C.D. Michel — SBN 144258
W. Lee Smith — SBN 196115
Scott M. Franklin — SBN 240254
MICHEL & ASSOCIATES, P.C.
180 East Ocean Boulevard, Suite 200
Long Beach, CA 90802
Telephone: (562) 216-4444
Facsimile: (562) 216-4445

Attorneys for Defendant San Gabriel Valley Gun Club

ORIGINAL FILED

MAR 01 2012

LOS ANGELES SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

EAST DISTRICT

BY FAX

CALMAT CO. dba VULCAN MATERIAL COMPANY, WESTERN DIVISION, a Delaware corporation; Plaintiff, vs. SAN GABRIEL VALLEY GUN CLUB, a non-profit California corporation; and DOES 1-1000, inclusive, Defendants.	CASE NO: KC062582J **DEFENDANT SAN GABRIEL VALLEY GUN CLUB'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO STRIKE PORTIONS OF COMPLAINT** ***Pursuant to CCP § 435*** Date: March 8, 2012 Time: 8:30 a.m. Dept.: J Action Filed: November 22, 2011 Trial Date: None

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Defendant San Gabriel Valley Gun Club ("Defendant" or the "Club") submits the following Reply to Plaintiff Calmat Co. dba Vulcan Materials Company, Western Division's ("Plaintiff" or "Vulcan") Opposition to Motion to Strike Portions of Plaintiff's Complaint.

C.D. Michel — SBN 144258
W. Lee Smith — SBN 196115
Scott M. Franklin — SBN 240254
MICHEL & ASSOCIATES, P.C.
180 East Ocean Boulevard, Suite 200
Long Beach, CA 90802
Telephone: (562) 216-4444
Facsimile: (562) 216-4445

Attorneys for Defendant San Gabriel Valley Gun Club

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

EAST DISTRICT

CALMAT CO. dba VULCAN MATERIAL COMPANY, WESTERN DIVISION, a Delaware corporation, Plaintiff, vs. SAN GABRIEL VALLEY GUN CLUB, a non-profit California corporation; and DOES 1-1000, inclusive, Defendants.	CASE NO: KC062582J **DEFENDANT SAN GABRIEL VALLEY GUN CLUB'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO STRIKE PORTIONS OF COMPLAINT** ***Pursuant to CCP § 435*** Date: March 8, 2012 Time: 8:30 a.m. Dept.: J Action Filed: November 22, 2011 Trial Date: None

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Defendant San Gabriel Valley Gun Club ("Defendant" or the "Club") submits the following Reply to Plaintiff Calmat Co. dba Vulcan Materials Company, Western Division's ("Plaintiff" or "Vulcan") Opposition to Motion to Strike Portions of Plaintiff's Complaint.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The facts pleaded in the Complaint on file herein show that Vulcan knowingly and repeatedly leased the Azusa Property to the Club for the express purpose of operating a shooting range. After over a half-century of silence, Vulcan is making claims under contracts and tort law theories that belie the terms of the relevant leases and California law. It is upon that background that the Club brought its Motion to Strike certain portions of Vulcan's Complaint. The Motion should be granted for the reasons stated in the Club's briefing.

II. ARGUMENT

A. Vulcan Cannot Support Its Claim for Treble Damages

Vulcan contends that its claim for treble damages is supported by allegations that waste resulted due the Club's "willful" conduct. (Opp. at pp. 3-4.) First, it is questionable if failure to complete a cleanup project due to lack of funds is "willful" conduct. Second, even assuming arguendo it is, wilfulness is not, in and of itself, sufficient to justify treble damages under Code of Civil Procedure section 732. Supreme Court authority in this state clearly shows that treble damages for waste are permitted "only when the waste was committed willfully *and* wantonly or maliciously." *Isom v. Rex Crude Oil Co.*, 140 Cal. 678, 680 (1903) (italics added).

"If the acts of waste were done under an honest claim of right, or as the result of an honest mistake as to the defendant's right, it is obvious that it would not be just to visit so severe a penalty upon him, and no strained construction of words should be allowed to have this effect." *Id.* Clearly, the facts pleaded in this action fail to allege the type of conduct that justifies a court exercising its discretion and issuing a judgment for "penal [e.g., treble] damages." *See Isom v. Book*, 142 Cal. 666, 667 (1904) (referring to the issuance of treble damages as "punishment of the defendants at the hands of the court").

Vulcan does not plead facts indicating the Club's alleged actions were done in bad faith, let alone "maliciously" or "wantonly." Vulcan's claim for treble damages is, therefore, untenable under *Isom v. Rex.* In fact, the Complaint plainly shows that: 1) the Club submitted environmental site assessments to Vulcan (Complaint, at p. 7, ¶ 38); 2) the Club gave Vulcan notice that "the

cleanup of the site ha[d] commenced" in early 2007 (*id.* at p. 8, ¶ 41); and 3) the Club "hired a lead reclamation contractor" (*id.* at ¶ 43). Thus, not only does the Complaint fail to allege the Club "refused" to clean up the property as Vulcan now states (Opp. at p. 4, ln. 3), it actually pleads facts showing that the Club *was attempting to* clean the property.

Because the facts pleaded in the Complaint actually refute the argument that the Club acted wantonly or maliciously with regard to Vulcan's waste allegations, the Complaint fails to plead facts that justify an exercise of judicial discretion resulting in a treble damages award. For that reason, Vulcan's treble damage allegations/prayer should be stricken without leave to amend. Leave to amend is not appropriate in this instance, considering that Vulcan has already conducted one full round of discovery in the federal action, and yet still cannot allege facts constituting wanton or malicious conduct.

B. The Relation Back Doctrine Does Not Apply

Vulcan contends that its permanent nuisance, permanent trespass, and negligence claims for damages related to offsite contamination are preserved by the "relation back doctrine." (Opp. at pp. 4-6.) Vulcan is mistaken. "The complaint to which a subsequently-filed complaint relates back must be in the same action; one complaint will not relate back to the complaint in another litigation even if between the same parties." Ann Taylor Schwing, *California Affirmative Defenses*, § 25:77 (2011 ed.) (citing *Mercury Cas. Co. v. State Bd. of Equal.*, 179 Cal. App.3d 34, 44 (2nd Dist.1986); *accord* Zerne P. Haning, et al., *California Practice Guide: Personal Injury* § 5:611.8 ("The 'relation back' doctrine does not apply where plaintiff files a completely new lawsuit ... even one based on the same operative facts. [*Hull v. Central Pathology Service Med. Clinic* (1994) 28 CA4th 1328, 1333, 34 CR2d 175, 179, fn. 4].") (omission in cited text).

As Vulcan admits, "[t]he relation back doctrine allows an *amended* complaint to relate back to the original complaint" if certain conditions are met. (Opposition, at p. 4, lns. 27-28) (italics added). As the Complaint on file clearly shows, it is not an amended complaint. (Complaint, p.1). Thus, the relation back doctrine has no application in this case.

1. *Dudley* Confuses a Tolling Issue with the Relation Back Doctrine

Vulcan cites *Dudley v. Dept. of Trans.*, 90 Cal.App.4th 255 (2001), and no other authority,

for the proposition that the relation back doctrine applies to "a state cause of action originally filed in federal court, and subsequently litigated in state court." (Opposition, at p. 5, lns. 2-6). The *Dudley* court, however, improperly referred to a *tolling* issue as a relation back issue, reflecting an error originating in defense briefing in *Dudley*.

In *Dudley*, the plaintiff's federal case was dismissed in March 1999, and she filed similar case in state court in April of 1999. *Dudley*, 90 Cal. App. 4th at 257-58. The defense briefing from *Dudley* provides the specifics of these two events: "The District Court granted Caltrans' Motion for Summary Judgment on March 25, 1999, . . . [t]he District Court declined to exercise supplemental jurisdiction[,] Dudley refiled her FEHA action in state court on April 21, 1999 . . . pursuant to 28 United States Code section 1367." *See Respondent's Brief*, 2001 WL 34145247 at *10).[1]

The *Dudley* defense briefing further stated that "[a]s long as Dudley refiled her FEHA action in state court within 30 days of the District Court's decision, the filing would relate back to the filing date of her federal action (28 United States Code section 1367.)[.]" *Id.* at *10-11. Section 1367, however, clearly relates to *tolling*, not relation back. "The period of limitations for any claim . . . voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be *tolled* while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period. 28 U.S.C. § 1367(d). Clearly, this error in the defense briefing was the origin of the *Dudley* court's comments on the issue of the relation back doctrine. Accordingly, because *Dudley* is a tolling case and not a relation back case, it is inapposite, meaning Vulcan has provided no authority that the relation back doctrine is applicable herein. Based on the foregoing, Vulcan's permanent nuisance, permanent trespass, and negligence claims for damages related to offsite contamination are not preserved by the "relation back doctrine" and should be stricken from the Complaint.

---

[1] The Club requests the Court take judicial notice of the fact that the defense statements quoted above were made as a part of the briefing in the *Dudley* appellate case pursuant to Evidence Code section 452(d),(f).

C. Vulcan's Claims for Damages as to Old Leases Are Time Barred

In opposing the Club's argument that leases preceding the 1992 Lease are time-barred, Vulcan contends that "[e]ach of the eight Leases referenced in the Complaint . . . are related to one another and function as extensions rather than independent leases for the purposes of calculating the appropriate statute of limitations." (Opposition at p. 6, lines 8-11.) Vulcan further contends that "Defendant operated under each Lease, beginning with the 1947 Lease until the execution of the next Lease and ending with the 1992 Lease" and that "[n]o time gaps exists in or between any of the Leases . . ."

Vulcan's Complaint itself alleges that "[f]rom approximately January 1947 to November 2006 . . . [Vulcan and the Club entered into] *a series* of written leases . . ." (Complaint at ¶ 7) (italics added.) This allegation refutes Vulcan's claim that each lease functions merely as an extension of previous leases.

Furthermore, Vulcan is incorrect as to its assertion that there are no time gaps between any of the leases. As noted in the Club's moving papers, the relevant leases show that "the December 11, 1977 Lease expired at midnight on December 10, 1987, and no lease was in place for approximately two months thereafter [February 4, 1988] . . ." (Motion to Strike at p. 5, lines 23-24 (citing to Exhibit F to Complaint at p. 2; Exhibit G to Complaint at p. 1).) Vulcan does not even attempt to refute this fact. As the expiration of a lease represents the outer limit of the date on which a breach of a lease may occur (*Morkowitz v. Texaco, Inc.*, 842 F. Supp. 1232, 1236 (N.D. Cal. 1994)), the statute of limitations for the 1977 Lease expired four years after the expiration of the lease, or on December 10, 1991. The gap between the 1977 Lease and the 1988 Lease alone is enough to bar any contract claims by Vulcan based on the 1977 Lease or earlier leases.

Just as Vulcan provides no evidence that there was not a gap between the 1977 and 1988 leases, Vulcan does not respond to the Club's argument that the integration clause of the 1992 Lease caused the 1988 Lease to be extinguished upon the execution of the 1992 Lease. To reiterate, the 1992 Lease states that it "contains the entire agreement of the parties hereto with respect to the matters covered hereby and no other agreement . . . which is not contained herein

shall be binding or valid." (Exhibit H to Complaint at ¶ 37).)[2] Thus, the 1988 Lease expired no later than the May 20, 1992 signing of the 1992 Lease. The statute of limitations for injuries arising from the 1988 Lease, therefore, expired on May 20, 1996 – long before Vulcan filed a complaint regarding the condition of the Azusa Property.

III. CONCLUSION

Based on the Club's arguments and Vulcan's failure to rebut them, the Club respectfully requests the Motion to Strike be granted in full.

Dated: March 1, 2012

MICHEL & ASSOCIATES, P.C.

Scott M. Franklin
Attorneys for Defendant San Gabriel Valley Gun Club

[2] The 1988 Lease includes an integration clause as well. (Exhibit H to Complaint at ¶ 37).

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

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

On March 1, 2012, I served the foregoing document(s) described as

DEFENDANT SAN GABRIEL VALLEY GUN CLUB'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO STRIKE PORTIONS OF COMPLAINT

Pursuant to CCP § 435

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

Kenneth A. Ehrlich
Paul A. Kroger
JEFFER, MANGELS, BUTLER & MITCHELL, LLP
1900 Avenue of the Stars, 7th Floor
Los Angeles, CA 90067

___ (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.
Executed on March 1, 2012, at Long Beach, California.

X (VIA OVERNIGHT MAIL As follows: I am "readily familiar" with the firm's practice of 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 March 1, 2012, at Long Beach, California.

___ (PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.
Executed on March 1, 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.

Christina Sanchez
CHRISTINA SANCHEZ