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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

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

Plaintiff,

v.

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

Defendants.

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

Counter-Claimant,

v.

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

Counter-Defendant.

CASE NO. EDCV08-1198 WHS (OPx)

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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

Pre-Trial Conf: none set
Trial: none set

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Plaintiff and Counter-Claimant Calmat Company dba Vulcan Materials Company, Western Division ("Vulcan") submits the following Reply Brief in Support of its Motion for Partial Summary Judgment against Defendant and Counterclaimant San Gabriel Valley Gun Club (the "Gun Club").

I. INTRODUCTION

Unable to raise any genuinely disputed issues, the Gun Club's Opposition focuses on irrelevant evidence and specious arguments. Nothing in the Gun Club's opposition papers raises a triable issue of fact. Therefore, the Court should be compelled to grant the Motion.

Having conceded that its breach of contract counterclaim based on Vulcan's depositing of mining tailings on the Property is barred by the statute of limitations, the Gun Club still focuses largely on whether Vulcan's conduct in depositing the materials was "proper". The Gun Club's arguments and evidence on this point have no relevance. If anything, these arguments relate to the amount of Vulcan's damages, which is not at issue in Vulcan's Motion. Regardless, the Gun Club's allegations do not raise a triable issue of fact.

In response to Vulcan's breach of contract claim, the Gun Club claims that the 1992 Lease (the "Lease") did not require the Gun Club to remove "Spent Ammunition"[1] because the Lease did not specifically include that requirement. However, the Lease affirmatively requires the Gun Club to remove "all rubbish and debris" and to return the Property to Vulcan in "good order and in a safe, sanitary condition" upon Lease termination. The basic rules of contract construction (and common sense) command that these obligations include the removal of "Spent Ammunition." Although the Gun Club argues that the Lease should have expressly

[1] The Lease does not define the term "Spent Ammunition". For purposes of this litigation, the Gun Club defines the term as "anything that comes out of a firearm during its normal operation at shooting range, i.e., bullets, shot, particulate matter, or casings" (Opp., p. 9, n 8).

included "Spent Ammunition" as part of the Gun Club's clean-up obligations, California law states just the opposite: that parties must expressly include *exceptions* or special definitions to ordinary terms if they do not intend for the ordinary definitions to apply.

The Gun Club's extrinsic evidence offered to show the parties' intentions regarding the Lease does not support the interpretation urged by the Gun Club. Further, even if the Gun Club's extrinsic evidence (which is almost entirely inadmissible) did support the Gun Club's putative facts, which it does not, the evidence is improper because it would lead to an unreasonable interpretation of the Lease and impermissibly add Lease terms.

Finally, the Gun Club fails to raise disputed facts regarding Vulcan's trespass, nuisance, and waste claims. The Gun Club argues that these claims fail because Vulcan allowed the Gun Club to operate a shooting range on the Property. Vulcan, however, only allowed the Gun Club to operate a shooting range ***on the express conditions that*** it remove "all rubbish and debris" and return the Property to Vulcan in "good order and in a safe, sanitary condition."

The Court should grant Vulcan's Motion in its entirety.

II. THE GUN CLUB'S DISCUSSION OF THE MINING TAILINGS BERM RAISES NO GENUINE DISPUTE OF MATERIAL FACT

The Gun Club allocates multiple pages of its Opposition to argue that Vulcan improperly built a mining tailings berm on the Property. (Opp., pp. 2-5, 20-21). The Gun Club's focus on this issue is inexplicable because it relates to the Gun Club's breach of contract counterclaim (whether Vulcan breached the Lease by building the mining tailings berm on the Property). However, *the Gun Club concedes that the statute of limitations bars its breach of contract counterclaim against Vulcan*. (*See* Section IV(A), below). To the extent this issue could potentially relate to the Gun Club's clean-up obligations under the Lease, it is only potentially relevant to the ***amount*** of Vulcan's damages, i.e., whether Vulcan is responsible for a portion of the

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remediation costs. Vulcan's Motion, however, seeks only a determination of liability, not damages.

Thus, the Court should disregard the Gun Club's entire discussion about whether Vulcan properly deposited the mining tailings on the Property as irrelevant for the purposes of this Motion.[2]

A. The Gun Club Has No Credible Evidence For Its Irrelevant Claim Regarding the Date of Vulcan's creation of the Mining Tailings Berm

The Gun Club asserts that, contrary to Vulcan's evidence, Vulcan began building the mining tailings berm before the Lease went into effect on May 20, 1992.[3] The Gun Club relies to two pieces of evidence in alleged support of this proposition: (1) a December 5, 1991 internal Vulcan memo[4]; and (2) aerial photographs of the Property from 1987 and 1992. (Opp., p. 2). This evidence does not reflect the date when Vulcan began building the berm. The December 5, 1991 memo is inadmissible hearsay and includes only a vague reference to a "waste pile" on the rifle range.[5] (Franklin Decl., Ex. P). The reference in that memo to the "stockpile" states, "reserve stockpile area in back of pistol/rifle range," demonstrating that the materials had not yet been placed in that area. *Id.* The 1987 photograph only shows that the mining tailings berm had ***not*** yet been created at that time. (Franklin Decl., Exs. U, V). The

[2] Although irrelevant to the Motion, Vulcan addresses the Gun Club's arguments regarding the mining tailings berm in Sections (A)-(C), below.

[3] Vulcan is compelled to address the Gun Club's improper and clearly incorrect statement that Vulcan attempts to mislead the Court on this issue. (Opp., pp. 2-3). Vulcan's statements in its Motion that the berm was created in "the early or mid 1990's" and that "the exact date of the installation or creation of the berm is unclear" are entirely consistent with the evidence submitted and are in no way misleading.

[4] The Opposition incorrectly states that the memo is dated December 20, 1991.

[5] The reference to the "waste pile" could have related to the rock dust that the *Gun Club* requested be placed on other portions of the Property. (Franklin Decl., Ex. L (Phillips depo.) at 69:22-71:19).

alleged "1992" photograph is undated and no testimony explains what it shows or when the photo was allegedly taken.[6] (Franklin Decl., Ex. W). The attached "Quote" for a "digital scan from 1/13/92 LA historical negative" does not establish the date when the photograph was taken.[7] *Id.* The alleged 1992 photograph and the "Quote," although included as a single exhibit, are actually two separate documents that were not transmitted or created together. *Id.* Clearly, they lack foundation and are inadmissible.

Nevertheless, regardless of ***when*** Vulcan began building the berm, or whether it was proper under the Lease, the Gun Club consented to it by its conduct in facilitating its construction and not objecting to it. *See*, SUF 48-50; Motion, Section IV(C)(2).

B. Vulcan's Purpose For Building the Mining Tailings Berm Does Not Relate to the Parties' Claims

The Gun Club's discussion about whether the mining tailings berm was created for safety reasons is also misplaced, irrelevant, and unnecessary. (Opp., p. 4-5). The reasons ***why*** Vulcan deposited the mining tailings on the Property do not change the facts that: 1) Vulcan was permitted to do so under the terms of the Lease, and 2) the Gun Club consented to it. (SUF 37, 48-50). Furthermore, Vulcan's contractual right to deposit the materials on the Property was not predicated on doing it for safety purposes only. (SUF 37).

C. The Gun Club Fails to Dispute That It Consented to the Mining Tailings Berm

Vulcan submitted ample evidence that the Gun Club consented to Vulcan's deposits of mining tailings on the Property. The Gun Club does not dispute that

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[6] The alleged 1992 photograph was produced by the Gun Club after fact discovery closed, and no witness authenticated it or testified about when the photo was taken.

[7] The "Quote" document is inadmissible hearsay. *See*, Evidentiary Objections.

Paragraph 35 of the Lease ***allowed*** Vulcan to deposit the mining tailings, or that the mining tailings were deposited in the location specified under the Lease. Gun Club's Response to Vulcan's SUF ("Response to SUF") Nos. 37, 45. Nor does the Gun Club dispute that it facilitated Vulcan's deposits of the mining tailings by arranging with Vulcan to deposit the materials when the Gun Club was closed to avoid disturbing the club's operations and for added safety. (Response to SUF No. 50).

The Gun Club attempts to dispute this issue on the sole basis that a Gun Club executive, Rick Phillips, verbally raised concerns about the berm "shortly after" Vulcan began building it. (Opp., p. 5; Franklin Decl., Ex. M at 59:11-19). Notably, Phillips himself testified that no one from the Gun Club objected to Vulcan's deposits of the mining tailings. (Kroeger Decl., M at 79:22-80:4). However, even if Phillips did express concerns about the berm when Vulcan ***first*** deposited the material, to which he did NOT testify, no one from the Gun Club raised any other concerns or objections during the following ***several years*** that Vulcan deposited the material. (Franklin, Ex. M, p. 61:11-16.). In fact, former Gun Club President Herb Bock testified that no one expressed their concerns about the berm because the Gun Club "assumed [Vulcan was] our landlord and they can do what they want to do." (Kroeger Decl., Ex. P, 87:19-88:18).[8] The Gun Club's failure to forbid Vulcan's conduct, which occurred over several years, amounts to consent. *Zellers v. State of California*, 134 Cal.App.2d 270 (1955) (complaining party consented to conduct where she "knew what was going on, and made no objection although she could have forbidden and stopped it at any time."); *see also, Leiter v. Eltinge*, 246 Cal.App.2d

[8] Bock testified that someone "voiced concern" to Vulcan "about how much property" would be affected by the berm because the Gun Club "wanted to keep a minimum a hundred meters on the rifle side, on the rifle range." He further testified that, Vulcan ***complied*** with the Gun Club's request "not to dump [material] beyond the hundred meters." (Kroeger Decl., Ex. P at 79:8-20). This is consistent with Phillips' testimony that, the Gun Club's only concerns about the mining tailings related to "how close the material was placed to the 100 yard line." (Kroeger Decl., Ex. M at 182:8-22).

1 306, 317-18 (1966) (waiver occurred where plaintiff failed to timely object to
2 breach).

3 **III. THE GUN CLUB FAILS TO RAISE A GENUINE DISPUTE**
4 **REGARDING VULCAN'S BREACH OF CONTRACT CLAIM**

5 **A. The Gun Club's Lease Interpretation is Unreasonable**

6 The interpretation of a contract "must be fair and reasonable, not leading to
7 absurd conclusions." *Transamerica Ins. Co. v. Sayble*, 193 Cal.App.3d 1562, 1566
8 (1987). "When a dispute arises over the meaning of contract language, the first
9 question to be decided is whether the language is 'reasonably susceptible' to the
10 interpretation urged by the party. If it is not, the case is over." *Southern Cal. Edison*
11 *Co. v. Sup. Ct.*, 37 Cal.App.4th 839, 847-848, (1995), *citing Consolidated World*
12 *Investments, Inc. v. Lido Preferred, Ltd.*, 9 Cal.App.4th 373, 379 (1992). Only if "the
13 court decides the language [of a contract] is reasonably susceptible to the
14 interpretation urged, [should] the court move[] to the second question: what did the
15 parties intend the language to mean?" *Id.*

16 The Gun Club urges the Court to adopt a wholly unreasonable interpretation of
17 the Lease by arguing that the Lease terms do not require it to remove bullet fragments
18 and other "Spent Ammunition" from the Property.

19 **1. Contrary to the Gun Club's Twisted Logic, The Phrase "All**
20 **Rubbish and Debris" Includes Bullet Fragments and "Spent**
21 **Ammunition"**

22 The Court must interpret the phrase "all rubbish and debris" in Paragraph 10 of
23 the Lease according to its ordinary and popular sense. Cal. Civil Code § 1644 ("The
24 words of a contract are to be understood in their ordinary and popular sense, . . .
25 unless used by the parties in a technical sense, or unless a special meaning is given to
26 them by usage, in which case the latter must be followed."). When courts interpret a
27 contractual term, "[the contract's] language must control and not a gratuitous
28 interpretation thereof. The common or usual meaning will be ascribed to words used

in a contract unless the context or the circumstances indicate that in a particular case a special meaning should be attached to them." *Reliance Life Ins. Co. of Pittsburgh v. Jaffe*, 121 Cal.App.2d 241, 244-45 (1953) (finding that the ordinary meaning of the word "beneficiary" applied, and "[i]f any other type of beneficiary had been intended, it would have been incumbent upon the parties involved to make the distinction in the instrument.").

The Gun Club contends that Court should interpret the terms "rubbish" and "debris" to exclude bullet fragments and "Spent Ammunition" (as defined by the Gun Club) because the Lease allowed the Gun Club to operate as a shooting range. (Opp., pp. 15-16).[9] Nothing in the Lease (or elsewhere) indicates that a special definition should apply to the terms "rubbish and debris." The Merriam-Webster Dictionary definition of "debris" is "the remains of something broken down or destroyed." The Merriam-Webster Dictionary defines "rubbish" as: "useless waste or rejected matter."[10] Indeed, the Gun Club's own definition of "Spent Ammunition," i.e., "anything that comes out of a firearm during its normal operation at shooting range, i.e., bullets, shot, particulate matter, or casings" (Opp., fn 8) is consistent with these dictionary definitions.

The Gun Club's argument that bullet fragments are not "rubbish" or "debris" because "used lead-based projectiles are recyclable and have value" (Opp., p. 16) is absurd. The Gun Club does not explain why recyclable bullet fragments would not at least qualify as "debris" under the ordinary definition of that term. In any event, the

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[9] The Gun Club's contention that the Lease does not include the term "Spent Ammunition" somehow relieves it of its duty to remove it (Opp. p. 19) is misleading. That defined term was created by the Gun Club for the purposes of this litigation. It has no legal significance. On the other hand, the parties certainly would have excluded "Spent Ammunition" from the Gun Club's clean-up obligations if the parties so intended.

[10] These definitions are almost identical to the definitions in other prevailing dictionaries.

Gun Club's clean up responsibilities are not limited to the recyclable bullet fragments. It must also remove all other debris that came from firearms.

Indeed, the Lease requires the removal of "***all*** rubbish and debris." (SUF 13) (emphasis added). Courts interpret the word "all" to mean "completely, wholly, the whole amount, quantity or number." *Stewart Title Co. v. Herbert*, 6 Cal.App.3d 957, 962 (1970) (interpreting the ordinary meaning of the word "all"). Courts will not interpret the word "all" to include any "exception or exclusion not specified." *Id.* Here, the Lease does not specify any exceptions to the phrase "all rubbish and debris." The plain meaning of the word "all" therefore applies.

Notably, and contrary to the Gun Club's suggested interpretation, the Lease *expressly limits* some of Vulcan's contractual rights. For example, in Paragraph 9, *at the Gun Club's express request*, Vulcan agreed to expressly limit its contractual right to "establish reasonable rules and regulations regarding [the Gun Club's] permitted use of the Premises." The parties excluded from this provision, any "rules or regulations regarding the type or size of ammunition or shot." (Linton Decl., Ex. H, ¶ 9). Likewise, the parties expressly excluded "ammunition, propellant powder, normal gun cleaning solvents, diesel fuel in safety cans, and fuel in vehicle tanks," from the Gun Club's obligations regarding the disposal of hazardous waste on the Property. *Id.* These terms were limited in this manner because the Gun Club "didn't want [Vulcan] to dictate what type of ammunition [it] could use." (Franklin Decl., Ex. B (Bock depo.) at 52:22-56:1, Ex. HH at p. 2).

Clearly, if the Gun Club intended to limit the meaning of the phrase "all rubbish and debris," it would have also included an express exclusion to that obligation. *Stewart Title*, 6 Cal.App.3d at 962 (contractual terms must be interpreted "in light of the remaining features" of the contract). Neither the facts nor the law supports the Gun Club's position.

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2. The Gun Club Could Not Turn Over the Property in a "Good" "Safe" and "Sanitary" Condition Without First Removing the "Spent Ammunition"

The Gun Club also argues that its obligation to return the Property in "good order and in a safe, sanitary condition" does NOT include the obligation to remove the "Spent Ammunition." (Opp., p. 17). This position is nonsense. No reasonable trier of fact could find that the Property can be both riddled with hundreds of thousands of lead bullets and be in "good order and in a safe, sanitary condition." The Lease cannot reasonably be susceptible to the interpretation urged by the Gun Club. *Southern Cal. Edison*, 37 Cal.App.4th at 847-848.

The Gun Club's contention that "the question [for the Court] is whether, objectively, the Property was returned in 'good order and in a safe, sanitary condition' *for a shooting range*," contradicts the plain language of the Lease, which provides no such limitation.[11] This contention also fails to raise a genuine issue of fact because the Gun Club offers no evidence that it returned the Property in "good order and in a safe, sanitary condition", even "for a shooting range."

The fact that Vulcan leased the Property to the Gun Club to operate a shooting range does not absolve the Gun Club of its clean-up obligations. Vulcan only consented to the Gun Club's use of the Property as a shooting range ***on the conditions specified in the Lease***, including the conditions that the Gun Club return the Property to a good, safe, and sanitary condition and remove all rubbish and debris when the Lease was terminated. Thus, this argument must also fail.

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[11] *Wu v. Interstate Consol. Indus.*, 226 Cal.App.3d 1511, 1514-15 (1991) does not support the Gun Club's argument. *Wu* involves a dispute regarding meaning of "fair market rental value," and whether that term "means a rent based upon the potential highest and best use of the premises or upon the purpose for which it has been rented." *Id.* at 1514. Given that the premises was "specifically defined" in the lease as a theater, the court interpreted the "fair market rental value" for the purposes of that tenant to mean its rental value as a theater. *Id.* at 1515.

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B. The Gun Club's Extrinsic Evidence Is Improper and Does Not Support Its Interpretation of the Lease

1. Parol Evidence May Not Be Offered to Interpret an Unambiguous Agreement, to Support an Unreasonable Interpretation, or to Add Contract Terms

As the Lease unambiguously requires the Gun Club to remove its "Spent Ammunition," the Gun Club cannot resort to extrinsic evidence for a Lease interpretation favorable to it. *Hicks v. Whelan Drug Co.*, 131 Cal.App.2d 110, 114 (1955) (trial court properly declined to consider extrinsic evidence to interpret clear and explicit terms of lease). "Courts will not strain to create an ambiguity where none exists." *Waller v. Truck Ins. Ex., Inc.*, 11 Cal.4th 1, 18-19 (1995).

Parol evidence may not be used to support an unreasonable interpretation or contradict the terms of a contract. *Wagner v. Columbia Pictures Industries, Inc.,* 146 Cal.App.4th 586, 590, 592 (2007); *Southern Cal. Edison*, 37 Cal.App.4th at 847-848. Even if the Court does find that extrinsic evidence may be offered to interpret the Lease, the Gun Club's extrinsic evidence is nonetheless improper because it is offered to: (1) support an unreasonable interpretation of the Lease; and (2) contradict the terms to the Lease.[12]

2. The Gun Club's Extrinsic Evidence Does Not Raise any Disputed Issues

The Gun Club's parol evidence does not remotely support its interpretation of the Lease or create disputed issues of material facts.

The Gun Club attempts to rely on extrinsic evidence regarding the parties' "prior contractual relationship." (Opp. p. 19). The Gun Club argues that the following putative "facts" support its position that it is not required to remove its

[12] Interestingly, the Gun Club argues both that Vulcan cannot rely on extrinsic evidence to interpret the Lease ***and*** that the Gun Club can rely on extrinsic evidence for the same purpose. (Opp., p. 18)

"Spent Ammunition" from the Property under the Lease: (1) from 1947 to 2006, Vulcan believed that the Gun Club was making no attempts to clean the Spent Ammunition on the Property; (2) prior to 2004, Vulcan did not contact the Gun Club about remediating the Spent Ammunition; and (3) Vulcan failed to file suit during certain periods of time when there was no operative lease. The Court should not consider these "facts" because the Gun Club's supporting evidence does not in any way indicate that the parties intended to exclude "Spent Ammunition" from its clean-up obligations.[13] In addition, none of these purported "facts" relate to or in any way undermine Vulcan's breach of contract claim. Vulcan bases its breach of contract claim on the Gun Club's failure to uphold its obligations upon returning the Property to Vulcan after the Lease was terminated. The Gun Club's claimed extrinsic evidence relates to alleged occurrences prior to Lease termination that do not in any way relate to the Gun Club's termination obligations.

The Gun Club's extrinsic evidence regarding "negotiations of the Lease" is also improper. The Gun Club has not submitted any affirmative evidence showing the parties' intentions during the Lease negotiations. As the Gun Club's evidence shows, none of the relevant witnesses could even recall the Lease negotiations. The Gun Club, however, argues that the *absence* of a reference to "Spent Ammunition" in the parties' Lease negotiations somehow shows that the parties did not intend to include it as part of its clean-up obligations. This is nonsense and incorrect because the negotiations submitted by the Gun Club do not constitute the complete universe of the parties' Lease negotiations; they are only those negotiations that were "located by the Club." (Opp., p, 20).

Significantly, none of the Gun Club's evidence supports its position that the parties meant to exclude "Spent Ammunition" from the Gun Club's obligations.

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[13] The evidence offered for these facts does not support them. *See* Vulcan's Response to the Gun Club's Additional Facts.

Furthermore, the December 5, 1991 Vulcan internal memo that the Gun Club relies upon (Opp. p. 18; Gun Club's Additional Fact ("AF") 31) actually supports Vulcan's position that it was concerned about the removal of the lead bullets on the Property, and demonstrates that the parties *intended* to impose clean-up obligations on the Gun Club at part of the Lease. (AF 31; Franklin Decl., Ex. AA).[14]

Finally, the Court should not consider any of the Gun Club's extrinsic evidence regarding the mining tailing berm. (Opp., pp. 20-21). This evidence does not support the Gun Club's position that Vulcan did not intend for the Gun Club to remove its "Spent Ammunition." The evidence also contradicts Paragraph 35 of the Lease, which unequivocally allowed Vulcan to deposit the materials on the Property, and the Gun Club chose not to include any express provision requiring Vulcan to be responsible for remediating that portion of the Property. (SUF 37, Linton Decl., Ex H at ¶ 35, Ex. B thereto).

3. <u>Armato's Testimony is Relevant and Admissible</u>

Vulcan's reliance on the testimony of John Armato concerning the Gun Club's understanding of its clean-up obligations under the Lease is proper and appropriate. (Opp., p. 6.) Armato's testimony that the Gun Club believed it had the obligation to return the Property to a "pristine" condition is offered to show the Gun Club's understanding of the Lease terms, and not to change or contradict them.[15] *Southern California Edison v. Superior Court*, 37 Cal.App.4th 839, 851 (1995) (a parties' interpretation of a contract, evidenced by his words or acts, can be used against him by the other party). Vulcan does not insist on "pristine" post-clean up

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[14] The other two 12/5/91 memos cited in support of AF 31 (Franklin Decl., Exs. P, Z) make only general references to the "lead" or "bullet" "problem" at the Property and similarly say nothing about the parties' intentions to exclude "Spent Ammunition" from the Gun Club's clean-up obligations.

[15] There is no substantive difference between returning the Property in a "pristine" condition and the Lease's requirement that the Gun Club return the Property to a "safe, sanitary condition".

condition; only that which is required by the Lease. Armato's testimony is further evidence that the Gun Club's interpretation of the Lease now is inconsistent with its pre-litigation understanding of its obligations. *Id.*

Further, it makes no difference that Armato did not himself negotiate the Lease. (Opp., p. 7). Armato's testimony illustrates the understanding of the Gun Club's Board of Directors on the Gun Club's clean-up obligation -- the very same Board of Directors that negotiated and approved of the Lease. (Kroeger Decl., Ex. L at 132:9-133:6).

Even if the Court somehow disregards Armato's testimony[16], the unambiguous Lease terms speak for themselves. No extrinsic evidence is necessary to explain the indisputable meaning of the Lease terms.

C. Both Parties Negotiated the Lease; Therefore, Any Uncertainty Cannot Be Construed Against Vulcan

The Gun Club's argument that the Lease should be interpreted against Vulcan is legally and factually incorrect. Contract terms may be interpreted against the drafting party only when an ambiguity exists, which is not the case here. *Orozco v. Clark*, 705 F.Supp.2d 1158, 1168 (C.D. Cal. 2010) (rule that contracts be interpreted against the party causing the ambiguity applies ***only*** after (1) the court determines that the contact cannot be interpreted by looking at the plain meaning of the agreement's language; ***and*** (2) the agreement is still ambiguous after the court looks to the objectively reasonable expectations of the promise).

Even if the Lease did contain ambiguities (which Vulcan contests), this rule of construction (Cal. Civil Code § 1654) still does not apply because the Gun Club's evidence does not establish that *Vulcan's* attorney created the purported ambiguity. Vulcan's attorney did not recall drafting the Lease, and the testimony submitted by the Gun Club relates only to the preparation of the "first draft" of the Lease. The

[16] No legal reason exists to exclude Mr. Armato's informative testimony.

clean-up obligations at issue in this Motion (Paragraphs 9-10 of the Lease) were also contained in the **1988 lease**. Linton Decl., Ex. G at Paragraphs 9-10. No evidence suggests that Vulcan's counsel prepared any portion of that lease.

Further, any ambiguities are not construed against the drafter where both parties actively participated in the negotiations of the contract and both parties were represented by legal counsel. *Dunne and Gaston v. Keltner*, 50 Cal.App.3d 560 (1975) (where "when an agreement is arrived at by negotiating, the 'preparer' principle should not be applied against either party," citing *Indenco, Inc. v. Evans*, 201 Cal.App.2d 369, 375 (1962)). The correspondence submitted by the Gun Club (to the extent admissible) demonstrates that both parties' attorneys actively negotiated and drafted the Lease terms. (Franklin Decl., Exs. JJ, HH). Contrary to the Gun Club's position, *Mayhew v. Benninghoff*, 53 Cal.App.4th 1365 (1997) has no application here because, unlike this case, *Mayhew* involved an ambiguous legal retainer agreement drafted by an attorney, who attempted to construe it against the client, and the client was not represented by counsel in the formation of the agreement.

D. Vulcan's Breach of Contract Claim is Not Time-Barred

The Gun Club asserts that the Lease expired in 2002 because the First Amendment to the Lease ("First Amendment") was actually a "new contract," and not an amendment. The terms of the First Amendment do not support this argument. The First Amendment states the parties' intentions, that: "[t]he parties desire to amend the Lease. . . ". Linton Decl., Ex. I. The First Amendment also states, "all the terms and conditions of the [1992] Lease shall remain in full force and effect." *Id.* When Vulcan ultimately terminated the Lease in May 2005, it specifically referenced the termination of the "Lease Agreement dated May 20, 1992" and the First Amendment (Linton Decl., Ex. J).

Nonetheless, whether Vulcan's claim is brought under the Lease or the First Amendment, both of those instruments imposed the same clean-up obligations

on the Gun Club. (Linton Decl., Exs. H, I). Those obligations arose when the Gun Club returned the Property to Vulcan. *Mortkowitz v. Texaco, Inc.*, 842 F.Supp. 1232, 1236 (N.D. Cal. 1994) (relied upon by the Gun Club, and stating that, "the alleged breach [for failing to restore the premises] would have occurred when [the] lease expired."). Since the Gun Club returned the Property to Vulcan in November 2006, that is when Vulcan's breach of contract claim accrued. Accordingly, the Vulcan's breach of contract claims undeniably fall within the four-year limitation period.

IV. THE GUN CLUB RAISES NO DISPUTED ISSUES REGARDING ITS BREACH OF CONTRACT COUNTERCLAIM

The Gun Club's Eighth Counterclaim for Breach of Contract is based on allegations that Vulcan: (1) placed mining tailing on the Property; and (2) prevented the Gun Club's contractor, Fred Wooldridge, from perform "remediation" work on the Property. Counterclaim ¶¶ 71-79. As discussed in Vulcan's Motion, these two alleged breaches fail as a matter of law for different reasons.

A. The Gun Club Concedes that Its Counterclaim Regarding the Mining Tailings Berm is Time-Barred

In its Motion, Vulcan argued the Gun Club's claim that Vulcan breached the Lease by depositing the mining tailings on the Property, is barred by the four-year statute of limitations. *See* Motion, Section IV(C)(1). The Gun Club does not dispute -- or even address -- this argument in its Opposition. Therefore, this Counterclaim fails as a matter of law. *See, e.g.*, *Ardente, Inc. v. Shanley*, 2010 U.S. Dist. LEXIS 11674, at *20 (N.D. Cal. Feb. 10, 2010) ("Plaintiff fails to respond to this argument and therefore concedes it through silence.")

B. The Gun Club Failed to Dispute That Vulcan Properly Precluded Wooldridge From Performing Services on the Property

The Gun Club does not dispute that: (1) the Lease was terminated as of November 2006; and (2) the Gun Club attempted to hire Wooldridge after the Lease was terminated to remove and recycle bullet fragments from the Property. (Response

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to SUF 25-26). The Gun Club argues that it had the right to hire Wooldridge to perform recycling work at the Property after the Lease was terminated because the Gun Club was a "holdover" tenant at the time. The Court must reject this unsupported argument.

The Gun Club relies on Paragraph 20 of the Lease (Opp., p. 21; AF 41), which states:

> Should Tenant hold over or continue in possession of the Premises after the term hereof, ***with the consent of Landlord thereto***, either expressed or implied, such holding over shall be a tenancy from month to month subject to all the terms of this Lease pertaining to the obligations of Tenant.

Linton Decl., Ex. H at ¶ 20 (emphasis added). The November 9, 2006 letter submitted by the Gun Club establishes that Vulcan **did not consent** to the Gun Club's holdover tenancy. That letter states, in pertinent part:

> "We appreciate learning [the Gun Club's] intentions regarding the required clean up and holdover tenancy. ***Before [Vulcan] can agree to any such arrangements***, various points must be clarified and certain remediation standards and protocols must be implemented."

(Franklin Decl., Ex. KK; AF 41) (emphasis added). The November 9, 2006 letter lists three (non-exhaustive) conditions that Vulcan required the Gun Club to perform before consenting to a holdover tenancy. These conditions included the Gun Club's complete remediation of the Property. *Id.* No evidence demonstrates that the Gun Club complied with any of the requirements listed in the November 2006 letter, or that Vulcan ultimately consented to a holdover tenancy. Further, Paragraph 20 of the Lease states that a holdover tenancy "shall be subject to all the terms of this Lease pertaining to the obligations of Tenant." No evidence suggests that the Gun Club complied with any of its obligations under the Lease during the purported holdover tenancy, including paying the monthly rent. This argument has no merit.

The Gun Club's argument (Opp., p. 8) that Vulcan failed to offer evidence that Wooldridge was not properly licensed or insured ignores Wooldridge's testimony that he was not licensed in California. That Wooldridge was not ***required*** to be licensed

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for his work (a fact that Vulcan does not concede), does not mean Vulcan was unjustified in rejecting his work proposal for that reason. Moreover, the Gun Club's fails to dispute that Vulcan was justified in precluding Wooldridge from performing his recycling work because it was not within the scope of what Vulcan had requested. (SUF 28, 29). Because the Gun Club was not even a tenant at the time, Vulcan had the right to exclude anyone from the Property. *See* Motion, Section IV(C)(1).

The Gun Club's attempts to blame Vulcan for "enlarging" its potential liability by precluding Wooldridge's work through a one-page excerpt from the 103-page EPA Best Management Practices for Lead at Outdoor Shooting Ranges ("EPA Best Management Practices"). (Opp., p. 22, AF 42). The EPA Best Management Practices discusses the serious environmental risks created by outdoor shooting ranges and only supports Vulcan's position in this case. No evidence even implies that Wooldridge's proposed work would have complied with the EPA's "best practices." Further, this argument relates only to the amount of Vulcan's recoverable damages, which is not at issue in this Motion.

Finally, the Court should discard the Gun Club's claim that Vulcan's offset argument is premature. Vulcan seeks a determination that, if it is found liable for breaching the Lease, which it contests, any contract damages are fully consumed by the contract damages owed by the Gun Club. The Court can properly decide this issue now because the Gun Club's alleged contract damages ***must*** be less than Vulcan's contract damages. Now that the Gun Club has conceded that its breach of contract counterclaim based on the mining tailings berm is time-barred, the only contract damages at issue is the $15,000 deposit the Gun Club allegedly paid to Wooldridge. Counterclaim ¶ 77. Thus, the Gun Club's purported damages are indisputably encompassed by the amount the Gun Club owes for cleaning up and remediating the remainder of the Property.

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V. THE GUN CLUB FAILS TO RAISE A TRIABLE ISSUE REGARDING VULCAN'S NUISANCE, TRESPASS, AND WASTE CLAIMS

A. The Gun Club Failed to Dispute That the Property Is Unusable As a Result of its Conduct

1. Anderson's Declaration Regarding the Condition of the Property Remains Competent and Relevant

The Gun Club argues (without authority) that Vulcan cannot rely on the Anderson Declaration to show that the Property is not currently usable. The Anderson Declaration is based on personal knowledge, experience, and most of all, common sense.

In fact, as Vulcan's Director of Environmental Management, Regulatory Affairs & Sustainable Development, Anderson is the single best person to testify regarding Vulcan's ability to use or re-lease the Property. In his declaration, Anderson properly lays the foundation for his statement that, "[d]ue to the current condition of the Property, Vulcan is unable to lease the Property to another tenant, and it will not be able to lease the Property until the Gun Club's debris has been cleaned and the Property has been remediated." (Anderson Decl., ¶ 10). This statement is based on (1) Anderson's background as a geologist and environmental consultant; (2) his "several" inspections of the Property; and (3) his observations that the Gun Club deposited "hazardous substances" throughout the Property. (Anderson Decl., ¶¶ 1-9).

Anderson's statement that the Property is not currently usable is also consistent with the Gun Club's own expert's testimony that, "the vast majority of the [Property] is, in fact, contaminated with lead." (Kroeger Decl., Ex. S, at 139:22-141:25). It belies common sense that a property riddled with hazardous waste can be currently leased to a third party.

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2. The Gun Club Offers No Evidence To Contradict the Anderson Declaration

The Gun Club argues that the Property is in fact usable because Vulcan continues to use a portion of it for a stockpile. (Opp., p. 9). This has no bearing on whether the Gun Club's "Spent Ammunition" caused damage to the Property and diminished its value. The Gun Club's suggestion that Vulcan could lease the "blacktopped portion" of the Property is unsupported by any evidence, and that would nevertheless be impractical given that the remainder of the Property is contaminated with lead and other hazardous materials.

B. Vulcan Is Entitled to Summary Judgment on its Nuisance Claim

The Gun Club argues that it cannot be held liable for nuisance because Vulcan consented to its use of the Property for the purposes of operating a gun range. As shown by the evidence, Vulcan only consented to the Gun Club's use of the Property ***on the conditions set forth in the Lease***, including the condition that the Gun Club return the Property to a good, safe, and sanitary condition and remove all rubbish and debris when the Lease was terminated. (Linton Decl., Ex. H at ¶¶ 9-10).

According to *Mangini v. Aerojet-General Corp.*, 230 Cal.App.3d 1125 (1991), which the Gun Club relies upon for its this argument, a lessee may assert a defense of consent against a nuisance claim only where the tenant's "use of the property was lawful and was authorized by the lease." *Id.* (emphasis added). Because the Gun Club's conduct in failing to remediate the Property was ***not*** authorized by the Lease, its consent argument must fail.

C. The Court Should Grant Vulcan Summary Judgment on its Trespass Claims

The Gun Club challenges Vulcan's trespass claim only on the grounds that the claim is not based on tortious conduct. (Opp., p. 23). Indeed, "[a] trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor . . . placed on the land." *Mangini*, 230 Cal.App.3d at 1141. Although

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the Gun Club relies on *Newhall Land & Farming Co. v. Sup, Ct.*, 19 Cal.App.4th 334 (1993), that case *supports* the Vulcan's position that failing to remove hazardous waste on a property constitutes a trespass. That the Gun Club leased the Property for use as a shooting range makes no difference because the trespass is based on the "continued presence" of the bullet fragments and other debris ***after*** the Lease was terminated.

D. The Court Should Grant Vulcan Summary Judgment on its Waste Claim

For the same reasons discussed above, Vulcan is also entitled to summary judgment on its waste claim. The Lease specifically required the Gun Club to remove all "Spent Ammunition." The fact that Vulcan allowed the Gun Club to operate a shooting range does not relieve the Gun Club of its clean-up responsibilities. Further, Paragraph 9 of the Lease expressly states that:

> Tenant shall not commit, or suffer to be committed, any waste upon the Premises, or any public or private nuisance. Tenant shall not occupy or use the Premises during the term of this Lease in such a manner as to interfere with the use of the Premises or an part thereof after termination of this Lease.

(Linton Decl., Ex. H at ¶ 9; SUF 12).

Accordingly, Vulcan's Claim for Waste should be adjudicated in its favor.

VI. CONCLUSION

The Gun Club fails to raise any genuine issue of material facts. Therefore, the Court should grant Vulcan's Motion for Partial Summary Judgment should in all respects.

DATED: June 13, 2011

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