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CO. DBA VULCAN MATERIALS COMPANY,
8 WESTERN DIVISION

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UNITED STATES DISTRICT COURT
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. EDCV08-1198 WHS (OPx)

**PLAINTIFF'S OBJECTIONS TO
SUPPLEMENTAL DECLARATION
OF SCOTT M. FRANKLIN
OFFERED IN SUPPORT OF
DEFENDANT SAN GABRIEL
VALLEY GUN CLUB'S MOTION
FOR SUMMARY JUDGMENT, OR IN
THE ALTERNATIVE, SUMMARY
JUDGMENT AS TO PORTIONS OF
PLAINTIFF'S COMPLAINT**

Date: June 27, 2011
Time: 10:00 a.m.
Dept/Judge: dept assigned to Hon. Justin
L. Quackenbush

Pre-Trial Conf: none set
Trial: none set

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1 Plaintiff and Counter-Claimant Calmat Company dba Vulcan Materials
2 Company, Western Division submits the following objections to the Supplemental
3 Declaration of Scott M. Franklin offered in support of Defendant San Gabriel Valley
4 Gun Club's Motion for Summary Judgment, or in the Alternative, Summary
5 Judgment as to Portions of Plaintiff's Complaint, which was filed on June 16, 2011.

6 "[W]hen a moving party advances in a reply new reasons and evidence
7 in support of its motion for summary judgment, the nonmoving party should be
8 granted an opportunity to respond." *Beaird v. Seagate Technology, Inc.*, 145 F.3d
9 1159, 1164-65 (10th Cir. 1998). Vulcan submits the following objections to the Gun
10 Club's new reply evidence.

11 **OBJECTIONS**

12 1. **Franklin Decl., ¶ 6:** "Attached as Exhibit J to the First SMF
13 Decl. is a true and correct copy of a photograph of the Site dated January 13, 1992.
14 This photograph was obtained by my office in connection with this matter from
15 Landiscor."¹

16 Objections: Lacks personal knowledge under Fed R. Evid. 602; lacks
17 authentication under Fed. R. Evid. 901. Franklin fails to state facts showing that he
18 has the personal knowledge about the photograph, including when it was taken, and
19 what it depicts. Franklin did not take the photograph, and he states that it was
20 obtained from a third party. Therefore, Franklin cannot authenticate the photograph
21 under Fed. R. Evid. 901(a) ("the requirement of authentication or identification as a
22 condition precedent to admissibility is satisfied by evidence sufficient to support a
23 finding that the matter in question is what its proponent claims."). *See also*
24 *Estremera v. United States* 442 F.3d 580, 584–585 (7th Cir. 2006) (declaration of
25 attorney insufficient to authenticate documents where knowledge was based only
26

27 ¹ Vulcan already objected to Exhibit J to the First SMF Declaration. *See*,
28 Vulcan's Evidentiary Objections, Dkt. # 68.

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1 upon interviews with witnesses and review of documents); *Zoslaw v. MCA*
2 *Distributing Corp.*, 693 F.2d 870, 883 (9th Cir. 1982) ("A writing is not authenticated
3 simply by attaching it to an affidavit . . . The foundation is laid for receiving a
4 document in evidence by the testimony of a witness with personal knowledge of the
5 facts who attests to the identity and due execution of the document," *U.S. v.*
6 *Dribble*, 429 F.2d 598, 601-02 (9th Cir. 1970) (finding that summary judgment
7 should cannot be predicated on insufficient affidavits that did not establish the
8 admissibility, based on personal knowledge, of the attached evidence).
9

10 2. **Franklin Decl., ¶ 7 and Exhibit 2:** "Attached hereto is a true and
11 correct copy of a document produced by Vulcan in discovery in this action. Exhibit 2
12 is dated March 5, 1992, and states it is from Brian W. Ferris, Division Counsel for
13 CalMat (i.e. Vulcan), to Robert Carter, Esq., and the document has a subject line that
14 states 'Re: San Gabriel Valley Gun Club Lease[.]' This document, which appears to
15 comprise a letter and two attachments (appearing to be a draft easement and draft
16 lease), is Bates stamped VUL 1056-57 (the apparent letter) and VUL 1058-83 (the
17 apparent attachments)."

18 Objections: Lacks personal knowledge under Fed R. Evid. 602; lacks
19 authentication under Fed. R. Evid. 901. Mr. Franklin provides no testimony that he
20 has personal knowledge of the document such that he is able to authenticate it as
21 required by the Federal Rules of Evidence. In fact, Franklin admits that he cannot
22 authenticate the attached document as he is only able to state what it "appears" to be.
23 Therefore, Franklin cannot authenticate Exhibit 2 under Fed. R. Evid. 901(a) ("the
24 requirement of authentication or identification as a condition precedent to
25 admissibility is satisfied by evidence sufficient to support a finding that the matter in
26 question is what its proponent claims."). *See also Estremera v. United States* 442
27 F.3d 580, 584–585 (7th Cir. 2006) (declaration of attorney insufficient to authenticate
28 documents where knowledge was based only upon interviews with witnesses and

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1 review of documents); *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 883 (9th
2 Cir. 1982) ("A writing is not authenticated simply by attaching it to an affidavit . . .
3 The foundation is laid for receiving a document in evidence by the testimony of a
4 witness with personal knowledge of the facts who attests to the identity and due
5 execution of the document," *U.S. v. Dribble*, 429 F.2d 598, 601-02 (9th Cir.
6 1970) (finding that summary judgment should cannot be predicated on insufficient
7 affidavits that did not establish the admissibility, based on personal knowledge, of the
8 attached evidence); *Hoffman v. Applicators Sales and Service, Inc.*, 439 F.3d 9, 14-15
9 (1st Dir. 2006) ("documents do not automatically become part of the record [on
10 summary judgment] just because they are products of discovery.")

11 In addition, Exhibit 2 is inadmissible hearsay because it is offered for the
12 truth of the matters stated therein. Fed. R. Evid. 801, 802.

13
14 3. **Franklin Decl., Exhibit 5 (Supplemental Declaration of Claude**
15 **Preston Cowan²), ¶ 3:** "The relocation mentioned in Paragraph 2 above was done in
16 response to multiple incidents of heavy rain that eroded the mining tailings pile at the
17 Property; each incident caused the contents of the mining tailings pile to partially
18 slide onto the floor of the rifle and pistol ranges operated by the Club at the
19 Property."

20 Objections. Cowan has failed to state facts that would establish his
21 personal knowledge or foundation to testify regarding these issues. Thus, his
22 statements are inadmissible under Fed. R. Evid. 602. This paragraph also contains
23 improper layperson opinion testimony because, under Federal Rules of Evidence 701,
24 non-expert opinion must be "rationally based on the perception of the witness. . . ."

25
26 _____
27 ² The Supplemental Cowan Declaration is offered to support the Gun Club's
28 "Undisputed Material Facts" Nos. UMF 25-27. Because there is no competent
evidence to support those facts, they must be disregarded.

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1 Here, Cowan puts forth no facts that establish that his opinion about the cause of
2 erosion is based on his own perception or personal knowledge.

3
4 4. **Franklin Decl., Exhibit 5 (Supplemental Declaration of Claude**
5 **Preston Cowan), ¶ 4:** "As a result of the 'heavy rain erosion' incidents described in
6 Paragraph 3 above, the face of the mining tailings pile slid down the pile create [sic] a
7 layer of mud (containing whatever was in the mining tailings pile) at least one foot
8 thick on the floor of the rifle range at the Property, covering the area between the
9 100-yard target holders on the rifle range and the base of the mining tailings pile (that
10 is, the portion of the rifle range where bullets would normally go)."

11 Objections. Cowan has failed to state facts that would establish his
12 personal knowledge or foundation to testify regarding these issues. Thus, his
13 statements are inadmissible under Fed. R. Evid. 602. This paragraph also contains
14 improper layperson opinion testimony because, under Federal Rules of Evidence 701,
15 non-expert opinion must be "rationally based on the perception of the witness. . . ."
16 Here, Cowan puts forth no facts that establish that his opinions about (1) the cause of
17 erosion, and (2) whether the mining tailings covered the area "where bullets would
18 normally go," are based on his own perception or personal knowledge.

19
20 5. **Franklin Decl., Exhibit 5 (Supplemental Declaration of Claude**
21 **Preston Cowan), ¶ 5:** "Though the location of the base of the mining tailings pile
22 changed over time (due to Calmat Co.'s manipulation of the pile and erosion), I
23 believe the space between the 100-yard target holders and the base of the pile was
24 about 30 feet wide."

25 Objections. Cowan has failed to state facts that would establish his
26 personal knowledge or foundation to testify regarding these issues. Thus, his
27 statements are inadmissible under Fed. R. Evid. 602. This paragraph also contains
28 improper layperson opinion testimony because, under Federal Rules of Evidence 701,

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1 non-expert opinion must be "rationally based on the perception of the witness. . . ."
2 Here, Cowan puts forth no facts that establish that his opinions about the location and
3 changes in location of the "mining tailings pile" are based on his own perception or
4 personal knowledge.

6. **Franklin Decl., Exhibit 5 (Supplemental Declaration of Claude
7 Preston Cowan), ¶ 6:** "To the best of my knowledge, every time Calmat Co.
8 relocated the material displaced by heavy rain erosion at the Property between 1989
9 and 2000, the material was taken from a range floor and placed on the top of the
10 mining tailings pile."

Objections. Cowan has failed to state facts that would establish his
11 personal knowledge or foundation to testify regarding these issues. Thus, his
12 statements are inadmissible under Fed. R. Evid. 602. This paragraph also contains
13 improper layperson opinion testimony because, under Federal Rules of Evidence 701,
14 non-expert opinion must be "rationally based on the perception of the witness. . . ."
15 Here, Cowan puts forth no facts that establish that his opinions about the cause of
16 erosion and the that the material was taken "from the range floor" are based on his
17 own perception or personal knowledge.

7. **Franklin Decl., Exhibit 5 (Supplemental Declaration of Claude
21 Preston Cowan), ¶ 7:** "It is my estimation that, for each of the times that Calmat Co.
22 relocated the material displaced by heavy rain erosion at the Property to the top of the
23 mining tailings pile, approximately 15 tons of material was relocated."

Objections. Cowan has failed to state facts that would establish his
24 personal knowledge or foundation to testify regarding these issues. Thus, his
25 statements are inadmissible under Fed. R. Evid. 602. This paragraph also contains
26 improper layperson opinion testimony because, under Federal Rules of Evidence 701,
27 non-expert opinion must be "rationally based on the perception of the witness. . . ."
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1 Here, Cowan puts forth no facts that establish that his opinions about the cause of
2 erosion and the amount of material that was relocated are based on his own
3 perception or personal knowledge.

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5 8. **Franklin Decl., Exhibit 5 (Supplemental Declaration of Claude**
6 **Preston Cowan), ¶ 8:** "I believe that the relocated material discussed in Paragraph 7
7 above contained bullets that had been fired into the mining tailings pile, but I do not
8 believe I can estimate how much of the relocated material was bullets."

9 Objections. Cowan has failed to state facts that would establish his
10 personal knowledge or foundation to testify regarding these issues. In fact, Cowan
11 even admits he cannot estimate "how much of the relocated material was bullets."
12 Thus, his statements are inadmissible under Fed. R. Evid. 602.

13
14 9. **Franklin Decl., Exhibit 5 (Supplemental Declaration of Claude**
15 **Preston Cowan), ¶ 10:** "It is my understanding that the tunnel mentioned in
16 Paragraph 9 above was built as part of a plan to create a conveyor system that would
17 allow off-site processing or disposal of material mined at Asuza Rock, and that
18 construction of the tunnel required Calmat Co. to encroach on the pistol range at the
19 Property."

20 Objections. Cowan has failed to state facts that would establish his
21 personal knowledge or foundation to testify regarding these issues. Thus, his
22 statements are inadmissible under Fed. R. Evid. 602. This paragraph also contains
23 improper layperson opinion testimony because, under Federal Rules of Evidence 701,
24 non-expert opinion must be "rationally based on the perception of the witness. . . ."
25 Here, Cowan puts forth no facts that establish that his opinion that "construction of
26 the tunnel required Calmat Co. to encroach on the pistol range at the Property" is
27 based on his own perception or personal knowledge.

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