tests that have been set forth." *Beck Dev. Co. V. S. Pac. Trans. Co.,* 44 Cal. App. 4th 1160, 1222-23 (1996).
17. A "trespass" is an unlawful interference with possession of property. *Civic Western Corp. v. Zila Industries, Inc*., 66 Cal.App.3d 1 (1977).	***Undisputed.***
18. Liability for a trespass exists regardless of intent. As such, a trespass may result from negligent or reckless activity. *Wilson v. Interlake Steel Co.*, 32 Cal.3d 229 (1982).	***Undisputed.***
19. California law permits a landowner to sue a prior tenant for trespass. *Newhall Land & Farming Co.*, 19 Cal.App.4th at 346-347; see *Mangini*, 230 Cal.App.3d at 1125 (depositing hazardous substances on property and failing and refusing to remove them after the plaintiff acquires the property constitutes a trespass).	***Disputed in part.*** Vulcan's parenthetical mischaracterizes the *Mangini* holding by omitting an important word: "wrongfully." The defendant must have wrongfully deposited the hazardous substances in order to be liable. *Mangini*, 230 Cal. App. 3d at 1141. "A trespass may be commited by the continued presence on the land of a structure, chattel, or other thing which the actor has *tortiously* placed there, whether or not the actor has the ability to remove it." *Newhall*, 19 Cal. App. 4th at 345 (quoting Restatement (second) of Torts § 161(l).) (emphasis added)
20. California courts recognize claims for both nuisance and trespass based on the same invasion of property. Mangini, 230 Cal.App.3d at 1136.	***Undisputed.***
21. The same standard for liability for both types claims applies to continuing and permanent trespass. *See Starrh and Starrh Cotton Growers v. Aera Energy LLC*, 153 Cal.App.4th 583, 593 (2007) (the issue of whether a trespass is continuing or permanent comes up when considering the correct measure of damages).	***Undisputed,*** though the parenthetical fails to mention that the distinction between continuing and permanent trespass is also important to determining whether the statute of limitations has run on the trespass claim. *Starrh and Starrh*, 153 Cal. App. 4th at 593-94.
22. Section 732 of the California Code of Civil Procedure provides that "[i]f	***Undisputed.***

a . . . tenant . . . of real property, commits waste thereon, any person aggrieved by the waste may bring an action against him therefore, in which action there may be judgment for treble damages."	
23. California law defines waste as "evidence of acts which injuriously affect the market value of property so that the value is substantially or permanently diminished or depreciated." Rowe v. Wells Fargo Realty Services, Inc., 166 Cal.App.3d 310, 319 (1985).	***Undisputed***, if "evidence of" is deleted from the definition.

Date: June 3, 2011

MICHEL & ASSOCIATES, P.C.

/s/*Scott M. Franklin*

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