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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

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. AND RELATED COUNTER-CLAIM.	CASE NO: EDCV08-01198 JLQ(OPx) **RESPONSE TO PLAINTIFF'S EVIDENTIARY OBJECTIONS TO AND REQUEST TO STRIKE PORTIONS OF THE DECLARATION OF SCOTT M. FRANKLIN OFFERED IN SUPPORT OF SAN GABRIEL VALLEY GUN CLUB'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY JUDGMENT AS TO PORTIONS OF PLAINTIFF'S COMPLAINT** Hon. Justin L. Quackenbush Date: June 27, 2011 Time: 10:00 AM Courtroom: 1

Defendant San Gabriel Valley Gun Club (the "Club") hereby submits this response to Plaintiff Calmat Company dba Vulcan Materials Company, Western Division's ("Vulcan") Evidentiary Objections to, and Request to Strike Portions of, the Declaration of Scott M. Franklin in Support of San Gabriel Valley Gun Club's Motion for Summary Judgment, or in the Alternative, Summary Judgment as to Portions of Plaintiff's Complaint ("Vulcan's Objections"). Vulcan's objections, many of which are authentication objections as to documents ***Vulcan itself*** produced in this action, should be overruled for the reasons stated herein.

EVIDENTIARY OBJECTIONS TO DECLARATION OF SCOTT M. FRANKLIN AND RESPONSES THERETO

OBJECTION NO. 1:

Declaration of Scott M. Franklin ("Franklin Decl.") p.2 ¶ 6, and Exhibit C. "Attached as Exhibit C to this Declaration is a true and correct copy of a letter from Don F. Tierney of the Club to Harry Jumper of Consolidated Rock Products Company dated January 14, 1947, produced by Vulcan in this case."

Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of Authentication. Fed. R. Evid. 901. Franklin provides no testimony that he has personal knowledge of the document such that he is able to authenticate it as required by the Federal Rules of Evidence. *See, e.g.*, *Estremera v. United States* 442 F3d 580, 584–585 (7th Cir. 2006)[1] (declaration of attorney insufficient to authenticate documents where knowledge was based only upon interviews with witnesses and review of documents); *see also*, Request to Strike, below.

Hearsay. Fed. R. Evid. 801, 802. The contents of the letter are out of court statements improperly being offered for the truth of what they assert.

RESPONSE TO OBJECTION NO. 1:

Fed. R. Evid. 602. Rule 602 states "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. A similar requirement is found in Federal Rule of Civil Procedure ("FRCP") 56(c)(4) regarding certain affidavits or declarations ("[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge").

[1] Errors in Vulcan's repeated citation of *Estremera* are corrected throughout the remainder of this document.

Franklin, as an attorney for the Club in this matter (and has been since before Vulcan filed suit on September 8, 2008; see Supplemental Declaration of Scott M. Franklin filed herewith ["Supp. Franklin Decl."] at ¶ 3), has "personal knowledge" of what documents have been produced by Vulcan to the Club in this action, including, as stated in ¶ 6 of the Franklin Decl., the document attached thereto as Exhibit C. Thus, the statement of Franklin Decl. at ¶ 6 is within Franklin's knowledge, proving Vulcan's Rule 602 objection is without merit.[2]

Fed. R. Evid. 901. Rule 901(a) states: "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Documents produced in discovery are considered authenticated for use by a party-opponent, presuming there is no dispute such production actually occurred. *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 777 n.20 (9th Cir. 2002) ("documents produced by a party in discovery were deemed authentic when offered by the party-opponent") (citing, among others, *Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 889 n.12 (9th Cir.1996)).

Vulcan apparently chooses to ignore on point Ninth Circuit authority like *Orr* and *Maljack* and instead (mis)cites a Seventh Circuit case (*Estremera*, 442 F.3d at 584-85) that is completely off point. The question at issue in *Estremera* was whether an affidavit "based on the attorney's review of the relevant

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[2] Further, "Federal Rule of Civil Procedure 56(e) does not require that all documents be authenticated through personal knowledge when submitted in a summary judgment motion." *Orr*, 285 F.3d at 777-78 n.24 (also citing "Fed. R. Evid. 901(b)(4) (authenticity may be satisfied by the "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances"). Because Vulcan cannot provide any legitimate argument that *any* of the documents it produced in discovery are not reasonably subject to authentication based on factors listed in Rule 901(b)(4), *all of* those documents meet the authentication requirements for documents relied on in summary judgement briefing.

documents" was based on sufficient personal knowledge to satisfy FRCP Rule 56(e),[3] where the attorney *did not introduce* "into the record the documents he relied on in his affidavit." *Id.* Additionally, even though Vulcan plainly indicates *Estremera* concerns authentication of documents, *Estremera* never mentions either Rule 901 or authentication.

Thus, unless Vulcan is attempting to raise the argument that this document (a document Bates stamped with a Vulcan identifier, nonetheless) was not produced to the Club by Vulcan in this action (which the Club obviously denies), Vulcan's Rule 901 objection must fail and should therefore be overruled.

Fed. R. Evid. 801, 802. Rules 801 and 802 state that "'[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

Plainly, this document falls within the hearsay inadmissability exception known as the "ancient document exception." Fed. R. Evid. 803(16) ("[s]tatements in a document in existence twenty years or more the authenticity of which is established"). The document at issue is dated January 14, *1947*, and was produced by Vulcan in this matter (thus establishing authenticity). Vulcan's hearsay argument clear fails in light of the ancient document exception.

Additionally, at least two other hearsay inadmissability exceptions apply: Rule 803(6), the "business records exception" (the document effectively memorializes matters related to the execution of a permit related to a landlord/tenant relationship, found in the records of the landlord), and Rule 807,

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[3] All references to Rule 56(e) in this document refer to the Rule prior to the major amendment of Rule 56 that occurred in 2010.

the "residual exception," which provides an exception for "statement[s] not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness . . ." Thus, because Vulcan's hearsay objection is unfounded, it should be overruled.

OBJECTION NO. 2:

> Franklin Decl. p. 2 ¶ 7, and Exhibit E. Attached as Exhibit E to this Declaration is a true and correct copy of portions of Vulcan's Supplemental Response to the First Set of Requests for Admission propounded by the Club."
>
> Objections. Cited portions not attached. The portions of this document cited in Defendants Proposed Uncontroverted Fact No. 8 are not attached to the declaration.

RESPONSE TO OBJECTION NO. 2:

Assuming Objection No. 2 refers to Exhibit E (which *is not* discussed in ¶ 7 of the Franklin Decl.) when meaning to refer to Exhibit D (which *is* discussed in ¶ 7 of the Franklin Decl.) as the result of a typographical error, Objection No. 2 has merit. The First SMF Decl. itself included an error, in that the document attached thereto as Exhibit D *should have been* a portion of a specific *interrogatory* response provided by Vulcan in this action, and not the document that was *actually* provided, a portion of a response to a specific *request for admission*. (*See* Supp. Franklin Decl. at ¶ 4). The unintentionally omitted document has been provided to opposing counsel and is provided as an attachment to the Supp. Franklin Decl. (*Id.*). Ultimately, as the interrogatory response at issue was produced by Vulcan in this action, this objection should be overruled.

OBJECTION NO. 3:

Franklin Decl. p.3 ¶ 12, and Exhibit I. "Attached as Exhibit I to this Declaration is a true and correct copy of a photograph of the Site dated June 17, 1987."

Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of Authentication. Fed. R. Evid. 901. Mr. Franklin provides no testimony that he has personal knowledge of the document such that he is able to authenticate it as required by the Federal Rules of Evidence. *See, e.g.*, *Estremera v. United States*, 442 F.3d 580, 584-85 (7th Cir. 2006) (declaration of attorney insufficient to authenticate documents where knowledge was based only upon interviews with witnesses and review of documents); *see also*, Request to Strike, below.

Hearsay. Fed. R. Evid. 801, 802. The contents of the photograph are out of court statements improperly being offered for the truth of what they assert.

RESPONSE TO OBJECTION NO. 3:

Vulcan's personal knowledge, authentication, and hearsay objections are absurd: Vulcan has admitted the photograph at issue is genuine, and that it "accurately depicts the SUBJECT PROPERTY as of June 17, 1987." (*See* Franklin Decl. at Ex. B). Though it is unreasonable for Vulcan to argue that it did not know the copy of the photograph dated (on its face) June 17, 1987, provided with the Franklin Decl. as Exhibit I was a copy of the abovementioned photograph (dated June 17, 1987, on its face) Franklin provides a statement in the declaration filed herewith to confirm the foregoing, a statement he can make because he was the person who provided Vulcan access to the photograph for review. (Supp. Franklin Decl. at ¶ 5). Vulcan's Objection No. 3 should be overruled as Vulcan has already conceded the photo at issue is genuine and does not constitute or include hearsay. In an abundance of caution, however, the Club also notes that the photograph at issue is more than 20 years old and its authenticity is undisputed, thus it is exempt

from classification as inadmissible hearsay pursuant to the ancient documents exception. Fed. R. Evid. 803(16).

OBJECTION NO. 4:

Franklin Decl. p.3 ¶ 13, and Exhibit J. "Attached as Exhibit J to this Declaration is a true and correct copy of a photograph of the Site dated January 13,1992."

Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of Authentication. Fed. R. Evid. 901. Mr. Franklin provides no testimony that he has personal knowledge of the document such that he is able to authenticate it as required by the Federal Rules of Evidence. *See, e.g.*, *Estremera v. United States*, 442 F.3d 580, 584-85 (7th Cir. 2006) (declaration of attorney insufficient to authenticate documents where knowledge was based only upon interviews with witnesses and review of documents); *see also*, Request to Strike, below.

Hearsay. Fed. R. Evid. 801, 802. The contents of the photograph are out of court statements improperly being offered for the truth of what they assert.

RESPONSE TO OBJECTION NO. 4:

Fed. R. Evid. 602. Rule 602 states "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. A similar requirement is found in FRCP 56(c)(4) regarding certain affidavits or declarations ("[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge").

Franklin, as an attorney for the Club in this matter (and has been since before Vulcan filed suit on September 8, 2008; see Supp. Franklin Decl. at ¶ 3), has "personal knowledge" of what documents it has purchased from outside vendors for the purpose of this lawsuit, including Exhibit J attached to the Franklin Decl.

Thus, the statement of Franklin Decl. at ¶ 6 is within Franklin's knowledge, proving Vulcan's Rule 602 objection is without merit. Further, as discussed below, the photograph at issue does not require authentication by declaration, thus making Vulcan's Rule 602 objection irrelevant.

Fed. R. Evid. 901. Rule 901(a) states: "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

> The issue for the trial judge under Rule 901 is whether there is prima facie evidence, circumstantial or direct, that the document is what it is purported to be. If so, the document is admissible in evidence.[Citations] It then remains for the trier of facts to make its own determination of the authenticity of the admitted evidence and the weight which it feels the evidence should be given.

Alexander Dawson, Inc. v. N.L.R.B., 586 F.2d 1300, 1302 (9th Cir. 1978) (citations omitted); *see also United States v. Black*, 767 F.2d 1134, 1342 (9th Cir. 1985) (indicating a showing "so that a reasonable juror could find in favor of authenticity or identification" is a sufficient prima facie showing of authenticity for purposes of Rule 901).

Here, the photograph at issue was obtained from Landiscor, an aerial information provider that has, "[f]or more than fifty years . . ., photographed, logged and recorded the changing face of real estate in many major cities throughout the United States." (*See* http://www.landiscor.com/about-us.html). Landiscor has "taken thousands upon thousands of aerial photographs and have organized them into one of the nation's most complete real estate-oriented photo libraries, ranging from historical shots to new imagery[.]" (*Id.*). Landiscor has provided an affidavit to the Club regarding the authenticity of the photo, and that affidavit is Exhibit 5 to the Supp. Franklin Decl. at ¶ 11. Finally, it is worth noting that neither Vulcan's Evidentiary Objection nor Vulcan's Statement of Genuine Issues and Additional Material Facts filed therewith cites *any* evidence intended to

(let alone actually) rebutting the Club's contention regarding the "substance" of the photo (i.e., that the Waste Pile at issue in this case was present, though incomplete, as of January 13, 1992).

Based on the information raised in the prior paragraph, the Club has plainly established prima facie evidence that the photo is what it is purported to be. *See, e.g.,* Fed. R. Evid. 901(b)(4) (authenticity may be satisfied by the "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances"). Specifically, under Rule 901(b)(4), it should be noted that the photo in issue is over nineteen years old, just months shy of being within the express coverage of the ancient document exception, (see Fed. R. Evid. 901(b)(8)).

Fed. R. Evid. 801, 802. Rules 801 and 802 state that "'[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

First, though a trial date has not been set in this matter, is possible that this document will fall within the hearsay inadmissability exception known as the "ancient document exception." Fed. R. Evid. 803(16) ("[s]tatements in a document in existence twenty years or more the authenticity of which is established"). The document at issue is dated January 13, *1992*, meaning it will be within the express scope of the ancient document within less than seven months of the filing of this document.[4]

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[4] To the extent any document facing a hearsay challenge herein is 1) over nineteen years old and 2) produced by Vulcan in discovery, the Club contends such documents, based on the two facts mentioned, should not be considered inadmissable hearsay pursuant to the residual exception. Fed. R.

Second, at least two other hearsay inadmissability exceptions apply: 1) Rule 803(6), the "business records exception" (the document is of the kind that is the stock and trade of Landiscor); and Rule 807, the "residual exception," which provides an exception for "statement[s] not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness . . ." Given that the photo was obtained from a company that maintains a database of historic aerial photography as a key part of its business, and the photograph is nearly twenty years old, there is a sufficient basis to find the photo is exempted from being classified as inadmissible hearsay. Thus, because Vulcan's hearsay objection is unfounded, it should be overruled.

OBJECTION NO. 5:

> Franklin Decl. p.3 ¶ 15, and Exhibit L. "Attached as Exhibit L to this Declaration is a true and correct copy of portions of a Workplan for Environmental Site Investigation of VMC-Owned Land at the San Gabriel Valley Gun Club, dated February 10, 2005, prepared by ENV America, Inc., which the Club received from Vulcan in the initial disclosures required by FRCP 26 in this case."
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> Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of Authentication. Fed. R. Evid. 901. Mr. Franklin provides no testimony that he has personal knowledge of the document such that he is able to authenticate it as required by the Federal Rules of Evidence. *See, e.g., Estremera v. United States*, 442 F.3d 580, 584-85 (7th Cir. 2006) (declaration of attorney insufficient to authenticate documents where knowledge was based only upon interviews with witnesses and review of documents); *see also*, Request to Strike, below.

Evid. 807.

RESPONSE TO OBJECTION NO. 5:

Fed. R. Evid. 602. Rule 602 states "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. A similar requirement is found in FRCP 56(c)(4) regarding certain affidavits or declarations ("[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge").

Franklin, as an attorney for the Club in this matter (and has been since before Vulcan filed suit on September 8, 2008; see Supp. Franklin Decl. at ¶ 3), has "personal knowledge" of what documents have been produced by Vulcan to the Club in this action, including, as stated in ¶ 15of the Franklin Decl., the document attached thereto as Exhibit L. Thus, the statement of Franklin Decl. at ¶ 15 is within Franklin's knowledge, proving Vulcan's Rule 602 objection is without merit.

Fed. R. Evid. 901. Rule 901(a) states: "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Documents produced in discovery are considered authenticated for use by a party-opponent, presuming there is no dispute such production actually occurred. *Orr*, 285 F.3d at 777 n.20 ("documents produced by a party in discovery were deemed authentic when offered by the party-opponent") (citing, among others, *Maljack*, 81 F.3d at 889 n.12).

Vulcan apparently chooses to ignore on point Ninth Circuit authority like *Orr* and *Maljack* and instead (mis)cites a Seventh Circuit case (*stremera*, 442 F.3d at 584-85) that is completely off point. The question at issue in *Estremera* was whether an affidavit "based on the attorney's review of the relevant documents" was based on sufficient personal knowledge to satisfy FRCP Rule 56(e), where the attorney *did not introduce* "into the record the documents he relied on in his

affidavit." *Id.* Additionally, even though Vulcan plainly indicates *Estremera* concerns authentication of documents, *Estremera* never mentions either Rule 901 or authentication.

Thus, unless Vulcan is attempting to raise the argument that this document (a document Bates stamped with a Vulcan identifier, nonetheless) was not produced to the Club by Vulcan in this action (which the Club obviously denies), Vulcan's Rule 901 objection must fail and should therefore be overruled.

Fed. R. Evid. 801, 802. Finally, though Vulcan's evidentiary objection regarding Exhibit L does not raise a hearsay objection, Vulcan's Request to Strike alleges (without any factual analysis) that Exhibit L contains hearsay (meaning the allegation is conclusory and should be overruled on that basis). Regardless, "[a] statement is not hearsay if . . . a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Fed. R. Evid. 801(d)(2)(D). Exhibit L is not hearsay because it is sections of a "workplan for environmental site investigation of VMC-owned land at the San Gabriel Valley Gun Club . . . prepared for Vulcan Materials Company . . . by ENV America Incorporated." Thus, any statements with the workplan are by Vulcan's "servant," "concerning a matter within the scope of . . . employment, made during the existence of the relationship."

Additionally, even if the statement(s) at issue were considered hearsay, they would not be inadmissible because the workplan is not inadmissible hearsay based on the business records exception (Fed. R. Eivd. 803(6)[5] and the residual exception

[5] I.e., the Workplan is a "report . . . of . . . conditions, ... opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, . . . kept in the course of a regularly conducted business activity, and [was created as part of] the regular practice of that business activity to make the . . . report[.]" *See* Fed. R. Evid. 803(6).

(Fed. R. Evid. 807).[6]

OBJECTION NO. 6:

Franklin Decl. p.3 ¶ 16, and Exhibit M. "Attached as Exhibit M to this Declaration is a true and correct copy of the Minutes of the Regular Meeting of the Executive Committee of Crystal, a California General Partnership, dated December 14, 1994, produced by Vulcan in this case."

Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of Authentication. Fed. R. Evid. 901. Mr. Franklin provides no testimony that he has personal knowledge of the document such that he is able to authenticate it as required by the Federal Rules of Evidence. *See, e.g., Estremera v. United States*, 442 F.3d 580, 584-85 (7th Cir. 2006) (declaration of attorney insufficient to authenticate documents where knowledge was based only upon interviews with witnesses and review of documents); *see also*, Request to Strike, below.

Hearsay. Fed. R. Evid. 801, 802. The contents of the document are out of court statements improperly being offered for the truth of what they assert.

RESPONSE TO OBJECTION NO. 6:

Fed. R. Evid. 602. Rule 602 states "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. A similar requirement is found in FRCP 56(c)(4) regarding certain affidavits or declarations ("[a]n affidavit

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[6] That Vulcan produced the Workplan as part of its Fed. R. Civ. P. 26(a) disclosure (i.e., it is a "document . . . that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses"), along with the contents of the workplan and the fact that it was in Vulcan's possession, provides sufficient evidence of trustworthiness to make the document with the exception stated in Rule 807.

or declaration used to support or oppose a motion must be made on personal knowledge").

Franklin, as an attorney for the Club in this matter (and has been since before Vulcan filed suit on September 8, 2008; see Supp. Franklin Decl. at ¶ 3), has "personal knowledge" of what documents have been produced by Vulcan to the Club in this action, including, as stated in ¶ 16 of the Franklin Decl., the document attached thereto as Exhibit M. Thus, the statement of Franklin Decl. at ¶ 6 is within Franklin's knowledge, proving Vulcan's Rule 602 objection is without merit.

Fed. R. Evid. 901. Rule 901(a) states: "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Documents produced in discovery are considered authenticated for use by a party-opponent, presuming there is no dispute such production actually occurred. *Orr*, 285 F.3d at 777 n.20 ("documents produced by a party in discovery were deemed authentic when offered by the party-opponent") (citing, among others, *Maljack*, 81 F.3d at 889 n.12).

Vulcan apparently chooses to ignore on point Ninth Circuit authority like *Orr* and *Maljack* and instead (mis)cites a Seventh Circuit case (*Estremera*, 442 F.3d at 584-85) that is completely off point. The question at issue in *Estremera* was whether an affidavit "based on the attorney's review of the relevant documents" was based on sufficient personal knowledge to satisfy FRCP Rule 56(e), where the attorney *did not introduce* "into the record the documents he relied on in his affidavit." *Id.* Additionally, even though Vulcan plainly indicates *Estremera* concerns authentication of documents, *Estremera* never mentions either Rule 901 or authentication.

Thus, unless Vulcan is attempting to raise the argument that this document (a document Bates stamped with a Vulcan identifier, nonetheless) was not produced

to the Club by Vulcan in this action (which the Club obviously denies), Vulcan's Rule 901 objection must fail and should therefore be overruled.

Fed. R. Evid. 801, 802. Rules 801 and 802 state that "'[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

"A statement is not hearsay if . . . the party's own statement, in either an individual or a representative capacity or, . . . a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Fed. R. Evid. 801(d)(2). Exhibit M is not hearsay because it is sections of "Minutes of the Regular Meeting of the Executive Committee of Crystal a California General Partnership[.]" Vulcan has never indicated in this action that it is not the successor-in-interest to Crystal partner Calmat Co.[7] Thus, any statements with the minutes are not hearsay because they are by Vulcan itself, if not its "servant" "concerning a matter within the scope of . . . employment, made during the existence of the relationship."

Additionally, at least two hearsay inadmissability exceptions apply: Rule 803(6), the "business records exception" (the document effectively memorializes matters related to the placement of material mined by Crystal and placed on the property leased by the Club at issue in this action); and Rule 807, the "residual exception," which provides an exception for "statement[s] not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of

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[7] Indeed, the Club believes Vulcan cannot make such argument without undermining its entire case, as the Club understands that Vulcan's ownership of the property at issue was obtained when Calmat was acquired by Vulcan.

trustworthiness . . ." Thus, because Vulcan's hearsay objection is unfounded, it should be overruled.

OBJECTION NO. 7:

> Franklin Decl., Ex. P, Declaration of Thomas Sheedy, II ¶ 18. "At the time tailings were deposited at the property leased by the San Gabriel Valley Gun Club, I was aware of the possibility that the tailings were being placed on top of a surface where bullets (partial or whole) were present."
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> Objection. Relevance. Fed. R. Evid. 401. Whether Mr. Sheedy was aware of a "possibility" is not of consequence to the determination of any fact in this action.

RESPONSE TO OBJECTION NO. 7:

Fed. R. Evid. 401. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Vulcan's relevance objection is ridiculous.

The Club contends that *this entire case* can be boiled down to one question: did the parties intend for the Club to be contractually required to remove/remediate the firearm projectiles and fragments thereof (and related material) present on the property it leased from Vulcan as of the end of the last express lease term between the Club and Vulcan (i.e., November 6, 2006)? The evidence at issue plainly shows that Vulcan (or its predecessor) *knowingly* chose to engage in conduct that could[8] result in the burial of firearm projectiles. Thus, the evidence at issue (i.e.,

[8] It seems Vulcan's objection is intended to raise the specious argument that the evidence at issue is "not of consequence" because it has to do with an awareness of a *possibility* (as opposed to the awareness of a *fact*). Here,

Sheedy's awareness "of the possibility that the tailings were being placed on top of a surface where bullets (partial or whole) were present") is, *clearly* "of consequence to the determination of any fact in this action."

The evidence has not only a tendency, but a *strong* "tendency to make the existence of a[] fact that is of consequence [i.e., that Vulcan *never* had contractual intent that the Club was required to remove/remediate firearm projectiles at the leased property] more . . . probable than it would be without the evidence." *See id.* That is, Vulcan's choice to take an action which it *knew* could result in the burial of firearm projectiles is at odds with, and thus relevant to rebutting, Vulcan's current assertion that it had the contractual intent that the Club would remove/remediate the firearm projectiles (and related materials) at the leased property. Vulcan's relevance objection is nothing more than an unfounded attempt to challenge evidence that is clearly detrimental to its case (and thus relevant), meaning the objection should be overruled.

OBJECTION NO. 8:

> Franklin Decl., Ex. P, Declaration of Thomas Sheedy, II ¶ 19
> "At the time tailings were deposited at the property leased by the San Gabriel Valley Gun Club, I believe the Management Committee I reported to was aware of the possibility that the tailings were placed on top of a surface where bullets (partial or whole) were present."

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however, it is the awareness of a possibility that is important. Even assuming hypothetically that Sheedy had been wrong and Vulcan's placement of the Waste Pile did not result in projectiles being buried, Sheedy's testimony would *still* be relevant to proving that Vulcan did not *intend* projectiles would be removed; the ultimate outcome (i.e., whether burial occurred or not) does not alter Vulcan's intent. The question is one of intent, not result, and Sheedy's testimony is plainly relevant to establishing that Vulcan did not intend that the Club was contractually required to remediate Spent Ammunition at the Property.

Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Mr. Sheedy does not testify as to any personal knowledge concerning whether the Management Committee was aware of the "possibility" that bullets were present where the tailings were deposited. It is improper for Mr. Sheedy to testify as to his belief.

RESPONSE TO OBJECTION NO. 8:

Fed. R. Evid. 602. Rule 602 states "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. A similar requirement is found in FRCP 56(c)(4) regarding certain affidavits or declarations ("[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge").

Vulcan's objection makes no sense. Vulcan's unsupported claim that " [i]t is improper for Mr. Sheedy to testify as to his belief" is incorrect. *See, e.g., Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 763-64 (2nd Cir. 1991) (testimony expressly stated as *belief*, and not *knowledge*, based on "general observation and knowledge, and not upon conjecture or hearsay[,]" can meet Rule 602's personal knowledge requirement). Vulcan cannot reasonably dispute that Sheedy himself was in periodic contact with the Management Committee, as Sheedy's Decl. (Exhibit P at ¶12 to the Franklin Decl.) states that Sheedy had to go to the Management Committee regarding major decisions related to the mining operation at issue herein, and that he specifically obtained permission (and thus implicitly must have discussed) the placement of Waste Pile with the Management Committee. (*Id.* at ¶¶ 12-13).

Further, Sheedy's Deposition testimony *regarding the particular statement at issue* indicates that Sheedy and the person Sheedy referred to as "the equivalent of the chairman [of the management commitee] Walt Lucariella[,]" i.e., Lukkarila, had been to the area in question with Sheedy, and that as a result of Lukkarila

visiting that location, the management committee was aware the "possibility that the tailings were being placed on top of a surface where bullets, partial or whole, were present." (*See* Declaration of Scott M. Franklin in Support of Defendant San Gabriel Valley Gun Club's Opposition to Plaintiff Vulcan's Motion for Partial Summary Judgment [Docket Document 63-1, the "Franklin Decl. ISO Opp."] at Exhibit O, 91:2-21 [at 178 per the Court's pagination]). Accordingly, based on general knowledge and observation, Sheedy's statement meets Rule 602's personal knowledge requirement.

If Vulcan wants to challenge the *weight* of Sheedy's testimony, it is free to do so at trial. At this point, however, Vulcan's Rule 602 objection does not show a lack of personal knowledge that justifies excluding the evidence at issue, meaning the objection should be overruled.

OBJECTION NO. 9:

> Franklin Decl., Ex. Q, Declaration of Claude Preston Cowan, ¶ 19. "I am not aware of CalMat Co. management (Tom Sheedy or any above him in CalMat Co.) ever discussing with its tenant the possibility that placing tailings on the leased property could result problems [sic] in the future regarding lead bullets (or lead fragments) being buried, though I do recall Rick Phillips (manager of the San Gabriel Valley Gun Club) making a comment to that effect in the early 1990s.
>
> Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Mr. Cowan establishes no personal knowledge of all (or any) conversations between CalMat Co. management and the San Gabriel Valley Gun Club such that he can testify as to their contents.
>
> Hearsay. Fed. R. Evid. 801, 802. The contents of any conversation between CalMat Co. management and the San Gabriel Valley Gun Club, and any statements by Mr. Phillips to Mr. Cowan are inadmissible hearsay.

RESPONSE TO OBJECTION NO. 9:

First, before responding to Vulcan's objections, the Club wants to point out that there are two distinct assertions in the particular evidence challenged by Vulcan:

> 1) that Preston Cowan is *not* "aware of CalMat Co. management (Tom Sheedy or any above him in CalMat Co.) ever discussing with its tenant the possibility that placing tailings on the leased property could result problems [sic] in the future regarding lead bullets (or lead fragments) being buried," and,
>
> 2) that Preston Cowan *does* "recall Rick Phillips (manager of the San Gabriel Valley Gun Club) making a comment to that effect[,]" i.e., that placing tailings on the leased property could result in problems in the future regarding lead bullets or lead fragments being buried on the leased property in the early 1990s.

The Club will refer to these two issues as Issue 1 and Issue 2, respectively.

Fed. R. Evid. 602. Rule 602 states "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. A similar requirement is found in FRCP 56(c)(4) regarding certain affidavits or declarations ("[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge").

Vulcan's Rule 602 objection is intended to address only Issue 1. As above, Vulcan's Rule 602 objection does not make sense. This time, Vulcan states that "Mr. Cowan establishes no personal knowledge of all (or any) conversations between CalMat Co. management and the San Gabriel Valley Gun Club such that he can testify as to their contents." Here, however, Cowan is not testifying the contents of "conversations between CalMat Co. management and the San Gabriel Valley Gun Club[,]" in fact, he is testifying that he has *no* personal knowledge of any communication between Calmat (i.e., Vulcan) management and the Club as to the potential effects burying lead bullets and fragments as a result of mining tailings being placed at the leased property.

If Vulcan wants to challenge the *weight* of Cowan's testimony, it is free to do so at trial. At this point, however, because Cowan's statement regarding his own lack of information on the topic at hand is most definitely within his personal knowledge (that is, Cowan is the only person who can testify as to what he is, *and is not*, aware of), Vulcan's Rule 602 objection should be overruled.

Fed. R. Evid. 801, 802. Rules 801 and 802 state that "'[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

Issue 1. As explained above, Cowan is not offering evidence of "[t]he contents of any conversation between CalMat Co. management and the San Gabriel Valley Gun Club." Thus, there is no hearsay (or any statement) upon which a hearsay objection could be based. Accordingly, Vulcan's hearsay objection should be overruled as to Issue 1.

Issue 2. A statement is not hearsay if it is not "offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). The club does not currently offer the statement at issue to prove that placing tailings on the leased property can result in problems regarding lead bullets or lead fragments being buried on the leased property (i.e., what Vulcan apparently contends is "the matter asserted"), it is being offered to show that the Club expressed a belief to Vulcan that placing tailings on the leased property could result in problems in the future regarding lead bullets or lead fragments being buried on the leased property. Fed. R. Evid. 801 advisory committee's note ("Note to Subdivision (c) . . . . If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay.); *see United States v. Scheele*, 231 F.3d 492, 497, 500 (9th Cir. 2000) (police officer's statement that he

heard a threat on a tape recording is not hearsay to the extent the statement is offered only to prove that the threat was made); *United States v. Munoz*, 36 F.3d 1229, 1233 (1st. Cir. 1994) ("It is quite true that an out-of-court statement is not hearsay if it is used only to show that the statement was made and that the listener heard the words uttered."). Because the evidence at issue is a "verbal act" and is not offered to prove the truth of the matter asserted, Vulcan's objection cannot be sustained.

OBJECTION NO. 10:

> Franklin Decl., Ex. Q, Declaration of Claude Preston Cowan, ¶ 20. "At some point in the early 1990s, I told Tom Sheedy that placing tailings on the property leased by San Gabriel Valley Gun Club was resulting in lead bullets or fragments being buried beneath tailings, but I do not remember what, if any, response, Mr. Sheedy gave."
>
> Hearsay. Fed. R. Evid. 801, 802. The contents of any conversation between Mr. Cowan and Mr. Sheedy are inadmissible hearsay.

RESPONSE TO OBJECTION NO. 10:

"A statement is not hearsay if it is not "offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). The club does not intend the statement at issue to be offered to prove that placing tailings on the property leased by San Gabriel Valley Gun Club was resulting in lead bullets or fragments being buried beneath tailings (i.e., what Vulcan apparently contends is "the matter asserted"), it is being offered to show that the Preston Cowan *told* Tom Sheedy (whether correctly or not) that placing tailings on the property leased by San Gabriel Valley Gun Club was resulting in lead bullets or fragments being buried beneath tailings. Fed. R. Evid. 801 advisory committee's note ("Note to Subdivision (c) . . . . If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the

statement is not hearsay.); *see Scheele*, 231 F.3d at 497, 500 (police officer's statement that he heard a threat on a tape recording is not hearsay to the extent the statement is offered only to prove that the threat was made); *Munoz*, 36 F.3d at 1233 ("It is quite true that an out-of-court statement is not hearsay if it is used only to show that the statement was made and that the listener heard the words uttered."). Because the evidence at issue is a "verbal act" and is not offered to prove the truth of the matter asserted, Vulcan's objection cannot be sustained.

Additionally, had the Club offered this evidence as proof of the matter asserted (i.e., that placing tailings on the property leased by San Gabriel Valley Gun Club was resulting in lead bullets or fragments being buried beneath tailings), that evidence would still not be hearsay, as it would be a non-hearsay admission of a party-opponent. Fed. R. Evid. 801(d)(2)(D). ("A statement is not hearsay if . . . a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."). Because Cowan and Sheedy were both employees of Vulcan or its predecessor in the relevant time period (i.e., "in the early 1990s"), and because the conversation at issue concerns movement of mining tailings, something that is plainly a "matter within the scope of the agency or employment[,]" the "contents of [this] conversation between Mr. Cowan and Mr. Sheedy" is non-hearsay, meaning Vulcan's hearsay objection is without merit and should therefore be overruled.

OBJECTION NO. 11:

> Franklin Decl., ¶ 21, and Exhibit R. "Attached as Exhibit R to this Declaration is a true and correct copy of a document produced in this action by Vulcan that purports to be a Daily Extra Work Report for work performed on March 18, 1992."
>
> Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of Authentication. Fed. R. Evid. 901. Mr. Franklin provides no testimony

that he has personal knowledge of the document such that he is able to authenticate it as required by the Federal Rules of Evidence. *See, e.g., Estremera v. United States*, 442 F.3d 580, 584-85 (7th Cir. 2006) (declaration of attorney insufficient to authenticate documents where knowledge was based only upon interviews with witnesses and review of documents); *see also*, Request to Strike, below.

Hearsay. Fed. R. Evid. 801, 802. The contents of the document are out of court statements improperly being offered for the truth of what they assert.

RESPONSE TO OBJECTION NO. 11:

Fed. R. Evid. 602. Rule 602 states "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. A similar requirement is found in FRCP 56(c)(4) regarding certain affidavits or declarations ("[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge").

Franklin, as an attorney for the Club in this matter (and has been since before Vulcan filed suit on September 8, 2008; see Supp. Franklin Decl. at ¶ 3), has "personal knowledge" of what documents have been produced by Vulcan to the Club in this action, including, as stated in ¶ 21 of the Franklin Decl., the document attached thereto as Exhibit R. Thus, the statement of Franklin Decl. at ¶ 21 is within Franklin's knowledge, proving Vulcan's Rule 602 objection is without merit.

Fed. R. Evid. 901. Rule 901(a) states: "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Documents produced in discovery are considered authenticated for use by a party-opponent, presuming there is no dispute such production actually occurred. *Orr*, 285 F.3d at 777 n.20 ("documents produced by a party in discovery were

deemed authentic when offered by the party-opponent") (citing, among others, *Maljack*, 81 F.3d at 889 n.12).

Vulcan apparently chooses to ignore on point Ninth Circuit authority like *Orr* and *Maljack* and instead (mis)cites a Seventh Circuit case (*Estremera*, 442 F.3d at 584-85) that is completely off point. The question at issue in *Estremera* was whether an affidavit "based on the attorney's review of the relevant documents" was based on sufficient personal knowledge to satisfy FRCP Rule 56(e), where the attorney *did not introduce* "into the record the documents he relied on in his affidavit." *Id.* Additionally, even though Vulcan plainly indicates *Estremera* concerns authentication of documents, *Estremera* never mentions either Rule 901 or authentication.

Thus, unless Vulcan is attempting to raise the argument that this document (a document Bates stamped with a Vulcan identifier, nonetheless) was not produced to the Club by Vulcan in this action (which the Club obviously denies), Vulcan's Rule 901 objection must fail and should therefore be overruled.

Fed. R. Evid. 801, 802. Rules 801 and 802 state that "'[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

First, the document at issue (including its contents) is not hearsay, as the document a non-hearsay admission of a party-opponent. Fed. R. Evid. 801(d)(2)(D). ("A statement is not hearsay if . . . a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."). The document is clearly a internal accounting document from Azusa Rock (i.e., Vulcan), meaning any statements therein are created by an employee or agent of Vulcan "concerning a matter within

the scope of the agency or employment, made during the existence of the relationship."

Additionally, at least two hearsay inadmissability exceptions apply: Rule 803(6), the "business records exception"; and Rule 807, the "residual exception," which provides an exception for "statement[s] not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness . . ." Aside from the information noted above, it is relevant that document was produced in this action by Vulcan, is over nineteen years old, and, the substance at issue (that Cowan was a heavy equipment operator around the time of the creation of the Waste Pile) is confirmed by Cowan's own declaration (Franklin Decl. at Ex. Q, ¶¶ 1, 3,4, 15). Based on that evidence, there is a "equivalent circumstantial guarantee[] of trustworthiness" making the residual exception applicable. Because Vulcan's hearsay objection is unfounded, it should be overruled.

OBJECTION NO. 12:

> Franklin Decl., ¶ 23, and Exhibit S."Attached as Exhibit S to this Declaration is a true and correct copy of a letter dated October 17, 1991 sent by Harry Sanford and Herb Bock to J. Weber produced by Vulcan."
>
> Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of Authentication. Fed. R. Evid. 901. Mr. Franklin provides no testimony that he has personal knowledge of the document such that he is able to authenticate it as required by the Federal Rules of Evidence. *See, e.g., Estremera v. United States*, 442 F.3d 580, 584-85 (7th Cir. 2006) (declaration of attorney insufficient to authenticate documents where knowledge was based only upon interviews with witnesses and review of documents); *see also*, Request to Strike, below.
>
> Hearsay. Fed. R. Evid. 801, 802. The contents of the document are out of court statements improperly being offered for the truth of what they assert.

RESPONSE TO OBJECTION NO. 12:

Fed. R. Evid. 602. Rule 602 states "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. A similar requirement is found in FRCP 56(c)(4) regarding certain affidavits or declarations ("[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge").

Franklin, as an attorney for the Club in this matter (and has been since before Vulcan filed suit on September 8, 2008; see Supp. Franklin Decl. at ¶ 3), has "personal knowledge" of what documents have been produced by Vulcan to the Club in this action, including, as stated in ¶ 23 of the Franklin Decl., the document attached thereto as Exhibit S. Thus, the statement of Franklin Decl. at ¶ 23 is within Franklin's knowledge, proving Vulcan's Rule 602 objection is without merit.

Fed. R. Evid. 901. Rule 901(a) states: "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Documents produced in discovery are considered authenticated for use by a party-opponent, presuming there is no dispute such production actually occurred. *Orr*, 285 F.3d at 777 n.20 ("documents produced by a party in discovery were deemed authentic when offered by the party-opponent") (citing, among others, *Maljack*, 81 F.3d at 889 n.12).

Vulcan apparently chooses to ignore on point Ninth Circuit authority like *Orr* and *Maljack* and instead (mis)cites a Seventh Circuit case (*Estremera*, 442 F.3d at 584-85) that is completely off point. The question at issue in *Estremera* was whether an affidavit "based on the attorney's review of the relevant documents" was based on sufficient personal knowledge to satisfy FRCP Rule 56(e), where the attorney *did not introduce* "into the record the documents he

relied on in his affidavit." *Id.* Additionally, even though Vulcan plainly indicates *Estremera* concerns authentication of documents, *Estremera* never mentions either Rule 901 or authentication.

Thus, unless Vulcan is attempting to raise the argument that this document (a document Bates stamped with a Vulcan identifier, nonetheless) was not produced to the Club by Vulcan in this action (which the Club obviously denies), Vulcan's Rule 901 objection must fail and should therefore be overruled.

Fed. R. Evid. 801, 802. Rules 801 and 802 state that "'[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

First, though a trial date has not been set in this matter, is possible that this document will fall within the hearsay inadmissability exception known as the "ancient document exception." Fed. R. Evid. 803(16) ("[s]tatements in a document in existence twenty years or more the authenticity of which is established"). The document at issue is dated October 17, 1991, meaning it will be within the express scope of the ancient document exception within approximately four months of the filing of this document (i.e., on October 17, 2011).

Additionally, at least two other hearsay inadmissability exceptions apply: Rule 803(6), the "business records exception" (the document concerns lease negotiations between an tenant and landlord); and Rule 807, the "residual exception," which provides an exception for "statement[s] not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness . . ." Thus, Vulcan's hearsay objection should be overruled.

OBJECTION NO. 13:

Franklin Decl., ¶ 26, and Exhibit V. "Attached as Exhibit V to this Declaration is a true and correct copy of three memos written by Vulcan, dated December 5, 1991, which were produced by Vulcan in this case."

Objections. Hearsay. Fed. R. Evid. 801, 802. The contents of the documents are out of court statements improperly being offered for the truth of what they assert.

RESPONSE TO OBJECTION NO. 13:

Fed. R. Evid. 801, 802. Rules 801 and 802 state that "'[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

First, the documents at issue (including there contents) are not hearsay, as the documents are non-hearsay admissions of a party-opponent. Fed. R. Evid. 801(d)(2)(D). ("A statement is not hearsay if . . . a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."). The documents are titled "INTER OFFICE MEMORANDUM" with a Calmat (i.e., Vulcan) logo, meaning any statements therein are created by an employee or agent of Vulcan "concerning a matter within the scope of the agency or employment, made during the existence of the relationship."

Second, though a trial date has not been set in this matter, is possible that these documents will fall within the hearsay inadmissability exception known as the "ancient document exception." Fed. R. Evid. 803(16) ("[s]tatements in a document in existence twenty years or more the authenticity of which is

established"). The documents at issue are all dated December 5, 1991, meaning they will be within the express scope of the ancient document exception within approximately five months of the filing of this document (i.e., on December 5, 2011).

Third, at least two other hearsay inadmissability exceptions apply: Rule 803(6), the "business records exception" (the documents are internal memoranda concerning lease negotiations between an tenant and landlord); and Rule 807, the "residual exception," which provides an exception for "statement[s] not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness . . ." Thus, Vulcan's hearsay objection should be overruled.

OBJECTION NO. 14:

> Franklin Decl., ¶ 27, and Exhibit W. "Attached as Exhibit W to this Declaration is a true and correct copy of a Letter of Transmittal from Vulcan to the Club dated February 10, 1992 and the Draft Lease dated February 10, 1992 that accompanied it; I obtained this document from Robert Carter."
>
> Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of Authentication. Fed. R. Evid. 901. Mr. Franklin provides no testimony that he has personal knowledge of the document such that he is able to authenticate it as required by the Federal Rules of Evidence. *See, e.g., Estremera v. United States*, 442 F.3d 580, 584-85(7th Cir. 2006) (declaration of attorney insufficient to authenticate documents where knowledge was based only upon interviews with witnesses and review of documents); *see also*, Request to Strike, below.
>
> Hearsay. Fed. R. Evid. 801, 802. The contents of the document are out of court statements improperly being offered for the truth of what they assert.

RESPONSE TO OBJECTION NO. 14:

Fed. R. Evid. 602. Rule 602 states "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. A similar requirement is found in FRCP 56(c)(4) regarding certain affidavits or declarations ("[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge").

Franklin, as an attorney for the Club in this matter (and has been since before Vulcan filed suit on September 8, 2008; see Supp. Franklin Decl. at ¶ 3), has "personal knowledge" of what documents he has obtained from the Club' prior lawyer as part of his defense of the Club this action, including, as stated in ¶ 27 of the Franklin Decl., the document attached thereto as Exhibit W. Thus, the statement of Franklin Decl. at ¶ 27 is within Franklin's knowledge, proving Vulcan's Rule 602 objection is without merit.

Fed. R. Evid. 901. Rule 901(a) states: "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

> The issue for the trial judge under Rule 901 is whether there is prima facie evidence, circumstantial or direct, that the document is what it is purported to be. If so, the document is admissible in evidence.[Citations] It then remains for the trier of facts to make its own determination of the authenticity of the admitted evidence and the weight which it feels the evidence should be given.

Alexander Dawson, 586 F.2d at 1302 (citations omitted); *see also Black*, 767 F.2d at 1342 (indicating a showing "so that a reasonable juror could find in favor of authenticity or identification" is a sufficient prima facie showing of authenticity for purposes of Rule 901). There are several "illistrations" listed in Rule 901of "authentication or identification conforming with" Rule 901(a), at least two of which are relevant here: Rule 901(b)(1) ("[t]estimony that a matter is what it is

claimed to be") and Rule 901(b)(4) ("[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances").[9]

Here, the document at issue comprises what appears to be a draft lease (with "bwf\leases\gunclub.lse" printed in the bottom left-hand corner of the page marked "20"), and a "letter of Transmittal" from CalMat dated February 10, 1992. (Franklin Decl. at ¶¶ 27, Ex. W). Brian Ferris of Vulcan has given testimony that he believes he did draft the "draft lease" portion of this document, based on the presence of his initials ("bwf") on the "draft lease." *See* Franklin Decl. ISO Opp." at Ex. X, 47:1-14 [at 223 per the Court's pagination]). Further, as stated in Franklin's Decl., the document was obtained from Robert Carter. . (Franklin Decl. at ¶¶ 27). Robert Carter was the Club's attorney regarding the negotiation of the Lease. *See* Franklin Decl. at Ex. X (February 24, 1992, letter from Robert Carter to Brian Ferris [of CalMat, i.e., Vulcan] stating Mr. Carter represents the Club and that and listing his comments in response to his review of "the proposed Easement and Lease which have been submitted to my client[.]"). Finally, it is worth noting that neither Vulcan's Evidentiary Objection nor Vulcan's Statement of Genuine Issues and Additional Material Facts filed therewith cites *any* evidence intended to (let alone actually) suggesting the document at issue is not what it purports to be. The foregoing facts are clearly sufficient "so that a reasonable juror could find in favor of authenticity or identification" (*Black*, 767 F.2d at 1342), meaning Vulcan's Rule 901 objection is meritless.

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[9] Though Rule 901(b)(8) (ancient documents) is not expressly applicable at this time (the document at issue is less than a year away from being twenty years old and thus an ancient document), the fact that this document is nearly twenty years old, in light it being found in the possession of the attorney handling the negotiation of a lease at issue in this case, is sufficient for the document to fall within the authentication illustration in Rule 901(b)(4).

Vulcan's citation to *Estremera*, 442 F.3d at 584-85, is completely off point. The question at issue in *Estremera* was whether an affidavit "based on the attorney's review of the relevant documents" was based on sufficient personal knowledge to satisfy FRCP Rule 56(e), where the attorney *did not introduce* "into the record the documents he relied on in his affidavit." *Id.* Additionally, even though Vulcan plainly indicates *Estremera* concerns authentication of documents, *Estremera* never mentions either Rule 901 or authentication. Based on the foregoing, Vulcan's Rule 901 objection fails and should therefore be overruled.

Fed. R. Evid. 801, 802. Rules 801 and 802 state that "'[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

First, the documents at issue (including there contents) are not hearsay, as the documents are non-hearsay admissions of a party-opponent. Fed. R. Evid. 801(d)(2)(D). ("A statement is not hearsay if . . . a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."). The draft lease is attached to a letter of transmittal with a Calmat (i.e., Vulcan) logo, and it is clear that statements in the document are created by an employee or agent of Vulcan "concerning a matter within the scope of the agency or employment, made during the existence of the relationship."

Second, though a trial date has not been set in this matter, is possible that these documents will fall within the hearsay inadmissability exception known as the "ancient document exception." Fed. R. Evid. 803(16) ("[s]tatements in a document in existence twenty years or more the authenticity of which is established"). The letter of transmittal is dated February 20, 1992, meaning they

will be within the express scope of the ancient document exception within approximately eight months of the filing of this document (i.e., on February 20, 2012).

Third, at least two other hearsay inadmissability exceptions apply: Rule 803(6), the "business records exception" (the document clearly concerns lease negotiations between an tenant and landlord); and Rule 807, the "residual exception," which provides an exception for "statement[s] not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness . . ." Thus, Vulcan's hearsay objection should be overruled.

OBJECTION NO. 15:

Franklin Decl., ¶ 28, and Exhibit X. "Attached as Exhibit X to this Declaration is a true and correct copy of a letter from Robert Carter of the Club to Brian Ferris of Vulcan dated February 24, 1992; I obtained this letter from Robert Carter."

Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of Authentication. Fed. R. Evid. 901. Mr. Franklin provides no testimony that he has personal knowledge of the document such that he is able to authenticate it as required by the Federal Rules of Evidence. *See, e.g., Estremera v. United States*, 442 F.3d 580, 584-85 (7th Cir. 2006) (declaration of attorney insufficient to authenticate documents where knowledge was based only upon interviews with witnesses and review of documents); *see also*, Request to Strike, below.

Hearsay. Fed. R. Evid. 801, 802. The contents of the document are out of court statements improperly being offered for the truth of what they assert.

RESPONSE TO OBJECTION NO. 15:

Fed. R. Evid. 602. Rule 602 states "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has

personal knowledge of the matter." Fed. R. Evid. 602. A similar requirement is found in FRCP 56(c)(4) regarding certain affidavits or declarations ("[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge").

Franklin, as an attorney for the Club in this matter (and has been since before Vulcan filed suit on September 8, 2008; see Supp. Franklin Decl. at ¶ 3), has "personal knowledge" of what documents he has obtained from the Club's prior lawyer as part of his defense of the Club this action, including, as stated in ¶ 28 of the Franklin Decl., the document attached thereto as Exhibit X. Thus, the statement of Franklin Decl. at ¶ 28 is within Franklin's knowledge, proving Vulcan's Rule 602 objection is without merit.

Fed. R. Evid. 901. Rule 901(a) states: "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

> The issue for the trial judge under Rule 901 is whether there is prima facie evidence, circumstantial or direct, that the document is what it is purported to be. If so, the document is admissible in evidence.[Citations] It then remains for the trier of facts to make its own determination of the authenticity of the admitted evidence and the weight which it feels the evidence should be given.

Alexander Dawson, 586 F.2d at 1302 (citations omitted); *see also Black*, 767 F.2d at 1342 (indicating a showing "so that a reasonable juror could find in favor of authenticity or identification" is a sufficient prima facie showing of authenticity for purposes of Rule 901).

Though Rule 901(b)(8) (ancient documents) is not expressly applicable at this time (the document at issue is less than a year away from being twenty years old and thus an ancient document), circumstances show the document is authentic per Rule 901(b)(4) (authentication based on "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with

circumstances").

Authentication is shown by the following facts: the document 1) is nearly twenty years old, 2) includes a fax "ACTIVITY REPORT" with a date of February 24, 1992, and indicating "TRANSMISSION OK[,]" 3) includes a fax cover sheet indicating the document was sent to Ferris (i.e., Vulcan), 4) was found in the possession of its apparent author, the Club's attorney handling the negotiation of a lease at issue in this case (*See* Franklin Decl. at Ex. X at 1), and 5) is plainly referenced in a letter dated March 5, 1992, produced by Vulcan in this matter (the letter refers to Robert Carter's "comments of February 24" [i.e., the date of the document at issue] regarding a lease and easement). (*See* Supp. Franklin Decl. at ¶ 7, Ex. 2). Further, Vulcan has not offered any evidence suggesting the document at issue is not authentic. It is obvious "a reasonable juror could find in favor of authenticity or identification" based on the foregoing facts. *Black*, 767 F.2d at 1342.

Vulcan's citation to *Estremera*, 442 F.3d at 584-85, is completely off point. The question at issue in *Estremera* was whether an affidavit "based on the attorney's review of the relevant documents" was based on sufficient personal knowledge to satisfy FRCP Rule 56(e), where the attorney *did not introduce* "into the record the documents he relied on in his affidavit." *Id.* Additionally, even though Vulcan plainly indicates *Estremera* concerns authentication of documents, *Estremera* never mentions either Rule 901 or authentication. Based on facts proving authentication and Vulcan's failure to raise a plausible argument otherwise, Vulcan's Rule 901 objection should be overruled.

Fed. R. Evid. 801, 802. Rules 801 and 802 state that "'[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of

Congress."

First, "[a] statement is not hearsay if it is not "offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). The club does not intend the document/statement at issue to be introduced to prove what the specific terms of a draft lease were (i.e., what Vulcan apparently contends is "the matter asserted"), it is being offered to show the *specific statement(s)* the Club expressed to Vulcan regarding the draft lease apparently at issue. Fed. R. Evid. 801 advisory committee's note ("Note to Subdivision (c) . . . . If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay."); *see Scheele*, 231 F.3d at 500 (police officer's statement that he heard threat a tape recording is not hearsay to the extent the statement is offered only to prove that the threat was made); *Munoz*, 36 F.3d at 1233 ("It is quite true that an out-of-court statement is not hearsay if it is used only to show that the statement was made and that the listener heard the words uttered."). Because the evidence at issue is a "verbal act" and is not offered to prove the truth of the matter asserted, Vulcan's objection cannot be sustained.

Second, though a trial date has not been set in this matter, is possible that this document will fall within the hearsay inadmissability exception known as the "ancient document exception." Fed. R. Evid. 803(16) ("[s]tatements in a document in existence twenty years or more the authenticity of which is established"). The document includes a fax "ACTIVITY REPORT" with a date of February 24, 1992, meaning the document will be within the express scope of the ancient document exception within approximately eight months of the filing of this document (i.e., on February 24, 2012).

Third, at least two other hearsay inadmissability exceptions apply: Rule 803(6), the "business records exception" (the document clearly concerns lease negotiations between an tenant and landlord); and Rule 807, the "residual exception," which provides an exception for "statement[s] not specifically covered

by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness . . ." Thus, Vulcan's hearsay objection should be overruled.

OBJECTION NO. 16:

> Franklin Decl., ¶ 29, and Exhibit Y. "Attached as Exhibit Y to this Declaration is a true and correct copy of a letter from Brian Ferris of Vulcan to Robert Carter of the Club dated March 5, 1992; I obtained this letter from Robert Carter."
>
> Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of Authentication. Fed. R. Evid. 901. Mr. Franklin provides no testimony that he has personal knowledge of the document such that he is able to authenticate it as required by the Federal Rules of Evidence. *See, e.g., Estremera v. United States*, 442 F.3d 580, 584-85 (7th Cir. 2006) (declaration of attorney insufficient to authenticate documents where knowledge was based only upon interviews with witnesses and review of documents); *see also*, Request to Strike, below.
>
> Hearsay. Fed. R. Evid. 801, 802. The contents of the document are out of court statements improperly being offered for the truth of what they assert.

RESPONSE TO OBJECTION NO. 16:

Fed. R. Evid. 602. Rule 602 states "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. A similar requirement is found in FRCP 56(c)(4) regarding certain affidavits or declarations ("[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge").

Franklin, as an attorney for the Club in this matter (and has been since before Vulcan filed suit on September 8, 2008; see Supp. Franklin Decl. at ¶ 3), has "personal knowledge" of what documents he has obtained from the Club's prior

lawyer as part of his defense of the Club this action, including, as stated in ¶ 29 of the Franklin Decl., the document attached thereto as Exhibit Y. Thus, the statement of Franklin Decl. at ¶ 29 is within Franklin's knowledge, proving Vulcan's Rule 602 objection is without merit.

Fed. R. Evid. 901. Rule 901(a) states: "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Documents produced in discovery are considered authenticated for use by a party-opponent, presuming there is no dispute such production actually occurred. *Orr*, 285 F.3d at 777 n.20 ("documents produced by a party in discovery were deemed authentic when offered by the party-opponent") (citing, among others, *Maljack*, 81 F.3d at 889 n.12).

Vulcan apparently chooses to ignore on point Ninth Circuit authority like *Orr* and *Maljack* and instead (mis)cites a Seventh Circuit case (*Estremera*, 442 F.3d at 584-85) that is completely off point. The question at issue in *Estremera* was whether an affidavit "based on the attorney's review of the relevant documents" was based on sufficient personal knowledge to satisfy FRCP Rule 56(e), where the attorney *did not introduce* "into the record the documents he relied on in his affidavit." *Id.* Additionally, even though Vulcan plainly indicates *Estremera* concerns authentication of documents, *Estremera* never mentions either Rule 901 or authentication.

Here, the document at issue (Ex. Y to the Franklin Decl.), save handwritten notes thereon (irrelevant to the Club's intentions in citing Ex. Y), was produced by Vulcan in discovery in this action. (*See* Supp. Franklin Decl. at ¶ 7, Ex. 2). Thus, unless Vulcan is attempting to raise the argument that this document (a document Bates stamped with a Vulcan identifier, nonetheless) was not produced to the Club by Vulcan in this action (which the Club obviously denies), Vulcan's Rule 901 objection must fail and should therefore be overruled.

Additionally, though Rule 901(b)(8) (ancient documents) is not expressly applicable at this time (the document at issue is less than a year away from being twenty years old and thus an ancient document), circumstances show the document is authentic per Rule 901(b)(4) (authentication based on "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances"). Authentication is shown by the following facts: the document: 1) is nearly twenty years old; 2) was reviewed by Ferris and he stated that though he didn't "recall writing it, . . . it appeared to be from" him (Supp. Franklin Decl. at ¶ 8, Ex. 3); 3) was found in the possession of its apparent intended recipient, the Club's attorney handling the negotiation of a lease at issue in this case (see Franklin Decl. at Ex. X at 1), and 5) it plainly references the letter dated February 24, 1992 (Franklin Dec. at Ex. X). Further, Vulcan has not offered any evidence suggesting the document at issue is not authentic. It is obvious "a reasonable juror could find in favor of authenticity or identification" based on the foregoing facts. *Black*, 767 F.2d at 1342.

Fed. R. Evid. 801, 802. Rules 801 and 802 state that "'[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

First, "[a] statement is not hearsay if it is not "offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). The club does not intend the document/statement at issue to be introduced to prove what the specific terms of a draft lease were (i.e., what Vulcan apparently contends is "the matter asserted"), it is being offered to show the *specific statement(s)* Vulcan made to the Club regarding the draft lease apparently at issue. Fed. R. Evid. 801 advisory committee's note ("Note to Subdivision (c) . . . . If the significance of an offered

statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay.); *see Scheele*, 231 F.3d at 497, 500 (police officer's statement that he heard threat a tape recording is not hearsay to the extent the statement is offered only to prove that the threat was made); *Munoz*, 36 F.3d at 1233 ("It is quite true that an out-of-court statement is not hearsay if it is used only to show that the statement was made and that the listener heard the words uttered."). Because the evidence at issue is a "verbal act" and is not offered to prove the truth of the matter asserted, Vulcan's objection cannot be sustained.

Second, the document at issue (including its contents) is not hearsay, as the document a non-hearsay admission of a party-opponent. Fed. R. Evid. 801(d)(2)(D). ("A statement is not hearsay if . . . a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."). The document is clearly a letter from a CalMat (Vulcan) attorney (Ferris), made during Ferris' employment, regarding lease negotiations between a tenant (the Club) and a landlord (Vulcan). Therefore, any statements in the document was created by an employee or agent of Vulcan "concerning a matter within the scope of the agency or employment, made during the existence of the relationship."

Third, though a trial date has not been set in this matter, is possible that this document will fall within the hearsay inadmissability exception known as the "ancient document exception." Fed. R. Evid. 803(16) ("[s]tatements in a document in existence twenty years or more the authenticity of which is established"). The document is dated of March 5, 1992, meaning the document will be within the express scope of the ancient document exception within less than nine months of the filing of this document (i.e., on March 5, 2012).

Fourth, at least two other hearsay inadmissability exceptions apply: Rule 803(6), the "business records exception"; and Rule 807, the "residual exception,"

which provides an exception for "statement[s] not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness . . ." It is relevant to note that document (save irrelevant handwritten notes) was produced in this action by Vulcan and is over nineteen years old. In addition, as to the substance of the document at issue, Vulcan has provided no evidence contrary thereto. Based on that evidence, there is a "equivalent circumstantial guarantee[] of trustworthiness" making the residual exception applicable. Because Vulcan's hearsay objection is unfounded, it should be overruled.

OBJECTION NO. 17:

> Franklin Decl., ¶ 31, and Exhibit AA. "Attached as Exhibit AA to this Declaration is a true and correct copy of a letter from Mack & Associates, Inc., Real Estate Evaluation, to Michael Linton, dated November 7, 2002, which was produced by Vulcan in this action."
>
> Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of Authentication. Fed. R. Evid. 901. Mr. Franklin provides no testimony that he has personal knowledge of the document such that he is able to authenticate it as required by the Federal Rules of Evidence. *See, e.g., Estremera v. United States*, 442 F.3d 580, 584-85 (7th Cir. 2006) (declaration of attorney insufficient to authenticate documents where knowledge was based only upon interviews with witnesses and review of documents); *see also*, Request to Strike, below.
>
> Hearsay. Fed. R. Evid. 801, 802. The contents of the document are out of court statements improperly being offered for the truth of what they assert.
>
> Opinion of an Undisclosed Expert. Fed. R. Evid. 701, 702. Real estate appraisals "are not the kinds of opinions a lay person can offer employing the reasoning of 'everyday life.'" *In re Commercial Loan Corp.*, 396 B.R. 730, 738-39 (Bankr. N.D. Ill. (2008) (finding that

> affidavit regarding loan status and ability to pay loan constituted expert opinion under FRE 702 and striking affidavit on the grounds that declarant was not properly designated as an expert). Mack & Associates, Inc. was [sic] designated as an expert by the Gun Club in this matter. Accordingly, it would be improper for the Court to consider the Mack & Associates, Inc. appraisal for any purpose.

RESPONSE TO OBJECTION NO. 17:

Fed. R. Evid. 602. Rule 602 states "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. A similar requirement is found in FRCP 56(c)(4) regarding certain affidavits or declarations ("[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge").

Franklin, as an attorney for the Club in this matter (and has been since before Vulcan filed suit on September 8, 2008; see Supp. Franklin Decl. at ¶ 3), has "personal knowledge" of what documents he has obtained from the Club's prior lawyer as part of his defense of the Club this action, including, as stated in ¶ 31 of the Franklin Decl., the document attached thereto as Exhibit AA. Thus, the statement of Franklin Decl. at ¶ 31 is within Franklin's knowledge, proving Vulcan's Rule 602 objection is without merit.

Fed. R. Evid. 901. Rule 901(a) states: "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Documents produced in discovery are considered authenticated for use by a party-opponent, presuming there is no dispute such production actually occurred. *Orr*, 285 F.3d at 777 n.20 ("documents produced by a party in discovery were deemed authentic when offered by the party-opponent") (citing, among others, *Maljack*, 81 F.3d at 889 n.12).

Vulcan apparently chooses to ignore on point Ninth Circuit authority like *Orr* and *Maljack* and instead (mis)cites a Seventh Circuit case (*Estremera*, 442 F.3d at 584-85) that is completely off point. The question at issue in *Estremera* was whether an affidavit "based on the attorney's review of the relevant documents" was based on sufficient personal knowledge to satisfy FRCP Rule 56(e), where the attorney *did not introduce* "into the record the documents he relied on in his affidavit." *Id.* Additionally, even though Vulcan plainly indicates *Estremera* concerns authentication of documents, *Estremera* never mentions either Rule 901 or authentication.

Here, the document at issue (Ex. AA to the Franklin Decl.) was produced by Vulcan in discovery in this action. (Franklin Decl. at ¶ 31). Thus, unless Vulcan is attempting to raise the argument that this document (a document Bates stamped with a Vulcan identifier, nonetheless) was not produced to the Club by Vulcan in this action (which the Club obviously denies), Vulcan's Rule 901 objection must fail and should therefore be overruled.

Additionally, Vulcan's objection is especially misplaced considering a Vulcan executive (Michael Linton) has testified that he is "pretty familiar" the document[10] and that it (along with the report referred to in the document) is "an appraisal [he] had commissioned of the . . . parcel which includes the gun club." (Supp. Franklin Decl. at ¶ 9, Ex. 4). The document is plainly authenticated per Rule 901(b)(1) (authentication can be by "[t]estimony that the matter is what it is claimed to be") and Rule 901(b)(4) (authentication based on "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in

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[10] The document was provided to Linton for review at deposition along with with the report referred to in the document as "a summary of pertinent property value characteristics, the valuation analysis, and the contingent and limiting conditions upon which the value of the conclusion is premised[.]" (Supp. Franklin Decl. at ¶ 9, Ex. 4).

conjunction with circumstances"). Further, Vulcan has not offered any evidence suggesting the document at issue is not authentic. It is obvious "a reasonable juror could find in favor of authenticity or identification" based on the facts mentioned above. *Black*, 767 F.2d at 1342. Vulcan's authentication objection is patently without merit and should be overruled.

Fed. R. Evid. 801, 802. Rules 801 and 802 state that "'[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

First, the document at issue (including its contents) is not hearsay, as the document a non-hearsay admission of a party-opponent. Fed. R. Evid. 801(d)(2)(D). ("A statement is not hearsay if . . . a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."). The document is clearly a letter from "Certified General Real Estate Appraiser" working for Vulcan, made during the appraiser's employment by Vulcan, regarding the value of the parcel of real property which included the property a tenant (the Club) leased from a landlord (Vulcan). Therefore, any statements in the document was created by an employee or agent of Vulcan "concerning a matter within the scope of the agency or employment, made during the existence of the relationship."

Third, at least two hearsay inadmissability exceptions apply: Rule 803(6), the "business records exception" (the appraisal is "[a] . . .report . . . of conditions [and] opinions . . . made at or near the time by, or from information transmitted by, a person with knowledge, . . . kept in the course of a regularly conducted business activity [as part of] the regular practice of that business activity as shown by . . . circumstances of preparation indicate lack of trustworthiness); and Rule 807, the

"residual exception," which provides an exception for "statement[s] not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness . . ." It is relevant to note that document was produced in this action by Vulcan and aVulcan executive has testified that he commissioned the appraisal referred to in the document. Based on that evidence, there is a "equivalent circumstantial guarantee[] of trustworthiness" making the residual exception applicable. Because Vulcan's hearsay objection is unfounded, it should be overruled.

Fed. R. Evid. 701, 702. Rules 701 and 702 are stated in their entirety below.

> **Rule 701. Opinion Testimony by Lay Witnesses**
> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.
>
> **Rule 702. Testimony by Experts**
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rules 701 and 702 address testimony. "Testimony . . . is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (citation, internal quotation marks, and brackets omitted). The document at issue, appearing to be an appraisal

or summary of an appraisal, is not " a solemn declaration or affirmation made for the purpose of establishing or proving some fact[,]" and is thus not testimony, and therefore not within the scope of Rules 701 and 702. Instead, the document at issue appears to be a common business document that obviously was not created by the Club for the purpose of establishing or proving some fact. (Franklin Decl. at Ex. AA). The fact that Vulcan does not cite a single case wherein a business record/party admission was treated as testimony is highly probative on the issue. Accordingly, because the document at issue is not testimony, and Rules 701 and 702 only apply to testimony, Vulcan's objection purportedly based on those rules must fail.

As to Rule 701 (i.e., the "opinion rule") specifically, the document is clearly a party-opponent admission as to the value of the parcel, and "[i]t is well settled that the opinion rule does not apply to a party's admissions." *See United States v. Bakshinian*, 65 F. Supp. 2d 1104, 1109 (C.D. Cal. 1999) (quoting *Owens v. Atchison, T & S. F. Ry. Co*., 393 F.2d 77, 79 (5th Cir. 1968)). Therefore, even setting aside that the document is not being offered as "opinion testimony by a lay witness," Rule 701 does not apply regarding the appraisal at issue.

As to Vulcan's assertions regarding Rule 702, there is "little helpful precedent" as to the application of Rule 702 to documents classified as "business records" under Rule 803(6). *See United States v. Licavoli*, 604 F.2d 613, 622-23 (9th Cir. 1979). The *Licavoli* court stated it saw "no reason to adopt an inflexible rule that every case requires the proponent of a business record containing expert opinion to affirmatively establish the qualifications of the person forming the opinion. Rule 803(6) . . . . allows the trial judge, in the exercise of his or her discretion, to exclude from evidence a record of the opinion of an expert whose qualifications are seriously challenged." *Id.*

Vulcan has not raised a serious challenge regarding the qualifications of Mack & Associates' (the apparent author of the document in question), nor could

it: Mack & Associates is Vulcan's *own appraiser*, who Vulcan had apparently used before the document at issue was created (*see* Supp. Franklin Decl. at ¶ 9, Ex. 4 [CalMat Co. and Vulcan Materials Company are listed on the "Representative Clients" list provided in Mack & Associates' appraisal]). Further, though the appraisal was discussed with Linton (a Vulcan executive) at his deposition, he made no mention of any concerns regarding Mack & Associates' qualifications. (*Id.*). Thus, though the Club may ultimately challenge the document at issue as being low-biased, based on faulty methodology, and/or of little evidentiary weight, there is no evidence at this point that Mack & Associates' qualifications are insufficient to provide expert testimony. Accordingly, Vulcan's 702 objection should not be sustained.

Finally, it is worth noting that, in Vulcan's 702 argument, Vulcan again cites out of circuit (and from a trial court, in this instance) and irrelevant authority. Vulcan cites *In re Commercial*, a case wherein a bankruptcy trustee offered into evidence an affidavit regarding his opinion (which was considered expert testimony by the court), and the Court struck the affidavit because the trustee was not designated as a witness. *In re Commercial*, 396 B.R. at 739. Vulcan cites *In re Commercial* (with no introductory signal) for the proposition that "[r]eal estate appraisals 'are not the kinds of opinions a lay person can offer employing the reasoning of 'everyday life."' (Vulcan's Objection at 9:22-25). *In re Commercial* says ***nothing*** about real estate appraisals; the language Vulcan quoted had to do with a trustee's opinion about a bankrupt corporation's loan status and ability to repay loans (based on the trutsee's experience and skill as a trustee), not real estate appraisal. *In re Commercial* is not on point for several reasons: 1) it deals with an affidavit, a form of written *testimony* (the document at issue here is an admission or a business record, and thus *not* testimony); 2) it deals with a written opinion offered for inclusion in the record by the party for whom it was created (as compared to here, where the document at issue is a party-opponent's admission).

The thrust of *In re Commercial* on the issue of expert testimony is that "[t]he Rules prevent one party from springing expert testimony on another[.]" *In re Commercial*, 396 B.R. at 739. The Club can hardly be accused of "springing" Vulcan's own eight-year-old appraisal on Vulcan. For all of the reasons listed above, Vulcan's Rule 701 and 702 objections are meritless and should be overruled.

RESPONSE TO VULCAN'S REQUEST TO STRIKE

Though the alleged basis for Vulcan's Request to Strike is completely undermined as stated above, the Club will briefly respond to two incorrect assertions stated in the Request to Strike.

Vulcan contends that, "[t]o meet the requirements of Rule 56, documents 'are required to be authenticated by affidavits or declarations of persons with personal knowledge through whom they could be introduced at trial.' *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 883 (9th Cir. 1982) (emphasis added)." Even if the *Zoslaw* court intended to state that the *only* way to authenticate documents at the summary judgement stage is by filing "affidavits or declarations of persons with personal knowledge" (which is far from clear), later authority *expressly* holds otherwise. *See Orr*, 285 F.3d at 777-78 n.24 (ruling issued March 15, *2002*, twenty years after *Zoslaw* was decided).[11]

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[11] [Footnote 24 in *Orr* states] Federal Rule of Civil Procedure 56(e) does not require that all documents be authenticated through personal knowledge when submitted in a summary judgment motion. Such a requirement is limited to situations where exhibits are introduced by being attached to an affidavit. Compare Fed.R.Civ.P. 56(e) (bearing the heading "Form of Affidavits"), with Fed.R.Evid. 901(b) (providing ten methods to authenticate evidence). For instance, documents attached to an exhibit list in a summary judgment motion could be authenticated by review of their contents if they appear to be sufficiently genuine. See Fed.R.Evid. 901(b)(4)(authenticity

Additionally, the Request to Strike quotes *Hoffman v. Applicators Sales & Service, Inc.*, 439 F.3d 9, 14-15 (1st Cir. 2006) as follows: "documents do not automatically become part of the record [on summary judgement] just because they are products of discovery." (Vulcan's Objections at 10:24-28). The Club does not dispute the correctness of that general statement (though the Club notes it is, once again, found in out-of-circuit precedent). The Club does dispute, however, Vulcan's misapplication of that statement; namely Vulcan's apparent attempt to argue that documents produced by a party-opponent and *actually submitted* with summary judgment briefing are not treated as authentic.

Hoffman addresses a unique type of document not at issue here. The document at issue in *Hoffman* was a chart (attached to an affidavit) that summarized *other* documents, documents *that had been produced in discovery* but were *not* attached to the affidavit. *See Hoffman*, 439 F.3d at 13-14.[12] The *Hoffman*

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may be satisfied by the "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."); *United States v. Whitworth*, 856 F.2d 1268, 1283 (9th Cir.1988) (authenticating letters by the linkage between the dates of postmarks and defendant's location on the days letters mailed); *United States v. One 56-Foot Motor Yacht Named Tahuna*, 702 F.2d 1276, 1284-85(9th Cir.1983) (authenticating a diary under Rule 901(b)(4) by reviewing its contents); *Alexander Dawson, Inc.*, 586 F.2d at 1302 ("[t]he content of a document, when considered with the circumstances surrounding its discovery, is an adequate basis for [its authentication]").

[12] If a party wishes the court to consider matters disclosed during discovery, he must take appropriate steps to have them included in the record: merely citing to pages of discovery materials not of record does not suffice . . . . Even supposing arguendo . . . corroborating evidence existed in the discovery documents, those documents were not before the judge, and the judge had no duty to search for them outside the record in order

court thus made the point that the presence of citations (in the chart) to information supposedly produced in discovery, without something more, was insufficient to consider the chart authenticated. *Id.* at 14-16. The fact that *Hoffman* correctly notes that a Rule 56(e) *authenticating* affidavit requires personal knowledge (*id.* at 16), does not support the much broader contention ascribed to *Hoffman* by Vulcan (i.e., "documents offered for summary judgment must be authenticated by someone with personal knowledge"). (Vulcan's Objections at 10:24-28). Because Vulcan's interpretation of *Hoffman* is both flawed and contrary to applicable Ninth Circuit law (*Orr*), it should be disregarded.

Vulcan's objections should be overruled and its request denied for the reasons stated herein.

Date: June 16, 2011

MICHEL & ASSOCIATES, P.C.

/s/*Scott M. Franklin*
Scott M. Franklin
Attorney for Defendants

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to see if they contained proper supporting data.

Id. at 15-16.

PROOF OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, Christina Sanchez, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

I am not a party to the above-entitled action. I have caused service of:

RESPONSE TO PLAINTIFF'S EVIDENTIARY OBJECTIONS TO AND REQUEST TO STRIKE PORTIONS OF THE DECLARATION OF SCOTT M. FRANKLIN OFFERED IN SUPPORT OF SAN GABRIEL VALLEY GUN CLUB'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY JUDGMENT AS TO PORTIONS OF PLAINTIFF'S COMPLAINT

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Kenneth A. Ehrlich
kehrlich@jmbm.com
Paul A. Kroeger
pkroeger@jmbm.com
JEFFER MANGELS BUTLER & MITCHELL LLP
1900 Avenue of the Stars, 7th Floor
Los Angeles, CA 90067

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 16, 2011.

/s/Christina Sanchez
CHRISTINA SANCHEZ