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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 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 OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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 Offered in Support of San Gabriel Valley Gun Club's Opposition to Plaintiff's Motion for Partial Summary Judgment ("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:

Franklin Decl., Exhibit M, Claude Preston Cowan Deposition Transcript 59:11-63:25.

Objections. Hearsay. Fed. R. Evid. 801, 802. The referenced excerpts from Mr. Cowan's deposition concern statements allegedly told to him by Gun Club employee Richard Phillips that Gun Club has offered in this matter for their truth. These out-of-court statements by Mr. Phillips constitute inadmissible hearsay.

RESPONSE TO OBJECTION NO. 1:

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 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 "Phillips expressed concern to Cowan that Vulcan was burying lead by placing the Waste Pile at the Property[.]" (Defendant's Response to Plaintiff's Statement of Uncontroverted Facts [Docket Document 64] at 47, Additional Fact 17); 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. 2:

Franklin Decl., Ex. N, Declaration of Thomas Sheedy, II ¶ 17.

"I am not aware of anyone authorized to represent CalMat Co. ever contacting San Gabriel Valley Gun Club regarding the possibility that bullets (partial or whole) at the leased property might be buried in or under the tailings Azuza Rock deposited on the property leased by the San Gabriel Valley Gun Club."

Objections. Relevance. Fed. R. Evid. 401, 402. Whether Mr. Sheedy was aware of an such communications is not of consequence to the determination of any fact in this action.

Fed. R. Evid. 602, 901. Mr. Sheedy lacks foundation and personal knowledge regarding whether anyone from CalMat contacted the Gun Club regarding this issue.

RESPONSE TO OBJECTION NO. 2:

Fed. R. Evid. 401, 402. Rules 401 and 402 state collectively that evidence which is not relevant is not admissible, and "'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."

> To be "relevant," evidence need not be conclusive proof of a fact sought to be proved, or even strong evidence of the same. All that is required is a "tendency" to establish the fact at issue. The Advisory Committee Notes to the 1972 Proposed Rules remind us that "[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." In that relation, "[t]he fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action." *Id.*

United States v. Curtin, 489 F.3d 935, 943 (9th Cir. 2007).

Vulcan's relevance objection is unsound. 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 tends to prove Vulcan did not contact the Club about the issue while Sheedy was involved with Vulcan, which supports the fact that the parties did not intend for the Club to be contractually bound to do the removal/remediation mentioned above. The evidence at issue (i.e., that Sheedy, a Vulcan executive in the relevant time frame, does *not* recalling that Vulcan's management discussed with the Club the issue of bullets potentially being buried by Vulcan) is *clearly* "of consequence to the determination of any fact in this action." Thus, 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.

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 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 does not make sense. Vulcan states that "Mr. Sheedy lacks foundation and personal knowledge regarding whether anyone from CalMat contacted the Gun Club regarding this issue." Here, however, Sheedy is not testifying the contents of "whether anyone from CalMat contacted the Gun Club regarding this issue[;]" 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 issue at hand.

If Vulcan wants to challenge the *weight* of Cowan's testimony, it is free to do so at trial. At this point, however, because Sheedy's statement regarding his own lack

of information on the topic at hand is most definitely within his personal knowledge (that is, Sheedy 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. 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."

Vulcan's Rule 901 objection is either a mistake or inappropriate, because there is no reason to question the authenticity of the declaration at issue. Vulcan itself inquired with the author (Sheedy) about the declaration at length during Sheedy's deposition. (Transcript of deposition of Thomas Sheedy II at 73:19-94:1).[1] Vulcan's Rule 901 objection is baseless and should be overruled.

OBJECTION NO. 3:

Franklin Decl., Ex. N, 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."

Objection. Relevance. Fed. R. Evid. 401, 402. 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. 3:

Fed. R. Evid. 401, 402. Rules 401 and 402 state collectively that evidence which is not relevant is not admissible, and "'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

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[1] Evidence cited herein but not referred to in Vulcan's objections can be produced upon request, but is not attached hereto because the filed material in this case is already quite voluminous, and, more importantly, it is the Club's belief that all such evidence is possessed by Vulcan.

the evidence."

> To be "relevant," evidence need not be conclusive proof of a fact sought to be proved, or even strong evidence of the same. All that is required is a "tendency" to establish the fact at issue. The Advisory Committee Notes to the 1972 Proposed Rules remind us that "[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." In that relation, "[t]he fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action." *Id.*

United States v. Curtin, 489 F.3d 935, 943 (9th Cir. 2007).

Vulcan's relevance objection is unsound. 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[2] result in the burial of firearm projectiles. Thus, the evidence at issue (i.e., 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."

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[2] 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, 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.

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. 4:

> Franklin Decl., Ex. N, 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."
>
> Objections. Lack of Personal Knowledge and Foundation. Fed R. Evid. 602, 901. 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.
> Relevance. Fed. R. Evid. 401, 402. Mr. Sheedy's knowledge of whether the Management Committee was aware of a "possibility"[3] is not of consequence to the determination of any fact in this action.

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 Rule(c)(4) regarding certain affidavits or declarations ("[a]n affidavit or declaration used to support or oppose a motion must be made on personal

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[3] See footnote 1.

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. ISO MSJ [Docket Document 60-2) 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 concerning (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.

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."

Vulcan's Rule 901 objection is either a mistake or inappropriate, because there is no reason to question the authenticity of the declaration at issue. Vulcan itself inquired with the author (Sheedy) about the declaration at length during Sheedy's deposition. (Transcript of deposition of Thomas Sheedy II at 73:19-94:1). Vulcan's Rule 901 objection is baseless and should be overruled.

Fed. R. Evid. 401, 402. Rules 401 and 402 state collectively that evidence which is not relevant is not admissible, and "'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."

> To be "relevant," evidence need not be conclusive proof of a fact sought to be proved, or even strong evidence of the same. All that is required is a "tendency" to establish the fact at issue. The Advisory Committee Notes to the 1972 Proposed Rules remind us that "[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." In that relation, "[t]he fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action." *Id.*

United States v. Curtin, 489 F.3d 935, 943 (9th Cir. 2007).

Vulcan's relevance objection is unsound. 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[4] result in the burial of firearm projectiles. Thus, the evidence at issue (i.e., 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. 5:

Franklin Decl. p. 3 19 and Exhibit P.

"Attached as Exhibit P to this Declaration is a true and correct copy of a document produced by Vulcan in this Action that appears to be a

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[4] 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, 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.

memorandum dated December 5, 1991, which references a letter, and the letter."

Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of Authentication/Foundation. 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 F3d 580, 584-585 (7th Cir. 2006) (declaration of attorney insufficient to authenticate documents where knowledge was based only upon interviews with witnesses and review of documents);[5] *see also*, Request to Strike, below. In fact, Mr. Franklin admits he cannot authenticate the document as he is only able to state what it "appears to be."

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

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 Rule 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. [Docket Document 76-1] at ¶ 3), has "personal knowledge" of what documents were produced by Vulcan in this action, including, as stated in ¶ 19 of the Franklin Decl., the document attached thereto as Exhibit P. Thus, the statement of Franklin Decl. at ¶ 19 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

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

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 documents" was based on sufficient personal knowledge to satisfy Rule Rule 56(e),[6] 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.

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[6] 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. Former Rule 56(e), as is relevant herein, is effectively now Rule 56(c)(4) (*See* Fed. R. Civ. P. advisory committee notes (2010 amendments); Fed. R. Civ. P. 56(c)(4); Fed. R. Civ. P. 56(e)(1) (2009)), and has to with affidavits that are themselves the evidence at issue, as opposed to documents attached to affidavits that are evidence. Fed. R. Civ. P. 56(c)(1)("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: citing to particular parts of materials in the record, including depositions, *documents*, electronically stored information, *affidavits or declarations* . . . .") (italics added); Fed. R. Civ. P. 56(c) (2009) (The judgment sought should be rendered if the pleadings, the *discovery and the disclosure material on file*, and *any affidavits* show there is no genuine issue . . . .") (italics added).

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). To the extent the Club offers the document at issue to prove the Waste Pile *existed* as of the date of the document at issue (i.e., December 5, 1991) and not to show that Vulcan was aware of the lead problem in the Waste Pile (i.e., Defendant's Response to Plaintiff's Statement of Uncontroverted Facts at 46, Additional Fact 4), this document is not offered to prove the truth of the matter asserted.

Second, the document at issue (including its contents) is not hearsay as to the memo portion of the document, as the document is 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 memo portion of the document is clearly an internal CalMat (i.e., Vulcan) memo, 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." And because the text of the memo refers to the attached letter, and because one of the signatories on the letter has given testimony indicating the letter is what it appears to be (i.e., part of a lease negotiation, see transcript of the deposition of Herb Bock at 112:19-114:15), the letter is admissible under Rule 807 (the"residual exception," discussed below).

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 memo is dated December 5, 1991, meaning the document will be within the express scope of the ancient document exception within approximately six months of the filing of this document (i.e., on December 5, 2011). The letter is dated October 16, 1991, , meaning the document 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 16, 2011).

Fourth, 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. 6:

Franklin Decl., p. 3 ¶ 20 and Exhibit Q.

Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of Authentication/Foundation. Fed. R. Evid. 901. Mr. Franklin provides no testimony that he has personal knowledge of the photograph or "Quote" attached to Exhibit Q 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) (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 and attached "Quote" 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 Rule 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 ¶ 20 of the Franklin Decl., the document attached thereto as Exhibit P. The relevant fact *here* (as opposed to the Club's response to Objection No. 8, below) is that the document was produced in discovery, not that the contents are correct (though they are). Thus, the statement of Franklin Decl. at ¶ 20 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, 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." Because "a photograph is not an assertion . . . as required by Fed. R. Evid. 801(a) (*United States v. May*, 622 F.3d 1000, 1007 (9th Cir. 1980) (citing Fed. R. Evid. 801(a)), they cannot be "offered to prove the truth of the matter asserted[,]" meaning photographs lack a critical element of hearsay.

First, as *May* makes clear, photos are not assertions which can be in the nature of hearsay. Thus, Vulcan's hearsay objection must fail as to the photograph at issue.

Second, though a trial date has not been set in this matter, is possible that photo portion of 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 photo 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.[7] And because the "Quote" is signed by the attorney who declares the photo and Quote are "true and correct copies" (see Franklin Decl. at ¶ 20), the Quote is admissible under Rule 807 (the"residual exception," discussed below). That is, Franklin can testify that he received the Quote from Landiscor, executed it, and sent the executed copy (or an electronic copy thereof) to Landiscor. Vulcan's Rule 901 objection is unsound and should be overruled.

Third, at least two other hearsay inadmissability exceptions apply regarding the photo: 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. 7:

Franklin Decl., p. 4 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 appears to be

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[7] 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. Evid. 807.

executive committee meeting notes dated December 14,1994, for an entity known as Crystal, a California General Partnership."

Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of Authentication/Foundation. 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 F3d 580, 584-585 (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. In fact, Mr. Franklin admits he cannot authenticate the document as he is only able to state what it "appears to be."

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. 7:

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 Rule 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 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.[8] 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 trustworthiness . . ." That the document is over sixteen years old, was produced by Vulcan in this action, and that Vulcan had the opportunity to, but did not, question Sheedy regarding the document (which is introduced to show that Sheedy was at the meeting the document purports to be the minutes of, and that at that meeting he "reported that there are approximately 600,000 tons of waste material on the CalMat (Gun Club) property")[9] shows the document falls within the residual exception. Thus, because Vulcan's hearsay objection is unfounded, it should be overruled.

OBJECTION NO. 8:

Franklin Decl. p. 4, ¶ 26 and Exhibit W.

"Attached as Exhibit W to this Declaration is a true and correct copy of a photograph that appears to show the Property, along with a quote referring to a 'digital scan from 1/13/92 LA Historical Negative.'"

Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of Authentication/Foundation. Fed. R. Evid. 901. Mr. Franklin provides no testimony that he has personal knowledge of the photograph or "Quote"

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[8] 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.

[9] (*See* Defendant's Response to Plaintiff's Statement of Uncontroverted Facts at 34, response to alleged uncontroverted fact 39).

> attached to Exhibit Q 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) (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 and attached "Quote" are out of court statements improperly being offered for the truth of what they assert.

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 Rule 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 W attached to the Franklin Decl. Thus, the statement of Franklin Decl. at ¶ 26 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 and thus properly overruled.

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, it is clear that the declarant has personal knowledge that the "matter is what it is claimed to be" (Fed. R. Evid. 901(b)(1)), in the Quote, as clearly signed it. And as to 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 Vulcan has never provided a single piece of documentary evidence from its files (or even those of the Club, which Vulcan reviewed during discovery) intended to (let alone actually) rebutting the Club's contention that the Waste Pile at issue in this case was present, though admittedly 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)). Vulcan's Rule 901 objection is unsound 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." Because "a photograph is not an assertion . . . as required by Fed. R. Evid. 801(a) (*United States v. May*, 622 F.3d 1000, 1007 (9th Cir. 1980) (citing Fed. R. Evid. 801(a)), they cannot be "offered to prove the truth of the matter asserted[,]" meaning photographs lack a critical element of hearsay.

First, as *May* makes clear, photos are not assertions which can be in the nature of hearsay. Thus, Vulcan's hearsay objection must fail as to the photograph at issue.

Second, though a trial date has not been set in this matter, is possible that photo portion of 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 photo 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. And because the "Quote" is signed by the attorney who declares the photo and Quote are "true and correct copies" (see Franklin Decl. at ¶ 26), the letter is admissible under Rule 807 (the"residual exception," discussed below). That is, Franklin can testify that he received the Quote from Landiscor, executed it, and sent the executed copy (or an electronic copy thereof) to Landiscor.

Third, at least two other hearsay inadmissability exceptions apply regarding the photo and the Quote: 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. 9:

> Franklin Decl. p. 5 29 and Exhibit Z.
>
> "Attached as Exhibit Z to this Declaration is a true and correct copy of a document produced by Vulcan in this Action that appears to be a memorandum dated December 5, 1991, including the heading 'Gun Club Environmental Status[.]"
>
> Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of Authentication/Foundation. Fed. R. Evid. 901. Mr. Franklin provides no testimony that he has personal knowledge of the memorandum such that he is able to authenticate them as required by the Federal Rules of Evidence. See, e.g., *Estremera v. United States* 442 F3d 580, 584-585 (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 memorandum are out of court statements improperly being offered for the truth of what they assert.

RESPONSE TO OBJECTION NO. 9:

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 Rule 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. [Docket Document 76-1] at ¶ 3), has "personal knowledge" of what documents were produced by Vulcan

in this action, including, as stated in ¶ 29 of the Franklin Decl., the document attached thereto as Exhibit Z. 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 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 documents" was based on sufficient personal knowledge to satisfy Rule 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 is 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 memo portion of the document is clearly a internal CalMat (i.e., Vulcan) memo, 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 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 memo is dated December 5, 1991, meaning the document will be within the express scope of the ancient document exception within approximately six 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 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 . . ." Rule 807 applies here because the document at issue is over nineteen years old, was produced in discovery by Vulcan, and Vulcan has provided no evidence that the document does not have "trustworthy as to the circumstantial guarantees of trustworthiness" on a par with those documents covered by Rule 803 or 804. Thus, Vulcan's hearsay objection should be overruled.

OBJECTION NO. 10:

Franklin Decl. p.5 30 and Exhibit AA.

"Attached as Exhibit AA to this Declaration is a true and correct copy of a document produced by Vulcan in this Action that appears to be a memorandum dated December 5, 1991, including the hearing [sic] "Gun Club Environmental Status."

Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of Authentication/Foundation. Fed. R. Evid. 901. Mr. Franklin provides no testimony that he has personal knowledge of the memorandum such that he is able to authenticate them as required by the Federal Rules of Evidence. *See, e.g., Estremera v. United States* 442 F3d 580, 584-585 (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 memorandum are out of court statements improperly being offered for the truth of what they assert.

RESPONSE TO OBJECTION NO. 10:

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 Rule 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. [Docket Document 76-1] at ¶ 3), has "personal knowledge" of what documents were produced by Vulcan in this action, including, as stated in ¶ 30 of the Franklin Decl., the document attached thereto as Exhibit AA. Thus, the statement of Franklin Decl. at ¶ 30 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 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 documents" was based on sufficient personal knowledge to satisfy Rule 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 is 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 memo portion of the document is clearly a

internal CalMat (i.e., Vulcan) memo, 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 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 memo is dated December 5, 1991, meaning the document will be within the express scope of the ancient document exception within approximately six 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 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 . . ." Rule 807 applies here because the document at issue is over nineteen years old, was produced in discovery by Vulcan, and Vulcan has provided no evidence that the document does not have "trustworthy as to the circumstantial guarantees of trustworthiness" on a par with those documents covered by Rule 803 or 804. Thus, Vulcan's hearsay objection should be overruled.

OBJECTION NO. 11:

Franklin Decl. p. 5 ¶ 34, and Exhibit EE.

"Attached as Exhibit EE 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 was produced by Vulcan in this Action."

Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of Authentication/Foundation. 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 F3d 580, 584–585 (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.

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 ¶ 34 of the Franklin Decl., the document attached thereto as Exhibit EE. Thus, the statement of Franklin Decl. at ¶ 34 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 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 EE does not raise a hearsay objection, Vulcan's Request to Strike alleges (without any factual analysis) that Exhibit EE 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 EE 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))[10] and the residual exception (Fed. R. Evid. 807).[11]

OBJECTION NO. 12:

> Franklin Decl., Ex. FF, 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, error in original] 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/Foundation. Fed R. Evid. 602, 901. 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.
>
> Relevance. Fed. R. Evid. 401, 402. Whether Cowan was aware of an such communications is not of consequence to the determination of any fact in this action.

RESPONSE TO OBJECTION NO. 12:

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:

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[10] 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).

[11] 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 find the document is not inadmissible hearsay pursuant to Rule 807.

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, error in original] 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. Vulcan's Rule 602 objection does not make sense. 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. 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."

Vulcan's Rule 901 objection is either a mistake or inappropriate, because there is no reason to question the authenticity of the declaration at issue. Vulcan itself inquired with the author (Cowan) about the declaration at length during Cowan's deposition. (*See, e.g.*, Transcript of deposition of Preston Claude Cowan at 74:1-76:23). Vulcan's Rule 901 objection is baseless 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."

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. (Defendant's Response to Plaintiff's Statement of Uncontroverted Facts at 47, Additional Fact 17); 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.

Fed. R. Evid. 401, 402. Rules 401 and 402 state collectively that evidence which is not relevant is not admissible, and "'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."

Vulcan relevancy objection, which is obviously only applicable to Issue 1, alleges "[w]hether Cowan was aware of an such communications [i.e., is not of consequence to the determination of any fact in this action." The Club does not believe it has relied on the content of Issue 1 to support the fact that Vulcan management and the Club did not discuss the possibility that placing tailings on the leased property could result in problems in the future regarding lead bullets (or lead fragments) being buried. Regardless, there is sufficient grounds for the content of Issue 1 to be relevant.

> To be "relevant," evidence need not be conclusive proof of a fact sought to be proved, or even strong evidence of the same. All that is required is a "tendency" to establish the fact at issue. The Advisory Committee

> Notes to the 1972 Proposed Rules remind us that "[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." In that relation, "[t]he fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action." *Id.*

United States v. Curtin, 489 F.3d 935, 943 (9th Cir. 2007).

Here, because Vulcan management would communicate with the Club about creating the Waste Pile "primarily through Preston Cow[a]n[,]" there is a legitimate reason to believe his testimony on this issue tends to show that Vulcan management and the Club did not discuss the possibility at issue. Once again, if Vulcan wants to challenge the *weight* of Cowan's testimony, it is free to do so at trial. But because evidence is relevant if it has "*any* tendency to make the existence of any fact . . . more probable[,]" and because Cowan's testimony tends to prove the communications at issue did not occur (which in turn suggests Vulcan did not intend the Club to clean up spent ammunition), Vulcan's relevance objection should be overruled. Fed. R. Evid. 401 (emphasis added).

OBJECTION NO. 13:

> Franklin Decl., Ex. FF, 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."
>
> Objections. Hearsay. Fed. R. Evid. 801, 802. The contents of any conversation between Mr. Cowan and Mr. Sheedy are inadmissible hearsay.

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." "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. (Defendant's Response to Plaintiff's Statement of Uncontroverted Facts at 50, Additional Fact 39); 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.").

Further, even if Vulcan's objection was aimed at the underlying fact at issue (i.e., placing tailings on the property leased by San Gabriel Valley Gun Club was resulting in lead bullets or fragments being buried beneath tailings), there is no doubt that Cowan had personal knowledge on that issue as the foreman in charge of the creation of the Waste Pile (see Franklin Decl. at Exhibit FF, at ¶¶ 11-12), thus precluding a hearsay allegation on either the underlying fact or the fact actually at issue (i.e., that Cowan raised the lead burial issue with Sheedy). Here, 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. 14:

Franklin Decl., p. 6, ¶ 36 and Exhibit GG.

"Attached as Exhibit GG to this Declaration is a true and correct copy of what appears to be a draft lease attached to a document titled 'Letter of Transmittal' dated February 10, 1992. This document, which has been produced to Vulcan in this Action, was provided to me by the Club's former attorney, Robert Carter, from the file he maintained regarding the work he did for the Club."

Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of Authentication/Foundation. 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 F3d 580, 584–585 (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. In fact, Mr. Franklin admits he cannot authenticate the document as he is only able to state what it "appears to be."

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.

Relevance. Fed. R. Evid. 401, 402. The draft lease and handwritten

> notes are irrelevant for the purposes the Gun Club offers them in light of the parties' final executed lease.

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 Rule 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 ¶ 36 of the Franklin Decl., the document attached thereto as Exhibit GG. Thus, the statement of Franklin Decl. at ¶ 36 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").[12]

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 ¶¶ 36, Ex. GG). 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, from the file he maintained regarding the Club. (Franklin Decl. at ¶¶ 36). Robert Carter was the Club's attorney regarding the negotiation of the Lease. *See* Franklin Decl. at Ex. HH (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 Vulcan has not cited 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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[12] 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 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 their 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.

Fed. R. Evid. 401, 402. Rules 401 and 402 state collectively that evidence which is not relevant is not admissible, and "'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."

> To be "relevant," evidence need not be conclusive proof of a fact sought to be proved, or even strong evidence of the same. All that is required is a "tendency" to establish the fact at issue. The Advisory Committee Notes to the 1972 Proposed Rules remind us that "[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." In that relation, "[t]he fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action." *Id.*

United States v. Curtin, 489 F.3d 935, 943 (9th Cir. 2007).

Vulcan alleges "The draft lease and handwritten notes are irrelevant for the purposes the Gun Club offers them in light of the parties' final executed lease."[13] Vulcan knows that extrinsic evidence regarding the negotiations leading up to a contract can be (and is here) relevant to showing what was (and was not) the mutual intent of the parties. *See Heston*, 160 Cal. App. 3d at 412 (citing, among others, Civ. Code § 1647 and Civ. Proc. Code § 1856). The Club cited *Heston* regarding the

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[13] The Club does not believe it has asserted that it is relying on the handwritten notes on what appears to be the draft lease portion of Exhibit GG, so that issue is not responded to herein.

propriety of using negotiation evidence to assist in lease interpretation in its Opposition to Plaintiff Vulcan's Motion for Partial Summary Judgment, and Vulcan did not dispute this issue (or even discuss *Heston*) in its Reply in Support of its Motion for Partial Summary Judgment (Defendant San Gabriel Valley Gun Club's Opposition to Plaintiff Vulcan's Motion for Partial Summary Judgment [Docket Document 63] at 19:19-20:1 [at 24:19-25:1 per the Court's pagination]). Because the presence of an executed contract (even a fully integrated one) does not change whether or not extrinsic evidence is relevant under Rule 401, Vulcan's objection lacks merit and should be overruled.

Further, the evidence actually at issue here is clearly relevant. When the evidence is read in conjunction with Exhibits P and GG, It shows that Vulcan, well aware of a "bullet problem in the waste pile on rifle range," tried to (*without explanation*) include in the lease a broad provision that allowed it to "establish reasonable rules and regulations regarding . . . the type of shot used" (see Ex. GG at SGVGC.004846), and that the Club rejected that new provision (but told Vulcan if it had "any additional restrictions on the use of the premises, [the Club] would be happy to consider them"). (see Ex. HH at SGVGC.005167). There is no evidence that Vulcan did provide the Club "any additional restrictions," and the resulting lease (the lease of May 5, 1992) does not include a provision that clearly addresses the "lead problem." Though the evidence at issue is only one part of a somewhat complex chain of facts, is relevant to showing that Vulcan knew of the "lead problem" and yet chose to execute a lease that did not mention that problem. That fact, in turn, is plainly probative on whether Vulcan and the Club had a meeting of the minds on what Vulcan alleges herein: i.e., that the parties agreed the Club would remove/remediate spent bullets. Because Vulcan's entire case turns on whether that allegation is correct, Exhibit GG and its contents are plainly relevant.

Once again, if Vulcan wants to challenge the *weight* of this evidence, it is free to do so at trial. But because evidence is relevant if it has "*any* tendency to make the

existence of any fact . . . more probable[,]" and because the evidence at issue meets that standard, Vulcan's relevance objection should be overruled. Fed. R. Evid. 401 (emphasis added).

OBJECTION NO. 15:

> Franklin Decl., p. 6, 37 and Exhibit HH.
>
> "Attached as Exhibit HH to this Declaration is a true and correct copy of what appears to be a letter discussing the terms of a proposed easement and lease, dated February 24, 1992, from Robert Carter to Brian Ferris. This document, which has been produced to Vulcan in this Action, was provided to me by the Club's former attorney, Robert Carter, from the file he maintained regarding the work he did for the Club."
>
> Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of Authentication/Foundation. 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 F3d 580, 584-585 (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. In fact, Mr. Franklin admits he cannot authenticate the document as he is only able to state what it "appears to be."
>
> 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.
>
> Relevance. Fed. R. Evid. 401, 402. The document is irrelevant for the purposes the Gun Club offers them in light of the parties' final executed lease.

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 Rule 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 ¶ 37 of the Franklin Decl., the document attached thereto as Exhibit HH. Also, as one of the attonrneys for the Club in this matter, he has personal knowledge of the fact that this document was provided to Vulcan in this action. Thus, the statement of Franklin Decl. at ¶ 37 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. HH, 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 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 (i.e., it does not discuss "the possibility of the Club being responsible for cleaning up Spent Ammunition at the Property).

(Defendant's Response to Plaintiff's Statement of Uncontroverted Facts at 50, Additional Fact 36); 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 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.

Fed. R. Evid. 401, 402. Rules 401 and 402 state collectively that evidence which is not relevant is not admissible, and "'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."

To be "relevant," evidence need not be conclusive proof of a fact sought to be proved, or even strong evidence of the same. All that is required is a "tendency" to establish the fact at issue. The Advisory Committee Notes to the 1972 Proposed Rules remind us that "[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." In that relation, "[t]he fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action." *Id.*

United States v. Curtin, 489 F.3d 935, 943 (9th Cir. 2007).

Vulcan's relevance objection is unsound. 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 has not only a tendency, but a *strong* "tendency to make the existence of a[] fact that is of consequence [i.e., that the parties *never* expressed a 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." Fed. R. Evid. 401.

The is evidence clearly relevant, in that it tends to disprove the lynchpin of Vulcan's case: that the parties had the mutual 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. 16:

Franklin Decl., p. 6, ¶ 38 and Exhibit II.

"Attached as Exhibit II to this Declaration is a true and correct copy of what appears to be a draft lease attached to a letter discussing the terms of a proposed easement and lease, dated March 5, 1992, from Brian Ferris to Robert Carter. This document, which has been produced to Vulcan in this Action, was provided to me by the Club's former attorney, Robert Carter, from the file he maintained regarding the work he did for the Club."

Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of Authentication/Foundation. 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 F3d 580, 584–585 (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. In fact, Mr. Franklin admits he cannot authenticate the document as he is only able to state what it "appears to be."

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.

Relevance. Fed. R. Evid. 401, 402. The documents are irrelevant for the purposes the Gun Club offers them in light of the parties' final executed lease.

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 Rule 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 ¶ 38 of the Franklin Decl., the document attached thereto as Exhibit II. Thus, the statement of Franklin Decl. at ¶ 38 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 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. II to the Franklin Decl.), save handwritten notes thereon (irrelevant to the Club's intentions in citing Ex. II), 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. HH at 1), and 5) it plainly references the letter dated February 24, 1992 (Franklin Dec. at Ex. HH). 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 (i.e., it does not discuss "the possibility of the Club being responsible for cleaning up Spent Ammunition at the Property). (Defendant's Response to Plaintiff's Statement of Uncontroverted Facts at 50, Additional Fact 36); 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 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 were 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.

Fed. R. Evid. 401, 402. Rules 401 and 402 state collectively that evidence which is not relevant is not admissible, and "'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."

> To be "relevant," evidence need not be conclusive proof of a fact sought to be proved, or even strong evidence of the same. All that is required is a "tendency" to establish the fact at issue. The Advisory Committee Notes to the 1972 Proposed Rules remind us that "[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." In that relation, "[t]he fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action." *Id.*

United States v. Curtin, 489 F.3d 935, 943 (9th Cir. 2007).

Vulcan's relevance objection is unsound. 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 has not only a tendency, but a *strong* "tendency to make the existence of a[] fact that is of consequence [i.e., that the parties *never* expressed a 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." Fed. R. Evid. 401.

The evidence is clearly relevant, in that it tends to disprove the lynchpin of Vulcan's case: that the parties had the mutual 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. 17:

Franklin Decl., p. 6, 39 and Exhibit JJ.

"Attached as Exhibit JJ to this Declaration is a true and correct copy of what appears to be a draft lease attached to a letter discussing the terms of a proposed easement and lease, dated April 17, 1992, from Robert Carter to Brian Ferris. This document, which has been produced to Vulcan in this Action, was provided to me by the Club's former attorney, Robert Carter, from the file he maintained regarding the work he did for the Club."

Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of Authentication/Foundation. Fed. R. Evid. 901. Mr. Franklin provides no testimonythat 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) (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. In fact, Mr. Franklin admits he cannot authenticate the document as he is only able to state what it "appears to be."

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.

Relevance. Fed. R. Evid. 401, 402. The documents are irrelevant for the purposes the Gun Club offers them in light of the parties' final executed lease.

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 Rule 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 ¶ 39 of the Franklin Decl., the document attached thereto as Exhibit JJ. Also, as one of the attonrneys for the Club in this matter, he has personal knowledge of the fact that this document was provided to Vulcan in this action. Thus, the statement of Franklin Decl. at ¶ 39 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 the correct address for Ferris (see transcript of deposition of Brian Ferris at 16:25-17:8); and 3) 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. HH, at 1). 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 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 (i.e., it does not discuss "the possibility of the Club being responsible for cleaning up Spent Ammunition at the Property). (Defendant's Response to Plaintiff's Statement of Uncontroverted Facts at 50, Additional Fact 36); 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 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 is dated April 17, 1992, meaning the document will be within the express scope of the ancient document exception within approximately ten months of the filing of this document (i.e., on April 17, 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.

Fed. R. Evid. 401, 402. Rules 401 and 402 state collectively that evidence which is not relevant is not admissible, and "'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."

To be "relevant," evidence need not be conclusive proof of a fact sought to be proved, even to the same. All that is required is a "tendency" to establish the fact at issue. The Advisory Committee Notes to the 1972 Proposed Rules remind us that "[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." In that relation, "[t]he fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action." *Id.*

United States v. Curtin, 489 F.3d 935, 943 (9th Cir. 2007).

Vulcan's relevance objection is unsound. 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 has not only a tendency, but a *strong* "tendency to make the existence of a[] fact that is of consequence [i.e., that the parties *never* expressed a 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." Fed. R. Evid. 401.

The is evidence clearly relevant, in that it tends to disprove the lynchpin of Vulcan's case: that the parties had the mutual 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. 18:

Franklin Declaration, p. 7, ¶ 41 and Exhibit LL.

"Attached as Exhibit LL to this Declaration is a true and correct copy of a document produced by Vulcan in this Action that appears to a be a time card dated March 16, 1992, which includes hand written text that appears to state: "47 Loads Class Two to Gun Club[.] Exhibit LL includes an enlargement I made of a portion of the aforementioned time card."

Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of Authentication/Foundation. 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 F3d 580, 584–585 (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. In fact, Mr. Franklin admits he cannot authenticate the document as he is only able to state what it "appears to be."

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. 18:

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 Rule 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. [Docket Document 76-1] at ¶ 3), has "personal knowledge" of what documents were produced by Vulcan in this action, including, as stated in ¶ 41 of the Franklin Decl., the document attached thereto as Exhibit LL. Thus, the statement of Franklin Decl. at ¶ 41 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 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 documents" was based on sufficient personal knowledge to satisfy Rule 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 is 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 an Azusa Rock, Inc. (i.e., Vulcan) time card, 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 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 March 16, 1992, meaning the document will be within the express scope of the ancient document exception within approximately nine months of the filing of this document (i.e., on March 16, 2011).

Third, at least two other hearsay inadmissability exceptions apply: Rule 803(6), the "business records exception" (the document clearly concerns the day to day activities of Vulcan's heavy equipment operators); 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 . . ." Rule 807 applies here because the document at issue is over nineteen years old, was produced in discovery by Vulcan, was identified (as a part of a packet of time cards) as a Kirst (i.e., Vulcan) time card by Cowan (see transcript of deposition of Preston Claude Cowan at 97:3-99:21), and Vulcan has provided no evidence that the document does not have "trustworthy as to the circumstantial guarantees of trustworthiness" on a par with those documents covered by Rule 803 or 804. Thus, Vulcan's hearsay objection should be overruled.

OBJECTION NO. 19:

Franklin Declaration, 42 and Exhibit MM.

"Attached as Exhibit MM to this Declaration is a true and correct copy of an excerpt from Best Management Practices for Lead at Outdoor Shooting Ranges, promulgated by Region 2 EPA, revised June 2005, available at http://www.epa.gov/region2/waste/leadshot/epa_bmp.pdf."

Objection. Document is incomplete. Mr. Franklin attaches only one page of 103 page document and fails to include many relevant standards.

RESPONSE TO OBJECTION NO. 19:

Vulcan's objection has no merit on its face and appears to serve no purpose other than to waste the Club's and the Court's time. First, it appears Vulcan would apparently would prefer that, instead of filing an excerpt of the document at issue, a document the contents of which cannot be disputed (as the Club provided a internet link to the location of that document), the Club should have filed the entirety of the 103-page Best Management Practices for Lead at Outdoor Shooting Ranges. Second, Vulcan's comment that the "one page . . . fails to include many relevant standards" is worthless, as it does not explain how the "many relevant standards" are supposedly relevant to the fact at issue.[14] Vulcan's is patently unreasonable and has no basis in the Federal Rules of Evidence, and thus 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 now respond to the Request to Strike.

1. *Orr v. Bank of Am., NT & ST* - (9th Cir. 2002)

Vulcan's Request to Strike includes the following quote *without attribution*: "'In a summary judgment motion, documents authenticated through personal knowledge must be "attached to an affidavit that meets the requirements of [Rule 56(e)] and the affiant must be a person through whom the exhibits could be admitted into evidence."[']" (alterations in Vulcan's Objections). The quote is clearly taken from *Orr*, 285 F.3d 764 at 773-774. It is unclear why Vulcan did not provide a citation for this quote, a troubling fact when it is recognized that the quoted sentence has a *drastically* different meaning when read in context.

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[14] I.e., "Spent Ammunition can potentially be excluded from classification as hazardous waste under the Resource Conservation and Recovery Act if it is recycled." (Defendant's Response to Plaintiff's Statement of Uncontroverted Facts at 51, Additional Fact 42).

> In a summary judgment motion, documents authenticated through personal knowledge must be "attached to an affidavit that meets the requirements of [Fed.R.Civ.P.] 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence." [Citation]. ***However**, a proper foundation need not be established through personal knowledge but can rest on any manner permitted by Federal Rule of Evidence 901(b) or 902. See Fed.R.Evid. 901(b)(providing ten approaches to authentication); Fed.R.Evid. 902 (self-authenticating documents need no extrinsic foundation).*

Orr, 285 F.3d 773-74 (emphasis added). *Orr* also confirms that, as long as there is no dispute that production actually occurred, "documents produced by a party in discovery [a]re 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)). Because none of the documents offered by the Club fail to meet the *Orr* standard for authentication, Vulcan's authentication challenges are all meritless.

2. *Zoslaw v. MCA Distributing Corp* - (9th Cir. 1982)

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)." Vulcan, however, is confusing the requirements of Rule 56(e)(1) (as it existed prior to the 2010 amendments)[15] with Rule 56 in general.

That is, *Zoslaw* does not stand for the broad proposition that, under "Rule 56, documents 'are required to be authenticated by affidavits or declarations . . .[,]" it stands for the narrow proposition that a *former Rule 56(e)(1) affidavit* (i.e., "[a] supporting or opposing affidavit") "must be made on personal knowledge . . . ." *Zoslaw*, 693 F.2d at 883; Fed. R. Civ. P. 56 (amended 2010).[16] Indeed, under Rule 56

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[15] *See* Fed. R. Civ. P. advisory committee notes (2010 amendments); Fed. R. Civ. P. 56(c)(4); Fed. R. Civ. P. 56(e)(1) (2009).

[16] *United States v. Dribble*, 429 F.2d 598, 601-02 (9th Cir. 1970), is also a former Rule 56(e) case, and thus states the rule for supporting or opposing

prior to and after the 2010 Amendment, it is clear that a "supporting or opposing affidavit[/declaration]" is not required to introduce documents that are appropriately included in the record on their own accord.[17] Regardless, even if the *Zoslaw* court had intended to hold that the *only* way to authenticate documents at the summary judgement stage is by filing "affidavits or declarations of persons with personal knowledge[,]" later precedential authority *expressly* holds otherwise. *See Orr*, 285 F.3d at 777-78 n.24 (issued March 15, *2002*, twenty years after *Zoslaw* was decided).[18]

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affidavits (which was at issue in *Dribble*), not documents that are admissible regardless of personal knowledge regarding the creation of such documents (which was not at issue in *Dribble*). *Id.* at 602.

[17] Fed. R. Civ. P. 56(c)(1)("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: citing to particular parts of materials in the record, including depositions, *documents*, electronically stored information, *affidavits or declarations* . . . .") (italics added); Fed. R. Civ. P. 56(c) (2009) (The judgment sought should be rendered if the pleadings, the *discovery and the disclosure material on file*, and *any affidavits* show there is no genuine issue . . . .") (italics added).

[18] 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 [now former] 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) . . . .

Orr, 285 F.3d at 777-78 n.24 (additional citations omitted).

3. *Hoffman v. Applicators Sales & Service, Inc.*- (1st Cir. 2006)[19]

Vulcan's application of *Hoffman v. Applicators Sales & Serv., Inc.*, 439 F.3d 9, 14-15 (1st Cir. 2006) is equally untenable. Vulcan quotes *Hoffman* as follows: "documents do not automatically become part of the record [on summary judgement] just because they are products of discovery." The Club does not dispute the correctness of that general statement, though the Club notes it is 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. The *Hoffman* 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.[20] The fact that *Hoffman* correctly notes that a former Rule 56(e) "authenticating affidavit" (i.e., a "supporting or opposing 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"). As with *Zoslaw*, Vulcan is

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[19] Though the Request to Strike cites *Estremera*, the Club's position on Vulcan's misuse of *Estrema* need not be repeated again herein, and is incorporated by reference from above.

[20] *See id.* at 15-16. ("Even supposing . . . 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 to see if they contained proper supporting data.")

attempting use *Hoffman* to create a personal knowledge requirement that does not exist, in an attempt to improperly limit the record.

4. Vulcan's Hearsay Case Law Is Correctly Cited, But Inapplicable

Because the hearsay argument located in the Request to Strike does not misrepresent or ignore case law, the Club will not put forth any argument regarding the Request to Strike's hearsay argument beyond what is stated in the specific objection responses provided above.

5. Conclusion

Vulcan's evidentiary objections evince either a pervasive misunderstanding of the Federal Rules of Evidence or willful ignorance of those rules. Either way, Vulcan's evidentiary objections are without merit and they should all be overruled.

Date: June 20, 2011

MICHEL & ASSOCIATES, P.C.

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

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 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 OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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

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JEFFER MANGELS BUTLER & MITCHELL LLP
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Los Angeles, CA 90067

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

Executed on June 20, 2011.

/s/Christina Sanchez
CHRISTINA SANCHEZ