

1 C.D. Michel — SBN 144258  
W. Lee Smith — SBN 196115  
2 Thomas E. Maciejewski — SBN 222736  
MICHEL & ASSOCIATES, P.C.  
3 180 East Ocean Boulevard, Suite 200  
Long Beach, CA 90802  
4 Telephone: (562) 216-4444  
Facsimile: (562) 216-4445  
5 Attorneys for Defendant San  
6 Gabriel Valley Gun Club

**ORIGINAL FILED**

JAN 26 2012

**LOS ANGELES  
SUPERIOR COURT**

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 IN AND FOR THE COUNTY OF LOS ANGELES

10 EAST DISTRICT

11 CALMAT CO. dba VULCAN MATERIAL )  
COMPANY, WESTERN DIVISION, a )  
12 Delaware corporation, )

13 Plaintiff, )

14 vs. )

15 SAN GABRIEL VALLEY GUN CLUB, a )  
non-profit California corporation; and DOES )  
16 1-1000, inclusive, )

17 Defendants. )

CASE NO: KC062582J

**NOTICE AND MOTION OF  
DEFENDANT SAN GABRIEL VALLEY  
GUN CLUB'S MOTION TO STRIKE  
PORTIONS OF PLAINTIFF'S  
COMPLAINT; MEMORANDUM IN  
SUPPORT THEREOF**

*Pursuant to CCP § 435*

Hon. Dan T. Oki, presiding

Date: March 8, 2012

Time: 8:30 a.m.

Dept.: J

Action Filed: November 22, 2011

Trial Date: None

20 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

21 PLEASE TAKE NOTICE that on March 8, 2012, at 8:30 a.m. or as soon thereafter as the  
22 matter may be heard in Department J, before the Honorable Dan T. Oki, at the Los Angeles  
23 Superior Court, 400 Civic Center Plaza, California, Defendant San Gabriel Valley Gun Club (the  
24 "Club"), will and hereby does move the Court for an order striking portions of the Complaint of  
25 Calmat Co. dba Vulcan Material Company, Western Division ("Vulcan") on the following  
26 grounds.  
27  
28

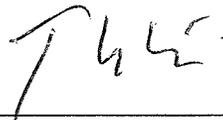
1           1.       Vulcan's prayer for treble damages is improper as Vulcan does not allege any facts  
2 indicating that the Club willfully or maliciously committed waste on the property at issue. (Code  
3 Civ. Proc. § 436 (b).)

4           2.       Vulcan's claims for damages related to offsite contamination are improper as they  
5 are time barred under their respective statutes of limitations. (Code Civ. Proc. § 436 (b).)

6           3.       Vulcan's claims for damages related to the 1988 lease (Exhibit G to Complaint)  
7 and earlier leases are improper as they are time barred. (Code Civ. Proc. § 436 (b).)

8  
9  
10 Dated: January 26, 2012

MICHEL & ASSOCIATES, P.C.

11 

12 \_\_\_\_\_  
13 Thomas Maciejewski  
14 Attorneys for Defendant San Gabriel Valley  
15 Gun Club  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 IN SUPPORT OF MOTION TO STRIKE PORTIONS OF PLAINTIFF'S COMPLAINT

3 **I. INTRODUCTION**

4 Defendant San Gabriel Valley Gun Club (the "Club") requests this Court strike irrelevant and  
5 improper portions of Plaintiff Calmat Co. dba Vulcan Material Company, Western division  
6 ("Vulcan")'s Complaint. First, since Vulcan's Complaint provides no evidence of malicious or  
7 willful behavior by the Club, Vulcan's request for treble damages for its waste cause of action should  
8 be stricken. Second, as Vulcan did not allege the Club caused any offsite contamination in its prior  
9 complaint in the federal case (the "Federal Complaint," attached as Exhibit A to accompanying  
10 Request for Judicial Notice), its causes of action for offsite contamination should also be stricken.  
11 Finally, all causes of action related to conditions existing before the May 1992 lease should be  
12 stricken as their statutes of limitations have expired.

13 **II. ARGUMENT**

14 **A. Standard for Motion to Strike**

15 A motion to strike may be used to cut out "any irrelevant, false, or improper matter inserted  
16 in any pleading." (Cal. Civ. Proc. Code § 436 (a).)<sup>1</sup> The grounds for a motion to strike shall appear  
17 on the face of the challenged pleading or from any matter of which the court is required to take  
18 judicial notice. (§ 437 (a).)

19 **B. Vulcan's Treble Damages Prayer as Part of its Waste Claim Cause of Action is**  
20 **Barred**

21 Vulcan alleges that it is entitled to recover treble damages for waste under California Code  
22 of Civil Procedure section 732. (Complaint at ¶ 92.) The award of treble damages in cases of waste  
23 is not mandatory, but is left to the trial court's discretion. (*Kanner v. Globe Bottling Co.*, (1969) 273  
24 Cal. App. 2d 559, 568.) Treble damages should only be awarded upon a showing of willfulness or  
25 maliciousness. (*Id.*) Vulcan has presented no facts to support the Club's alleged "willful and  
26 malicious" waste on the Azusa Property (the "Site"). Moreover, Vulcan's only claim for waste can  
27

---

28 <sup>1</sup> All further section references are to the California Code of Civil Procedure unless otherwise noted.

1 be that the Club operated as it was expected to operate: as a shooting range. It can not be alleged that  
2 the Club's operation of a shooting range, as contemplated by every lease executed on the Site,<sup>2</sup> was  
3 "willful" or "malicious" waste. Vulcan's claim for treble damages, therefore, should be stricken.

4 **C. Vulcan's Offsite Contamination Claims for Damages are Time-Barred**

5 The Complaint adds new allegations regarding *off-Site* contamination that were not included  
6 in the previous Federal Complaint. (See Request for Judicial Notice filed herewith at Exhibit A  
7 attached thereto). Vulcan's commingling of allegations has resulted in its tort causes of action being  
8 pled to include allegations regarding *both* on and off-Site damage and damage to the Site. As no  
9 offsite contamination allegations were included in Vulcan's Federal Complaint, the statutes of  
10 limitations for bringing these allegations could not, and were not, tolled by the federal action, and  
11 have therefore expired. They should therefore be stricken as improper.

12 Specifically, Vulcan adds allegations of offsite contamination to its claims for permanent  
13 nuisance, permanent trespass, and negligence. The allegations of offsite contamination for each of  
14 these causes of action are time barred.

---

15  
16 <sup>2</sup> See, e.g., 1947 Lease (attached as Exhibit A to Complaint) at p. 1: "The Club has been  
17 organized for the purpose of making available to its members and their families a location and  
18 facilities for target practice . . ." and p. 3: "The Club shall exercise every precaution in the  
19 operation of the target range."; 1950 Lease (attached as Exhibit B to Complaint) at p. 1: "The  
20 Club has been organized for the purpose of making available to its members and their families a  
21 location and facilities for target practice . . ." and p. 5: "The Club shall exercise every precaution  
22 in the operation of the target range."; 1958 Lease (attached as Exhibit C to Complaint) at p. 1:  
23 "The Club has been organized for the purpose of making available to its members and their  
24 families, (including junior Gun Club members) a location and facilities for target practice . . ."  
25 and p. 3: "The Club shall exercise every precaution in the operation of the target range."; 1961  
26 Lease (attached as Exhibit D to Complaint) at p. 1: "Tenant is organized for the purpose of  
27 teaching and fostering respect for, and safe operation of fire arms . . ." and p. 3 "Tenant shall use  
28 the Property only and exclusively for carrying on and operating safety training and target practice  
and closely related activities. In the operation of its target ranges, Tenant shall exercise every  
possible precaution."; 1970 Lease (attached as Exhibit E to Complaint) at p. 2: "Tenant shall use  
the property only as a Pistol, Rifle, Trap and Skeet Range and closely related purposes."; 1977  
Lease (attached as Exhibit F to Complaint) at p. 2: "Tenant shall use the property only as a Pistol,  
Rifle, Trap and Skeet Range and closely related purposes."; 1988 Lease (attached as Exhibit G to  
Complaint) at p. 5: "Tenant agrees that the Premises shall not be used for any purpose except as a  
pistol and rifle trap and skeet range."; and 1992 Lease (attached as Exhibit H to Complaint) at p.  
5: "Tenant agrees that the Premises shall not be used for any purpose except as a pistol, rifle and  
trap and skeet range."

1                   **1. Vulcan’s Offsite Contamination Allegations as to its Permanent Nuisance**  
2                   **Cause of Action are Time-Barred**

3                   Vulcan’s cause of action for permanent nuisance alleges that “Defendants have also created  
4 a nuisance by permitting bullets, bullet fragments, and other contaminants to traverse beyond the  
5 boundaries of the Azusa Property and onto neighboring property owned by Vulcan where they  
6 continue to reside to this day and are causing environmental contamination that requires abatement.”  
7 (Complaint at ¶ 67.) No corresponding allegation of bullets or other contaminants traveling off the  
8 Azusa property was made in Vulcan’s Federal Complaint. (Federal Complaint, Exhibit A to Request  
9 for Judicial Notice, at ¶¶89-93.)

10                  The statute of limitations for a permanent nuisance is three years after the creation of the  
11 permanent nuisance. (*KFC W., Inc. v. Meghrig*, (1994) 23 Cal. App. 4th 1167, 1180.) Vulcan’s  
12 Complaint states that the Club’s leasehold interest in the Site terminated around November 6, 2006,  
13 and the Club ceased club operations as of that date. (Complaint at ¶¶ 34, 39.) Although Vulcan  
14 contends the Club remained in the possession of the Site beyond November 6, 2006, Vulcan alleges  
15 that the Club did so “purportedly for the purpose of remediating the contamination caused by [the  
16 Club’s] operations.” (Complaint at ¶ 39.) Therefore, since the statute of limitations for Vulcan to  
17 bring a claim for permanent nuisance relative to alleged offsite contamination expired on November  
18 6, 2009. Thus, this Court should strike paragraph 67 from Vulcan’s Complaint as it is improper.

19                   **2. Vulcan’s Allegations of Offsite Contamination as to its Permanent**  
20                   **Trespass Cause of Action are Time-Barred**

21                  Vulcan’s cause of action for permanent trespass alleges the Club caused contamination to  
22 “remain in, or under the Azusa property and neighboring Vulcan property without Vulcan’s  
23 knowledge or consent.” (Complaint at ¶ 78.) Further, Vulcan contends that it is entitled to recover  
24 the “cost to repair and restore the Azusa Property and neighboring Vulcan property to proper  
25 condition . . . .” (Complaint at ¶ 79.) The language “and neighboring Vulcan property” is absent from  
26 the corresponding locations in the Federal Complaint. (See Exhibit A to Request for Judicial Notice  
27 at ¶¶ 101, 102.)

1 The statute of limitations for permanent trespass is three years, and it accrues and begins to  
2 run at the time of entry. (*Starrh & Starrh Cotton Growers v. Aera Energy LLC*, (2007) 153 Cal. App.  
3 4th 583; 592.) Vulcan argues the Club created a permanent nuisance by causing contamination to  
4 “remain in, or under the Azusa Property and neighboring Vulcan property without Vulcan’s  
5 knowledge or consent.” (Complaint at ¶ 78.) The Club ceased operations around November 2006,  
6 and the Complaint contains no facts or allegations that the Club caused any contamination on the Site  
7 after that date. Accordingly, the statute of limitations on Vulcan’s permanent trespass claim relative  
8 to any alleged offsite contamination expired in November 2009. Consequently, this Court should  
9 strike the language “and neighboring Vulcan property” from paragraphs 78 and 79 of the Complaint  
10 as they are improper.

11 **3. Vulcan’s Offsite Contamination Allegations as to its Negligence Cause of**  
12 **Action are Time-Barred**

13 Vulcan’s cause of action for negligence alleges that “Defendants further breached their duty  
14 of care by permitting bullets, bullet fragments, and other contaminants to traverse beyond the  
15 boundaries of the Azusa Property and onto neighboring property owned by Vulcan where they  
16 continue to reside to this day and are causing environmental contamination that requires abatement.”  
17 (Complaint at ¶ 82.) Again, like its Permanent Nuisance and Permanent Trespass claims, Vulcan  
18 presented no corresponding allegation of offsite contamination in its negligence claim in its Federal  
19 Complaint. (Exhibit A to Request for Judicial Notice at ¶¶ 103-108.)

20 “A negligence claim involving damage to real property is governed by a three-year limitations  
21 period ([C.C.P.]§ 338, subd. (b)), which commences to run when the plaintiff knows, or should have  
22 known, of the wrongful conduct at issue.” (*Angeles Chem. Co. v. Spencer & Jones*, (1996) 44 Cal.  
23 App. 4th 112, 119 (citation omitted).) Vulcan should have known of any of the alleged wrongful  
24 conduct shortly after the termination of the Club’s lease. And Vulcan admits that it, in fact, had  
25 discovered the alleged damages to the Site on July 2, 2005 (which was *before* the lease terminated)  
26 (Complaint at ¶ 35). Further, as Vulcan’s offsite contamination allegations relate to the alleged  
27 contamination of Vulcan’s own property, Vulcan was in a position to know of the contamination as  
28 it was allegedly occurring. Because the Club ceased operations in November 2006, therefore, the

1 statute of limitations on Vulcan's negligence claim relative to any alleged offsite contamination  
2 expired at latest in November 2009. This Court should, therefore, strike the final sentence of  
3 paragraph 82 from the Complaint as it is improper.

4 **4. Vulcan's Request for Costs to Repair Neighboring Properties Should be**  
5 **Stricken**

6 Vulcan prays for "costs to repair and restore the Azusa Property and neighboring properties  
7 to proper condition . . ." (Complaint at p. 20, ¶ 1.) But Vulcan's prayer for relief in the Federal  
8 Complaint contained no such request for costs related to neighboring properties. (Exhibit A to  
9 Request for Judicial Notice at p. 26, ¶ 1.) Because, as noted above, the related causes of action have  
10 expired, the language "and neighboring properties" should be stricken from the prayer for relief (page  
11 20, line 5) in Vulcan's Complaint as it is improper.

12 **D. Vulcan's Damages Claims for Old Leases are Time-Barred**

13 Vulcan is barred from seeking damages regarding contract claims accruing prior to September  
14 4, 2004, based on Code of Civil Procedure section 337 (stating a four year statute of limitation for  
15 claims on written contracts) to the date the federal action was filed: September 4, 2008. (Exhibit A  
16 to Request for Judicial Notice). "[A] cause of action for breach of contract accrues at the time of  
17 breach, which then starts the limitations period running." (*Bjorklund v. N. Am. Cos. for Life & Health*  
18 *Ins.*, 72 Fed. App. 550, 551 (9th Cir. 2003) (citation omitted).) Any breach that occurs regarding the  
19 condition of the Site occurs, at the latest, when the relevant lease expires. (*See Mortkowitz v. Texaco*,  
20 842 F. Supp. 1232, 1236 (N.D. Cal. 1994) (indicating that failure to return Site in a condition required  
21 by covenant occurs, and thus a cause of action accrues, when the relevant lease expires) (citation  
22 omitted).)

23 As the December 11, 1977 Lease expired at midnight on December 10, 1987, and no lease was  
24 in place for approximately two months thereafter (See Exhibit F to Complaint at p. 2; Exhibit G to  
25 Complaint at p. 1), any claim for breach of the Lease of 12/10/87 had to be brought, pursuant to  
26 section 337, by 12/10/91 (i.e., four years after the breach). As 12/10/91 occurred well before this  
27 action was filed, Vulcan is clearly barred from seeking relief regarding the Lease of 12/11/77, and,  
28

1 by obvious implication, any lease entered prior thereto.<sup>3</sup> The Court should, therefore, strike all  
2 allegations seeking relief based upon the leases beginning on December 11, 1977 or earlier.

3 The February 4, 1988 Lease states that it “contains the entire agreement of the parties hereto  
4 with respect to the matters covered hereby and no other agreement no other agreement . . . which is  
5 not contained herein shall be binding or valid.” (Exhibit H to Complaint at ¶ 37.) Thus, as the Lease  
6 of February 4, 1988 was not contained in the Lease of May 20, 1992, but the terms of the two leases  
7 overlapped,<sup>4</sup> the earlier lease of the two was extinguished upon execution of the latter (i.e., a novation  
8 occurred). (*See Airs Int’l, Inc. v. Perfect Scents Distrib., LTD*, 902 F. Supp. 1141, 1147-48 (N.D. Cal.  
9 1995) (citing Civ. Code § 1530) (further citations omitted).) Accordingly, since the termination of  
10 the February 4, 1988 Lease clearly occurred before the relevant cutoff date under section 337 (i.e.,  
11 September 4, 2004), Vulcan is also barred from seeking damages for a breach of that lease.

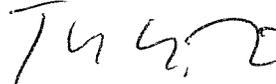
12 Vulcan therefore asks this Court strike all allegations seeking relief based upon the all leases  
13 other than the 1992 lease. Specifically, Vulcan asks the Court to strike paragraphs 9 through 29  
14 (including Exhibits A-G); the language “1947 Lease, 1950 Lease, 1958 Lease, 1961 Lease, 1970  
15 Lease, 1977 Lease, 1988 Lease” and “(collectively, the Leases)” from paragraph 54 of the Complaint;  
16 and the plural “-s” from “Leases” in paragraph 55 of the Complaint.

17 **III. CONCLUSION**

18 This Motion to Strike should be granted for the reasons stated herein.

19 Dated: January 26, 2012

MICHEL & ASSOCIATES, P.C.

20   
21 \_\_\_\_\_  
22 Thomas E. Maciejewski  
23 Attorney’s for Defendant San Gabriel Valley  
Gun Club

24 <sup>3</sup> Further, this exact same argument applies to any waste, nuisance, trespass, or  
25 negligence claim based on conduct occurring before 12/10/87: the only difference (which is not  
26 even relevant in this particular instance), is that the relevant period for statute of limitations  
27 calculations would have been three, not four years. Civ. Proc. Code § 338. Thus, Vulcan has no  
right to any state law claim arising on or before 12/10/87.

28 <sup>4</sup> See Exhibit G to Complaint at p. 1 (providing for a December 9, 1992 expiration of the  
1988 lease) and Exhibit H to Complaint at p.1 (providing for a May 20, 1992 start date for the  
1992 lease).

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA  
3 COUNTY OF LOS ANGELES

4 I, Christina Sanchez, am employed in the City of Long Beach, Los Angeles County,  
5 California. I am over the age eighteen (18) years and am not a party to the within action. My business  
6 address is 180 E. Ocean Boulevard, Suite 200, Long Beach, California 90802.

7 On January 26, 2012, I served the foregoing document(s) described as

8 **NOTICE OF DEFENDANT SAN GABRIEL VALLEY GUN CLUB MOTION TO STRIKE**  
9 **AND MOTION TO STRIKE TO PORTIONS OF PLAINTIFF'S COMPLAINT;**  
10 **MEMORANDUM IN SUPPORT THEREOF**

11 on the interested parties in this action by placing

12 [ ] the original

13 [X] a true and correct copy

14 thereof enclosed in sealed envelope(s) addressed as follows:

15 Kenneth A. Ehrlich

16 Paul A. Kroger

17 JEFFER, MANGELS, BUTLER & MITCHEL, LLP

18 1900 Avenue of the Stars, 7<sup>th</sup> Floor

19 Los Angeles, CA 90067

20 X (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and  
21 processing correspondence for mailing. Under the practice it would be deposited with the  
22 U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach,  
23 California, in the ordinary course of business. I am aware that on motion of the party served,  
24 service is presumed invalid if postal cancellation date is more than one day after date of  
25 deposit for mailing an affidavit.

26 Executed on January 26, 2012, at Long Beach, California.

27        (VIA OVERNIGHT MAIL) As follows: I am "readily familiar" with the firm's practice of  
28 collection and processing correspondence for overnight delivery by UPS/FED-EX. Under the  
practice it would be deposited with a facility regularly maintained by UPS/FED-EX for receipt  
on the same day in the ordinary course of business. Such envelope was sealed and placed for  
collection and delivery by UPS/FED-EX with delivery fees paid or provided for in accordance  
with ordinary business practices.

Executed on January 26, 2012, at Long Beach, California.

       (PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the  
addressee.

Executed on January 26, 2012, at Long Beach, California.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the  
foregoing is true and correct.

       (FEDERAL) I declare that I am employed in the office of the member of the bar of this court  
at whose direction the service was made.

27   
CHRISTINA SANCHEZ



Checking WF - 7133

40.00

L.A.S.C. - POMONA COURTS  
 POMONA COURTS  
 POMONA CA 91766  
 DATE PAID: 01/26/12 02:02:55 PM  
 RECEIPT #: POM468046034  
 CIT/CASE: K0062582 LEA/DEF#: 0310  
 PAYMENT: \$40.00  
 RECEIVED:  
 CHECK: 40.00  
 CASH:  
 CHANGE:  
 CARD: