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7
8 **UNITED STATES DISTRICT COURT**

9 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

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

13 Plaintiff,

14 v.

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

17 Defendants.

18
19 AND RELATED COUNTER-CLAIM.
20

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

21 Defendant San Gabriel Valley Gun Club (the "Club") hereby submits this
22 response to Plaintiff Calmat Company dba Vulcan Materials Company, Western
23 Division's ("Vulcan") Evidentiary Objections to, and Request to Strike Portions of,
24 the Declaration of Scott M. Franklin in Support of Offered in Support of San Gabriel
25 Valley Gun Club's Opposition to Plaintiff's Motion for Partial Summary Judgment
26 ("Vulcan's Objections"). Vulcan's objections, many of which are authentication
27 objections as to documents Vulcan itself produced in this action, should be overruled
28 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*,

1 36 F.3d 1229, 1233 (1st. Cir. 1994) (“It is quite true that an out-of-court statement is
 2 not hearsay if it is used only to show that the statement was made and that the listener
 3 heard the words uttered.”). Because the evidence at issue is a “verbal act” and is not
 4 offered to prove the truth of the matter asserted, Vulcan’s objection cannot be
 5 sustained.

6 **OBJECTION NO. 2:**

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

8 “I am not aware of anyone authorized to represent CalMat Co. ever
 9 contacting San Gabriel Valley Gun Club regarding the possibility that
 10 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.”

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

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

15 **RESPONSE TO OBJECTION NO. 2:**

16 Fed. R. Evid. 401, 402. Rules 401 and 402 state collectively that evidence
 17 which is not relevant is not admissible, and “‘relevant’ evidence means evidence
 18 having any tendency to make the existence of any fact that is of consequence to the
 19 determination of the action more probable or less probable than it would be without
 20 the evidence.”

21 To be “relevant,” evidence need not be conclusive proof of a fact sought
 22 to be proved, or even strong evidence of the same. All that is required is
 23 a “tendency” to establish the fact at issue. The Advisory Committee
 24 Notes to the 1972 Proposed Rules remind us that “[r]elevancy is not an
 25 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.*

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

27 Vulcan’s relevance objection is unsound. The Club contends that *this entire*
 28 *case* can be boiled down to one question: did the parties intend for the Club to be

1 contractually required to remove/remediate the firearm projectiles and fragments
2 thereof (and related material) present on the property it leased from Vulcan as of the
3 end of the last express lease term between the Club and Vulcan (i.e., November 6,
4 2006)? The evidence at issue tends to prove Vulcan did not contact the Club about
5 the issue while Sheedy was involved with Vulcan, which supports the fact that the
6 parties did not intend for the Club to be contractually bound to do the
7 removal/remediation mentioned above. The evidence at issue (i.e., that Sheedy, a
8 Vulcan executive in the relevant time frame, does *not* recalling that Vulcan's
9 management discussed with the Club the issue of bullets potentially being buried by
10 Vulcan) is *clearly* "of consequence to the determination of any fact in this action."
11 Thus, Vulcan's relevance objection is nothing more than an unfounded attempt to
12 challenge evidence that is clearly detrimental to its case (and thus relevant), meaning
13 the objection should be overruled.

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

20 Vulcan's Rule 602 objection does not make sense. Vulcan states that "Mr.
21 Sheedy lacks foundation and personal knowledge regarding whether anyone from
22 CalMat contacted the Gun Club regarding this issue." Here, however, Sheedy is not
23 testifying the contents of "whether anyone from CalMat contacted the Gun Club
24 regarding this issue[;]" in fact, he is testifying that he has *no* personal knowledge of
25 any communication between Calmat (i.e., Vulcan) management and the Club as to the
26 issue at hand.

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

1 of information on the topic at hand is most definitely within his personal knowledge
2 (that is, Sheedy is the only person who can testify as to what he is, *and is not*, aware
3 of), Vulcan's Rule 602 objection should be overruled.

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

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

13 **OBJECTION NO. 3:**

14 Franklin Decl., Ex. N, Declaration of Thomas Sheedy, II ¶ 18.

15 "At the time tailings were deposited at the property leased by the San
16 Gabriel Valley Gun Club, I was aware of the possibility that the tailings
17 were being placed on top of a surface where bullets (partial or whole)
18 were present."

19 Objection. Relevance. Fed. R. Evid. 401, 402. Whether Mr. Sheedy was
20 aware of a "possibility" is not of consequence to the determination of any
21 fact in this action.

22 **RESPONSE TO OBJECTION NO. 3:**

23 Fed. R. Evid. 401, 402. Rules 401 and 402 state collectively that evidence
24 which is not relevant is not admissible, and "'relevant' evidence means evidence
25 having any tendency to make the existence of any fact that is of consequence to the
26 determination of the action more probable or less probable than it would be without

27 ¹ Evidence cited herein but not referred to in Vulcan's objections can be
28 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.

1 the evidence.”

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

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

12 Vulcan’s relevance objection is unsound. The Club contends that *this entire case* can
 13 be boiled down to one question: did the parties intend for the Club to be contractually
 14 required to remove/remediate the firearm projectiles and fragments thereof (and
 15 related material) present on the property it leased from Vulcan as of the end of the last
 16 express lease term between the Club and Vulcan (i.e., November 6, 2006)? The
 17 evidence at issue plainly shows that Vulcan (or its predecessor) *knowingly* chose to
 18 engage in conduct that could² result in the burial of firearm projectiles. Thus, the
 19 evidence at issue (i.e., Sheedy’s awareness “of the possibility that the tailings were
 20 being placed on top of a surface where bullets (partial or whole) were present”) is,
 21 *clearly* “of consequence to the determination of any fact in this action.”

22 ² It seems Vulcan’s objection is intended to raise the specious argument that
 23 the evidence at issue is “not of consequence” because it has to do with an
 24 awareness of a *possibility* (as opposed to the awareness of a *fact*). Here,
 25 however, it is the awareness of a possibility that is important. Even
 26 assuming hypothetically that Sheedy had been wrong and Vulcan’s
 27 placement of the Waste Pile did not result in projectiles being buried,
 28 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.

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

11 **OBJECTION NO. 4:**

12 Franklin Decl., Ex. N, Declaration of Thomas Sheedy, II ¶ 19.

13 "At the time tailings were deposited at the property leased by the San
14 Gabriel Valley Gun Club, I believe the Management Committee I
15 reported to was aware of the possibility that the tailings were placed on
16 top of a surface where bullets (partial or whole) were present."

17 Objections. Lack of Personal Knowledge and Foundation. Fed R. Evid.
18 602, 901. Mr. Sheedy does not testify as to any personal knowledge
19 concerning whether the Management Committee was aware of the
20 "possibility" that bullets were present where the tailings were deposited.
21 It is improper for Mr. Sheedy to testify as to his belief.
22 Relevance. Fed. R. Evid. 401, 402. Mr. Sheedy's knowledge of whether
23 the Management Committee was aware of a "possibility"^[3] is not of
24 consequence to the determination of any fact in this action.

25 **RESPONSE TO OBJECTION NO. 4:**

26 Fed. R. Evid. 602. Rule 602 states “[a] witness may not testify to a matter
27 unless evidence is introduced sufficient to support a finding that the witness has
28 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

³ See footnote 1.

1 knowledge”).

2 Vulcan’s objection makes no sense. Vulcan’s unsupported claim that “[i]t is
3 improper for Mr. Sheedy to testify as to his belief” is incorrect. *See, e.g., Folio*
4 *Impressions, Inc. v. Byer California*, 937 F.2d 759, 763-64 (2nd Cir. 1991) (testimony
5 expressly stated as *belief*, and not *knowledge*, based on “general observation and
6 knowledge, and not upon conjecture or hearsay[,]” can meet Rule 602’s personal
7 knowledge requirement). Vulcan cannot reasonably dispute that Sheedy himself was
8 in periodic contact with the Management Committee, as Sheedy’s Decl. (Exhibit P at
9 ¶12 to the Franklin Decl. ISO MSJ [Docket Document 60-2) states that Sheedy had
10 to go to the Management Committee regarding major decisions related to the mining
11 operation at issue herein, and that he specifically obtained permission concerning (and
12 thus implicitly must have discussed) the placement of Waste Pile with the
13 Management Committee. (*Id.* at ¶¶ 12-13).

14 Further, Sheedy’s Deposition testimony *regarding the particular statement at*
15 *issue* indicates that Sheedy and the person Sheedy referred to as “the equivalent of the
16 chairman [of the management committee] Walt Lucariella[,]” i.e., Lukkarila, had been
17 to the area in question with Sheedy, and that as a result of Lukkarila visiting that
18 location, the management committee was aware the “possibility that the tailings were
19 being placed on top of a surface where bullets, partial or whole, were present.” (*See*
20 *Declaration of Scott M. Franklin in Support of Defendant San Gabriel Valley Gun*
21 *Club’s Opposition to Plaintiff Vulcan’s Motion for Partial Summary Judgment*
22 *[Docket Document 63-1, the “Franklin Decl. ISO Opp.”]* at Exhibit O, 91:2-21 [at 178
23 per the Court’s pagination]). Accordingly, based on general knowledge and
24 observation, Sheedy’s statement meets Rule 602’s personal knowledge requirement.

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

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

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

10 Fed. R. Evid. 401, 402. Rules 401 and 402 state collectively that evidence
11 which is not relevant is not admissible, and “‘relevant’ evidence means evidence
12 having any tendency to make the existence of any fact that is of consequence to the
13 determination of the action more probable or less probable than it would be without
14 the evidence.”

15 To be “relevant,” evidence need not be conclusive proof of a fact sought
16 to be proved, or even strong evidence of the same. All that is required is
17 a “tendency” to establish the fact at issue. The Advisory Committee
18 Notes to the 1972 Proposed Rules remind us that “[r]elevancy is not an
19 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.*

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

21 Vulcan’s relevance objection is unsound. The Club contends that *this entire*
22 *case* can be boiled down to one question: did the parties intend for the Club to be
23 contractually required to remove/remediate the firearm projectiles and fragments
24 thereof (and related material) present on the property it leased from Vulcan as of the
25 end of the last express lease term between the Club and Vulcan (i.e., November 6,
26 2006)? The evidence at issue plainly shows that Vulcan (or its predecessor)

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28

1 *knowingly* chose to engage in conduct that could⁴ result in the burial of firearm
2 projectiles. Thus, the evidence at issue (i.e., Sheedy’s awareness “of the possibility
3 that the tailings were being placed on top of a surface where bullets (partial or whole)
4 were present”) is, *clearly* “of consequence to the determination of any fact in this
5 action.”

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

16 **OBJECTION NO. 5:**

17 Franklin Decl. p. 3 19 and Exhibit P.

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

20 ⁴ It seems Vulcan’s objection is intended to raise the specious argument that
21 the evidence at issue is “not of consequence” because it has to do with an
22 awareness of a *possibility* (as opposed to the awareness of a *fact*). Here,
23 however, it is the awareness of a possibility that is important. Even
24 assuming hypothetically that Sheedy had been wrong and Vulcan’s
25 placement of the Waste Pile did not result in projectiles being buried,
26 Sheedy’s testimony would *still* be relevant to proving that Vulcan did not
27 *intend* projectiles would be removed; the ultimate outcome (i.e., whether
28 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.

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

3 Objections. Lack of Personal Knowledge. Fed. R. Evid. 602. Lack of
4 Authentication/Foundation. Fed. R. Evid. 901. Mr. Franklin provides no
5 testimony that he has personal knowledge of the document such that he
6 is able to authenticate it as required by the Federal Rules of Evidence.
7 See, e.g., *Estremera v. United States* 442 F3d 580, 584-585 (7th Cir.
8 2006) (declaration of attorney insufficient to authenticate documents
9 where knowledge was based only upon interviews with
10 witnesses and review of documents);^{5]} see also, Request to Strike,
11 below. In fact, Mr. Franklin admits he cannot authenticate the document
12 as he is only able to state what it "appears to be."

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

16 **RESPONSE TO OBJECTION NO. 5:**

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

23 Franklin, as an attorney for the Club in this matter (and has been since before
24 Vulcan filed suit on September 8, 2008; see Supp. Franklin Decl. [Docket Document
25 76-1] at ¶ 3), has "personal knowledge" of what documents were produced by Vulcan
26 in this action, including, as stated in ¶ 19 of the Franklin Decl., the document attached
27 thereto as Exhibit P. Thus, the statement of Franklin Decl. at ¶ 19 is within Franklin's
28 knowledge, proving Vulcan's Rule 602 objection is without merit.

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

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

1 claims.” Documents produced in discovery are considered authenticated for use by
2 a party-opponent, presuming there is no dispute such production actually occurred.
3 *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 777 n.20 (9th Cir. 2002) (“documents
4 produced by a party in discovery were deemed authentic when offered by the
5 party-opponent”) (citing, among others, *Maljack Prods., Inc. v. GoodTimes Home*
6 *Video Corp.*, 81 F.3d 881, 889 n.12 (9th Cir.1996)).

7 Vulcan apparently chooses to ignore on point Ninth Circuit authority like *Orr*
8 and *Maljack* and instead (mis)cites a Seventh Circuit case (*Estremera*, 442 F.3d at
9 584-85) that is completely off point. The question at issue in *Estremera* was whether
10 an affidavit “based on the attorney’s review of the relevant documents” was based on
11 sufficient personal knowledge to satisfy Rule Rule 56(e),⁶ where the attorney *did not*
12 *introduce* “into the record the documents he relied on in his affidavit.” *Id.*
13 Additionally, even though Vulcan plainly indicates *Estremera* concerns authentication
14 of documents, *Estremera* never mentions either Rule 901 or authentication.

15 Thus, unless Vulcan is attempting to raise the argument that this document (a
16 document Bates stamped with a Vulcan identifier, nonetheless) was not produced to
17 the Club by Vulcan in this action (which the Club obviously denies), Vulcan’s Rule
18 901 objection must fail and should therefore be overruled.

19
20 ⁶ All references to Rule 56(e) in this document refer to the Rule prior to the
21 major amendment of Rule 56 that occurred in 2010. Former Rule 56(e), as
22 is relevant herein, is effectively now Rule 56(c)(4) (*See* Fed. R. Civ. P.
23 advisory committee notes (2010 amendments); Fed. R. Civ. P. 56(c)(4); Fed.
24 R. Civ. P. 56(e)(1) (2009)), and has to with affidavits that are themselves
25 the evidence at issue, as opposed to documents attached to affidavits that are
26 evidence. Fed. R. Civ. P. 56(c)(1) (“A party asserting that a fact cannot be
27 or is genuinely disputed must support the assertion by: citing to particular
28 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).

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

6 First, a statement is not hearsay if it is not “offered in evidence to prove the
7 truth of the matter asserted.” Fed. R. Evid. 801(c). To the extent the Club offers the
8 document at issue to prove the Waste Pile *existed* as of the date of the document at
9 issue (i.e., December 5, 1991) and not to show that Vulcan was aware of the lead
10 problem in the Waste Pile (i.e., Defendant’s Response to Plaintiff’s Statement of
11 Uncontroverted Facts at 46, Additional Fact 4), this document is not offered to prove
12 the truth of the matter asserted.

13 Second, the document at issue (including its contents) is not hearsay as to the
14 memo portion of the document, as the document is a non-hearsay admission of a party-
15 opponent. Fed. R. Evid. 801(d)(2)(D). (“A statement is not hearsay if . . . a statement
16 by the party's agent or servant concerning a matter within the scope of the agency or
17 employment, made during the existence of the relationship.”). The memo portion of
18 the document is clearly an internal CalMat (i.e., Vulcan) memo, meaning any
19 statements therein are created by an employee or agent of Vulcan “concerning a matter
20 within the scope of the agency or employment, made during the existence of the
21 relationship.” And because the text of the memo refers to the attached letter, and
22 because one of the signatories on the letter has given testimony indicating the letter
23 is what it appears to be (i.e., part of a lease negotiation, see transcript of the deposition
24 of Herb Bock at 112:19-114:15), the letter is admissible under Rule 807 (the “residual
25 exception,” discussed below).

26 Third, though a trial date has not been set in this matter, is possible that this
27 document will fall within the hearsay inadmissibility exception known as the “ancient
28 document exception.” Fed. R. Evid. 803(16) (“[s]tatements in a document in

1 existence twenty years or more the authenticity of which is established”). The memo
2 is dated December 5, 1991, meaning the document will be within the express scope
3 of the ancient document exception within approximately six months of the filing of
4 this document (i.e., on December 5, 2011). The letter is dated October 16, 1991, ,
5 meaning the document will be within the express scope of the ancient document
6 exception within approximately four months of the filing of this document (i.e., on
7 October 16, 2011).

8 Fourth, at least two other hearsay inadmissability exceptions apply: Rule
9 803(6), the “business records exception” (the document clearly concerns lease
10 negotiations between an tenant and landlord); and Rule 807, the “residual exception,”
11 which provides an exception for “statement[s] not specifically covered by Rule 803
12 or 804 but having equivalent circumstantial guarantees of trustworthiness . . .” Thus,
13 Vulcan’s hearsay objection should be overruled.

14 **OBJECTION NO. 6:**

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

16 Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of
17 Authentication/Foundation. Fed. R. Evid. 901. Mr. Franklin provides no
18 testimony that he has personal knowledge of the photograph or "Quote"
19 attached to Exhibit Q such that he is able to authenticate it as required by
20 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.

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

23 **RESPONSE TO OBJECTION NO. 6:**

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

1 knowledge”).

2 Franklin, as an attorney for the Club in this matter (and has been since before
3 Vulcan filed suit on September 8, 2008; see Supp. Franklin Decl. at ¶ 3), has “personal
4 knowledge” of what documents have been produced by Vulcan to the Club in this
5 action, including, as stated in ¶ 20 of the Franklin Decl., the document attached thereto
6 as Exhibit P. The relevant fact *here* (as opposed to the Club’s response to Objection
7 No. 8, below) is that the document was produced in discovery, not that the contents
8 are correct (though they are). Thus, the statement of Franklin Decl. at ¶ 20 is within
9 Franklin’s knowledge, proving Vulcan’s Rule 602 objection is without merit.

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

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

20 *Alexander Dawson, Inc. v. N.L.R.B.*, 586 F.2d 1300, 1302 (9th Cir. 1978) (citations
21 omitted); *see also United States v. Black*, 767 F.2d 1134, 1342 (9th Cir. 1985)
22 (indicating a showing “so that a reasonable juror could find in favor of authenticity or
23 identification” is a sufficient prima facie showing of authenticity for purposes of Rule
24 901).

25 Here, the photograph at issue was obtained from Landiscor, an aerial
26 information provider that has, “[f]or more than fifty years . . . , photographed, logged
27 and recorded the changing face of real estate in many major cities throughout the
28 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

1 libraries, ranging from historical shots to new imagery[.]” (*Id.*). Landiscor has
2 provided an affidavit to the Club regarding the authenticity of the photo, and that
3 affidavit is Exhibit 5 to the Supp. Franklin Decl. at ¶ 11. Finally, it is worth noting
4 that neither Vulcan’s Evidentiary Objection nor Vulcan’s Statement of Genuine Issues
5 and Additional Material Facts filed therewith cites *any* evidence intended to (let alone
6 actually) rebutting the Club’s contention regarding the “substance” of the photo (i.e.,
7 that the Waste Pile at issue in this case was present, though incomplete, as of January
8 13, 1992).

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

16 Fed. R. Evid. 801, 802. Rules 801 and 802 state that “[h]earsay’ is a statement,
17 other than one made by the declarant while testifying at the trial or hearing, offered
18 in evidence to prove the truth of the matter asserted” and that “[h]earsay is not
19 admissible except as provided by these rules or by other rules prescribed by the
20 Supreme Court pursuant to statutory authority or by Act of Congress.” Because “a
21 photograph is not an assertion . . . as required by Fed. R. Evid. 801(a) (*United States*
22 *v. May*, 622 F.3d 1000, 1007 (9th Cir. 1980) (citing Fed. R. Evid. 801(a)), they cannot
23 be “offered to prove the truth of the matter asserted[.]” meaning photographs lack a
24 critical element of hearsay.

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

27 Second, though a trial date has not been set in this matter, is possible that photo
28 portion of this document will fall within the hearsay inadmissibility exception known

1 as the “ancient document exception.” Fed. R. Evid. 803(16) (“[s]tatements in a
2 document in existence twenty years or more the authenticity of which is established”).
3 The photo at issue is dated January 13, 1992, meaning it will be within the express
4 scope of the ancient document within less than seven months of the filing of this
5 document.⁷ And because the “Quote” is signed by the attorney who declares the photo
6 and Quote are “true and correct copies” (see Franklin Decl. at ¶ 20), the Quote is
7 admissible under Rule 807 (the “residual exception,” discussed below). That is,
8 Franklin can testify that he received the Quote from Landiscor, executed it, and sent
9 the executed copy (or an electronic copy thereof) to Landiscor. Vulcan’s Rule 901
10 objection is unsound and should be overruled.

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

21 **OBJECTION NO. 7:**

22 Franklin Decl., p. 4 21 and Exhibit R.

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

25 ⁷ To the extent any document facing a hearsay challenge herein is 1) over
26 nineteen years old and 2) produced by Vulcan in discovery, the Club
27 contends such documents, based on the two facts mentioned, should not be
28 considered inadmissible hearsay pursuant to the residual exception. Fed. R.
Evid. 807.

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

3 Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of
4 Authentication/Foundation. Fed. R. Evid. 901. Mr. Franklin provides no
5 testimony that he has personal knowledge of the document such that he
6 is able to authenticate it as required by the Federal Rules of Evidence.
7 See, e.g., *Estremera v. United States* 442 F3d 580, 584-585 (7th Cir.
8 2006) (declaration of attorney insufficient to authenticate documents
9 where knowledge was based only upon interviews with
10 witnesses and review of documents); see also, Request to Strike, below.
11 In fact, Mr. Franklin admits he cannot authenticate the document as he
12 is only able to state what it "appears to be."

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

16 **RESPONSE TO OBJECTION NO. 7:**

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

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

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

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

3 Vulcan apparently chooses to ignore on point Ninth Circuit authority like *Orr*
4 and *Maljack* and instead (mis)cites a Seventh Circuit case (*Estremera*, 442 F.3d at
5 584-85) that is completely off point. The question at issue in *Estremera* was whether
6 an affidavit “based on the attorney’s review of the relevant documents” was based on
7 sufficient personal knowledge to satisfy Rule 56(e), where the attorney *did not*
8 *introduce* “into the record the documents he relied on in his affidavit.” *Id.*
9 Additionally, even though Vulcan plainly indicates *Estremera* concerns authentication
10 of documents, *Estremera* never mentions either Rule 901 or authentication.

11 Thus, unless Vulcan is attempting to raise the argument that this document (a
12 document Bates stamped with a Vulcan identifier, nonetheless) was not produced to
13 the Club by Vulcan in this action (which the Club obviously denies), Vulcan’s Rule
14 901 objection must fail and should therefore be overruled.

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

20 “A statement is not hearsay if . . . the party's own statement, in either an
21 individual or a representative capacity or, . . . a statement by the party's agent or
22 servant concerning a matter within the scope of the agency or employment, made
23 during the existence of the relationship.” Fed. R. Evid. 801(d)(2). Exhibit M is not
24 hearsay because it is sections of “Minutes of the Regular Meeting of the Executive
25 Committee of Crystal a California General Partnership[.]” Vulcan has never indicated
26 in this action that it is not the successor-in-interest to Crystal partner
27
28

1 Calmat Co.⁸ Thus, any statements with the minutes are not hearsay because they are
2 by Vulcan itself, if not its “servant,” “concerning a matter within the scope of . . .
3 employment, made during the existence of the relationship.”

4 Additionally, at least two hearsay inadmissability exceptions apply: Rule
5 803(6), the “business records exception” (the document effectively memorializes
6 matters related to the placement of material mined by Crystal and placed on the
7 property leased by the Club at issue in this action); and Rule 807, the “residual
8 exception,” which provides an exception for “statement[s] not specifically covered by
9 Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness
10 . . .” That the document is over sixteen years old, was produced by Vulcan in this
11 action, and that Vulcan had the opportunity to, but did not, question Sheedy regarding
12 the document (which is introduced to show that Sheedy was at the meeting the
13 document purports to be the minutes of, and that at that meeting he “reported that
14 there are approximately 600,000 tons of waste material on the CalMat (Gun Club)
15 property”)⁹ shows the document falls within the residual exception. Thus, because
16 Vulcan’s hearsay objection is unfounded, it should be overruled.

17 **OBJECTION NO. 8:**

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

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

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

23 _____
24 ⁸ Indeed, the Club believes Vulcan cannot make such argument without
25 undermining its entire case, as the Club understands that Vulcan’s
26 ownership of the property at issue was obtained when Calmat was acquired
by Vulcan.

27 ⁹ (See Defendant’s Response to Plaintiff’s Statement of Uncontroverted
28 Facts at 34, response to alleged uncontroverted fact 39).

1 attached to Exhibit Q such that he is able to authenticate it as required by
2 the Federal Rules of Evidence. *See, e.g., Estremera v. United States* 442
3 F3d 580, 584–585 (7th Cir. 2006) (declaration of attorney insufficient to
4 authenticate documents where knowledge was
5 based only upon interviews with witnesses and review of documents);
6 *see also*, Request to Strike, below.

7 Hearsay. Fed. R. Evid. 801, 802. The contents of the photograph and
8 attached "Quote" are out of court statements improperly being offered for
9 the truth of what they assert.

10 **RESPONSE TO OBJECTION NO. 8:**

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

17 Franklin, as an attorney for the Club in this matter (and has been since before
18 Vulcan filed suit on September 8, 2008; see Supp. Franklin Decl. at ¶ 3), has “personal
19 knowledge” of what documents it has purchased from outside vendors for the purpose
20 of this lawsuit, including Exhibit W attached to the Franklin Decl. Thus, the statement
21 of Franklin Decl. at ¶ 26 is within Franklin’s knowledge, proving Vulcan’s Rule 602
22 objection is without merit. Further, as discussed below, the photograph at issue does
23 not require authentication by declaration, thus making Vulcan’s Rule 602 objection
24 irrelevant and thus properly overruled.

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

29 The issue for the trial judge under Rule 901 is whether there is prima
30 facie evidence, circumstantial or direct, that the document is what it is
31 purported to be. If so, the document is admissible in evidence. [Citations]
32 It then remains for the trier of facts to make its own determination of the

1 authenticity of the admitted evidence and the weight which it feels the
2 evidence should be given.

3 *Alexander Dawson, Inc. v. N.L.R.B.*, 586 F.2d 1300, 1302 (9th Cir. 1978) (citations
4 omitted); *see also United States v. Black*, 767 F.2d 1134, 1342 (9th Cir. 1985)
5 (indicating a showing “so that a reasonable juror could find in favor of authenticity or
6 identification” is a sufficient prima facie showing of authenticity for purposes of Rule
7 901).

8 Here, it is clear that the declarant has personal knowledge that the “matter is
9 what it is claimed to be” (Fed. R. Evid. 901(b)(1)), in the Quote, as clearly signed it.
10 And as to the photograph at issue, was obtained from Landiscor, an aerial information
11 provider that has, “[f]or more than fifty years . . . , photographed, logged and recorded
12 the changing face of real estate in many major cities throughout the United States.”
13 (See <http://www.landiscor.com/about-us.html>).

14 Landiscor has “taken thousands upon thousands of aerial photographs and have
15 organized them into one of the nation’s most complete real estate-oriented photo
16 libraries, ranging from historical shots to new imagery[.]” (*Id.*). Landiscor has
17 provided an affidavit to the Club regarding the authenticity of the photo, and that
18 affidavit is Exhibit 5 to the Supp. Franklin Decl. at ¶ 11. Finally, it is worth noting
19 that Vulcan has never provided a single piece of documentary evidence from its files
20 (or even those of the Club, which Vulcan reviewed during discovery) intended to (let
21 alone actually) rebutting the Club’s contention that the Waste Pile at issue in this case
22 was present, though admittedly incomplete, as of January 13, 1992.

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

1 coverage of the ancient document exception, (see Fed. R. Evid. 901(b)(8)). Vulcan’s
2 Rule 901 objection is unsound and should be overruled.

3 Fed. R. Evid. 801, 802. Rules 801 and 802 state that “[h]earsay’ is a statement,
4 other than one made by the declarant while testifying at the trial or hearing, offered
5 in evidence to prove the truth of the matter asserted” and that “[h]earsay is not
6 admissible except as provided by these rules or by other rules prescribed by the
7 Supreme Court pursuant to statutory authority or by Act of Congress.” Because “a
8 photograph is not an assertion . . . as required by Fed. R. Evid. 801(a) (*United States*
9 *v. May*, 622 F.3d 1000, 1007 (9th Cir. 1980) (citing Fed. R. Evid. 801(a)), they cannot
10 be “offered to prove the truth of the matter asserted[,]” meaning photographs lack a
11 critical element of hearsay.

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

14 Second, though a trial date has not been set in this matter, is possible that photo
15 portion of this document will fall within the hearsay inadmissability exception known
16 as the “ancient document exception.” Fed. R. Evid. 803(16) (“[s]tatements in a
17 document in existence twenty years or more the authenticity of which is established”).
18 The photo at issue is dated January 13, 1992, meaning it will be within the express
19 scope of the ancient document within less than seven months of the filing of this
20 document. And because the “Quote” is signed by the attorney who declares the photo
21 and Quote are “true and correct copies” (see Franklin Decl. at ¶ 26), the letter is
22 admissible under Rule 807 (the“residual exception,” discussed below). That is,
23 Franklin can testify that he received the Quote from Landiscor, executed it, and sent
24 the executed copy (or an electronic copy thereof) to Landiscor.

25 Third, at least two other hearsay inadmissability exceptions apply regarding the
26 photo and the Quote: 1) Rule 803(6), the “business records exception” (the document
27 is of the kind that is the stock and trade of Landiscor); and Rule 807, the “residual
28 exception,” which provides an exception for “statement[s] not specifically covered by

1 Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness
2 . . .” Given that the photo was obtained from a company that maintains a database of
3 historic aerial photography as a key part of its business, and the photograph is nearly
4 twenty years old, there is a sufficient basis to find the photo is exempted from being
5 classified as inadmissible hearsay. Thus, because Vulcan’s hearsay objection is
6 unfounded, it should be overruled.

7 **OBJECTION NO. 9:**

8 Franklin Decl. p. 5 29 and Exhibit Z.

9 "Attached as Exhibit Z to this Declaration is a true and correct copy of
10 a document produced by Vulcan in this Action that appears to be a
11 memorandum dated December 5, 1991, including the heading 'Gun Club
12 Environmental Status[.]'"

13 Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of
14 Authentication/Foundation. Fed. R. Evid. 901. Mr. Franklin provides no
15 testimony that he has personal knowledge of the memorandum such that
16 he is able to authenticate them as required by the Federal Rules of
17 Evidence. See, e.g., *Estremera v. United States* 442 F3d 580, 584-585
18 (7th Cir. 2006) (declaration of attorney insufficient to authenticate
19 documents where knowledge was based only upon
20 interviews with witnesses and review of documents); *see also*, Request
21 to Strike, below.

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

25 **RESPONSE TO OBJECTION NO. 9:**

26 Fed. R. Evid. 602. Rule 602 states “[a] witness may not testify to a matter
27 unless evidence is introduced sufficient to support a finding that the witness has
28 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

1 in this action, including, as stated in ¶ 29 of the Franklin Decl., the document attached
2 thereto as Exhibit Z. Thus, the statement of Franklin Decl. at ¶ 29 is within Franklin's
3 knowledge, proving Vulcan's Rule 602 objection is without merit.

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

13 Vulcan apparently chooses to ignore on point Ninth Circuit authority like *Orr*
14 and *Maljack* and instead (mis)cites a Seventh Circuit case (*Estremera*, 442 F.3d at
15 584-85) that is completely off point. The question at issue in *Estremera* was whether
16 an affidavit "based on the attorney's review of the relevant documents" was based on
17 sufficient personal knowledge to satisfy Rule Rule 56(e), where the attorney *did not*
18 *introduce* "into the record the documents he relied on in his affidavit." *Id.*
19 Additionally, even though Vulcan plainly indicates *Estremera* concerns authentication
20 of documents, *Estremera* never mentions either Rule 901 or authentication.

21 Thus, unless Vulcan is attempting to raise the argument that this document (a
22 document Bates stamped with a Vulcan identifier, nonetheless) was not produced to
23 the Club by Vulcan in this action (which the Club obviously denies), Vulcan's Rule
24 901 objection must fail and should therefore be overruled.

25 Fed. R. Evid. 801, 802. Rules 801 and 802 state that "[h]earsay' is a statement,
26 other than one made by the declarant while testifying at the trial or hearing, offered
27 in evidence to prove the truth of the matter asserted" and that "[h]earsay is not
28

1 admissible except as provided by these rules or by other rules prescribed by the
2 Supreme Court pursuant to statutory authority or by Act of Congress.”

3 First, the document at issue (including its contents) is not hearsay, as the
4 document is a non-hearsay admission of a party-opponent. Fed. R. Evid.
5 801(d)(2)(D). (“A statement is not hearsay if . . . a statement by the party's agent or
6 servant concerning a matter within the scope of the agency or employment, made
7 during the existence of the relationship.”). The memo portion of the document is
8 clearly a internal CalMat (i.e., Vulcan) memo, meaning any statements therein are
9 created by an employee or agent of Vulcan “concerning a matter within the scope of
10 the agency or employment, made during the existence of the relationship.”

11 Second, though a trial date has not been set in this matter, is possible that this
12 document will fall within the hearsay inadmissibility exception known as the “ancient
13 document exception.” Fed. R. Evid. 803(16) (“[s]tatements in a document in
14 existence twenty years or more the authenticity of which is established”). The memo
15 is dated December 5, 1991, meaning the document will be within the express scope
16 of the ancient document exception within approximately six months of the filing of
17 this document (i.e., on December 5, 2011).

18 Third, at least two other hearsay inadmissibility exceptions apply: Rule 803(6),
19 the “business records exception” (the document clearly concerns lease negotiations
20 between an tenant and landlord); and Rule 807, the “residual exception,” which
21 provides an exception for “statement[s] not specifically covered by Rule 803 or 804
22 but having equivalent circumstantial guarantees of trustworthiness . . .” Rule 807
23 applies here because the document at issue is over nineteen years old, was produced
24 in discovery by Vulcan, and Vulcan has provided no evidence that the document does
25 not have “trustworthy as to the circumstantial guarantees of trustworthiness” on a par
26 with those documents covered by Rule 803 or 804. Thus, Vulcan’s hearsay objection
27 should be overruled.

28

1 **OBJECTION NO. 10:**

2 Franklin Decl. p.5 30 and Exhibit AA.

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

7 Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of
8 Authentication/Foundation. Fed. R. Evid. 901. Mr. Franklin provides no
9 testimony that he has personal knowledge of the memorandum such that
10 he is able to authenticate them as required by the Federal Rules of
11 Evidence. See, e.g., *Estremera v. United States* 442 F3d 580, 584-585
12 (7th Cir. 2006) (declaration of attorney insufficient to authenticate
13 documents where knowledge was based only upon
14 interviews with witnesses and review of documents); see also, Request
15 to Strike, below.

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

19 **RESPONSE TO OBJECTION NO. 10:**

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

26 Franklin, as an attorney for the Club in this matter (and has been since before
27 Vulcan filed suit on September 8, 2008; see Supp. Franklin Decl. [Docket Document
28 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

1 claims.” Documents produced in discovery are considered authenticated for use by
2 a party-opponent, presuming there is no dispute such production actually occurred.
3 *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 777 n.20 (9th Cir. 2002) (“documents
4 produced by a party in discovery were deemed authentic when offered by the
5 party-opponent”) (citing, among others, *Maljack Prods., Inc. v. GoodTimes Home*
6 *Video Corp.*, 81 F.3d 881, 889 n.12 (9th Cir.1996)).

7 Vulcan apparently chooses to ignore on point Ninth Circuit authority like *Orr*
8 and *Maljack* and instead (mis)cites a Seventh Circuit case (*Estremera*, 442 F.3d at
9 584-85) that is completely off point. The question at issue in *Estremera* was whether
10 an affidavit “based on the attorney’s review of the relevant documents” was based on
11 sufficient personal knowledge to satisfy Rule Rule 56(e), where the attorney *did not*
12 *introduce* “into the record the documents he relied on in his affidavit.” *Id.*
13 Additionally, even though Vulcan plainly indicates *Estremera* concerns authentication
14 of documents, *Estremera* never mentions either Rule 901 or authentication.

15 Thus, unless Vulcan is attempting to raise the argument that this document (a
16 document Bates stamped with a Vulcan identifier, nonetheless) was not produced to
17 the Club by Vulcan in this action (which the Club obviously denies), Vulcan’s Rule
18 901 objection must fail and should therefore be overruled.

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

24 First, the document at issue (including its contents) is not hearsay, as the
25 document is a non-hearsay admission of a party-opponent. Fed. R. Evid. 801(d)(2)(D)
26 (“A statement is not hearsay if . . . a statement by the party's agent or servant
27 concerning a matter within the scope of the agency or employment, made during the
28 existence of the relationship.”). The memo portion of the document is clearly a

1 internal CalMat (i.e., Vulcan) memo, meaning any statements therein are created by
2 an employee or agent of Vulcan “concerning a matter within the scope of the agency
3 or employment, made during the existence of the relationship.”

4 Second, though a trial date has not been set in this matter, is possible that this
5 document will fall within the hearsay inadmissibility exception known as the “ancient
6 document exception.” Fed. R. Evid. 803(16) (“[s]tatements in a document in
7 existence twenty years or more the authenticity of which is established”). The memo
8 is dated December 5, 1991, meaning the document will be within the express scope
9 of the ancient document exception within approximately six months of the filing of
10 this document (i.e., on December 5, 2011).

11 Third, at least two other hearsay inadmissibility exceptions apply: Rule 803(6),
12 the “business records exception” (the document clearly concerns lease negotiations
13 between an tenant and landlord); and Rule 807, the “residual exception,” which
14 provides an exception for “statement[s] not specifically covered by Rule 803 or 804
15 but having equivalent circumstantial guarantees of trustworthiness . . .” Rule 807
16 applies here because the document at issue is over nineteen years old, was produced
17 in discovery by Vulcan, and Vulcan has provided no evidence that the document does
18 not have “trustworthy as to the circumstantial guarantees of trustworthiness” on a par
19 with those documents covered by Rule 803 or 804. Thus, Vulcan’s hearsay objection
20 should be overruled.

21 **OBJECTION NO. 11:**

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

23 “Attached as Exhibit EE to this Declaration is a true and correct copy of
24 portions of a Workplan for Environmental Site Investigation of VMC-
25 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.”

26 Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of
27 Authentication/Foundation. Fed. R. Evid. 901. Mr. Franklin provides no
28 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.

1 *See, e.g., Estremera v. United States* 442 F.3d 580, 584–585 (7th Cir.
2 2006) (declaration of attorney insufficient to
3 authenticate documents where knowledge was based only upon
 interviews with witnesses and review of documents); *see also*, Request
 to Strike, below.

4 **RESPONSE TO OBJECTION NO. 11:**

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

11 Franklin, as an attorney for the Club in this matter (and has been since before
12 Vulcan filed suit on September 8, 2008; see Supp. Franklin Decl. at ¶ 3), has “personal
13 knowledge” of what documents have been produced by Vulcan to the Club in this
14 action, including, as stated in ¶ 34 of the Franklin Decl., the document attached thereto
15 as Exhibit EE. Thus, the statement of Franklin Decl. at ¶ 34 is within Franklin’s
16 knowledge, proving Vulcan’s Rule 602 objection is without merit.

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

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

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

5 Thus, unless Vulcan is attempting to raise the argument that this document (a
6 document Bates stamped with a Vulcan identifier, nonetheless) was not produced to
7 the Club by Vulcan in this action (which the Club obviously denies), Vulcan’s Rule
8 901 objection must fail and should therefore be overruled.

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

21 Additionally, even if the statement(s) at issue were considered hearsay, they
22 would not be inadmissible because the workplan is not inadmissible hearsay based
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1 on the business records exception (Fed. R. Evid. 803(6))¹⁰ and the residual exception
2 (Fed. R. Evid. 807).¹¹

3 **OBJECTION NO. 12:**

4 Franklin Decl., Ex. FF, Declaration of Claude Preston Cowan, ¶ 19.

5 "I am not aware of CalMat Co. management (Tom Sheedy or any above
6 him in CalMat Co.) ever discussing with its tenant the possibility that
7 placing tailings on the leased property could result problems [sic, error
8 in original] in the future regarding lead bullets
9 (or lead fragments) being buried, though I do recall Rick Phillips
10 (manager of the San Gabriel Valley Gun Club) making a comment to that
11 effect in the early 1990s.

12 Objections. Lack of Personal Knowledge/Foundation. Fed R. Evid. 602,
13 901. Mr. Cowan establishes no personal knowledge of all (or any)
14 conversations between CalMat Co. management and the San Gabriel
15 Valley Gun Club such that he can testify as to their contents.

16 Hearsay. Fed. R. Evid. 801, 802. The contents of any conversation
17 between CalMat Co. management and the San Gabriel Valley Gun Club,
18 and any statements by Mr. Phillips to Mr. Cowan are inadmissible
19 hearsay.

20 Relevance. Fed. R. Evid. 401, 402. Whether Cowan was aware of an
21 such communications is not of consequence to the determination of any
22 fact in this action.

23 **RESPONSE TO OBJECTION NO. 12:**

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

27 ¹⁰ I.e., the Workplan is a "report . . . of . . . conditions, . . . opinions, or
28 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 1) that Preston Cowan is *not* “aware of CalMat Co. management (Tom Sheedy
2 or any above him in CalMat Co.) ever discussing with its tenant the possibility
3 that placing tailings on the leased property could result problems [sic, error in
4 original] in the future regarding lead bullets (or lead fragments) being buried,”
5 and,

6 2) that Preston Cowan *does* “recall Rick Phillips (manager of the San
7 Gabriel Valley Gun Club) making a comment to that effect[,]” i.e., that
8 placing tailings on the leased property could result in problems in the
9 future regarding lead bullets or lead fragments being buried on the leased
10 property in the early 1990s.

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

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

18 Vulcan’s Rule 602 objection is intended to address only Issue 1. Vulcan’s Rule
19 602 objection does not make sense. Vulcan states that “Mr. Cowan establishes no
20 personal knowledge of all (or any) conversations between CalMat Co. management
21 and the San Gabriel Valley Gun Club such that he can testify as to their contents.”
22 Here, however, Cowan is not testifying the contents of “conversations between
23 CalMat Co. management and the San Gabriel Valley Gun Club[,]” in fact, he is
24 testifying that he has *no* personal knowledge of any communication between Calmat
25 (i.e., Vulcan) management and the Club as to the potential effects burying lead bullets
26 and fragments as a result of mining tailings being placed at the leased property.

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

1 of information on the topic at hand is most definitely within his personal knowledge
2 (that is, Cowan is the only person who can testify as to what he is, *and is not*, aware
3 of), Vulcan's Rule 602 objection should be overruled.

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

8 Vulcan's Rule 901 objection is either a mistake or inappropriate, because there
9 is no reason to question the authenticity of the declaration at issue. Vulcan itself
10 inquired with the author (Cowan) about the declaration at length during Cowan's
11 deposition. (*See, e.g.*, Transcript of deposition of Preston Claude Cowan at 74:1-
12 76:23). Vulcan's Rule 901 objection is baseless and should be overruled.

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

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

23 *Issue 2*. A statement is not hearsay if it is not "offered in evidence to prove the
24 truth of the matter asserted." Fed. R. Evid. 801(c). The club does not currently offer
25 the statement at issue to prove that placing tailings on the leased property can result
26 in problems regarding lead bullets or lead fragments being buried on the leased
27 property (i.e., what Vulcan apparently contends is "the matter asserted"), it is being
28 offered to show that the Club expressed a *belief* to Vulcan that placing tailings on the

1 leased property could result in problems in the future regarding lead bullets or lead
2 fragments being buried on the leased property. (Defendant’s Response to Plaintiff’s
3 Statement of Uncontroverted Facts at 47, Additional Fact 17); Fed. R. Evid. 801
4 advisory committee’s note (“Note to Subdivision (c) If the significance of an
5 offered statement lies solely in the fact that it was made, no issue is raised as to the
6 truth of anything asserted, and the statement is not hearsay.); *see United States v.*
7 *Scheele*, 231 F.3d 492, 497, 500 (9th Cir. 2000) (police officer’s statement that he
8 heard a threat on a tape recording is not hearsay to the extent the statement is offered
9 only to prove that the threat was made); *United States v. Munoz*, 36 F.3d 1229, 1233
10 (1st. Cir. 1994) (“It is quite true that an out-of-court statement is not hearsay if it is
11 used only to show that the statement was made and that the listener heard the words
12 uttered.”). Because the evidence at issue is a “verbal act” and is not offered to prove
13 the truth of the matter asserted, Vulcan’s objection cannot be sustained.

14 Fed. R. Evid. 401, 402. Rules 401 and 402 state collectively that evidence
15 which is not relevant is not admissible, and “‘relevant’ evidence means evidence
16 having any tendency to make the existence of any fact that is of consequence to the
17 determination of the action more probable or less probable than it would be without
18 the evidence.”

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

27 To be “relevant,” evidence need not be conclusive proof of a fact sought
28 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

1 Notes to the 1972 Proposed Rules remind us that “[r]elevancy is not an
2 inherent characteristic of any item of evidence but exists only as a
3 relation between an item of evidence and a matter properly provable in
4 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.*

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

6 Here, because Vulcan management would communicate with the Club about
7 creating the Waste Pile “primarily through Preston Cow[a]n[,]” there is a legitimate
8 reason to believe his testimony on this issue tends to show that Vulcan management
9 and the Club did not discuss the possibility at issue. Once again, if Vulcan wants to
10 challenge the *weight* of Cowan’s testimony, it is free to do so at trial. But because
11 evidence is relevant if it has “*any* tendency to make the existence of any fact . . . more
12 probable[,]” and because Cowan’s testimony tends to prove the communications at
13 issue did not occur (which in turn suggests Vulcan did not intend the Club to clean up
14 spent ammunition), Vulcan’s relevance objection should be overruled. Fed. R. Evid.
15 401 (emphasis added).

16 **OBJECTION NO. 13:**

17 Franklin Decl., Ex. FF, Declaration of Claude Preston Cowan, 20.
18 “At some point in the early 1990s, I told Tom Sheedy that placing
19 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.”

20 Objections. Hearsay. Fed. R. Evid. 801, 802. The contents of any
21 conversation between Mr. Cowan and Mr. Sheedy are inadmissible
hearsay.

22 **RESPONSE TO OBJECTION NO. 13:**

23 Fed. R. Evid. 801, 802. Rules 801 and 802 state that “[h]earsay’ is a statement,
24 other than one made by the declarant while testifying at the trial or hearing, offered
25 in evidence to prove the truth of the matter asserted” and that “[h]earsay is not
26 admissible except as provided by these rules or by other rules prescribed by the
27 Supreme Court pursuant to statutory authority or by Act of Congress.” “A statement
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1 is not hearsay if it is not “offered in evidence to prove the truth of the matter asserted.”
2 Fed. R. Evid. 801(c).

3 The club does not intend the statement at issue to be offered to prove that
4 placing tailings on the property leased by San Gabriel Valley Gun Club was resulting
5 in lead bullets or fragments being buried beneath tailings (i.e., what Vulcan apparently
6 contends is “the matter asserted”), it is being offered to show that the Preston Cowan
7 *told* Tom Sheedy (whether correctly or not) that placing tailings on the property leased
8 by San Gabriel Valley Gun Club was resulting in lead bullets or fragments being
9 buried beneath tailings. (Defendant’s Response to Plaintiff’s Statement of
10 Uncontroverted Facts at 50, Additional Fact 39); Fed. R. Evid. 801 advisory
11 committee’s note (“Note to Subdivision (c) If the significance of an offered
12 statement lies solely in the fact that it was made, no issue is raised as to the truth of
13 anything asserted, and the statement is not hearsay.”); *see Scheele*, 231 F.3d at 497, 500
14 (police officer’s statement that he heard a threat on a tape recording is not hearsay to
15 the extent the statement is offered only to prove that the threat was made); *Munoz*, 36
16 F.3d at 1233 (“It is quite true that an out-of-court statement is not hearsay if it is used
17 only to show that the statement was made and that the listener heard the words
18 uttered.”).

19 Further, even if Vulcan’s objection was aimed at the underlying fact at issue
20 (i.e., placing tailings on the property leased by San Gabriel Valley Gun Club was
21 resulting in lead bullets or fragments being buried beneath tailings), there is no doubt
22 that Cowan had personal knowledge on that issue as the foreman in charge of the
23 creation of the Waste Pile (see Franklin Decl. at Exhibit FF, at ¶¶ 11-12), thus
24 precluding a hearsay allegation on either the underlying fact or the fact actually at
25 issue (i.e., that Cowan raised the lead burial issue with Sheedy). Here, the evidence
26 at issue is a “verbal act” and is not offered to prove the truth of the matter asserted,
27 Vulcan’s objection cannot be sustained.

28

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

14 **OBJECTION NO. 14:**

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

16 “Attached as Exhibit GG to this Declaration is a true and correct copy of
17 what appears to be a draft lease attached to a document titled ‘Letter of
18 Transmittal’ dated February 10, 1992. This document, which has been
19 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.”

20 Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of
21 Authentication/Foundation. Fed. R. Evid. 901. Mr. Franklin provides no
22 testimony that he has personal knowledge of the document such that he
23 is able to authenticate it as required by the Federal Rules of Evidence.
24 *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.”

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

27 Relevance. Fed. R. Evid. 401, 402. The draft lease and handwritten
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1 notes are irrelevant for the purposes the Gun Club offers them in light of
2 the parties' final executed lease.

3 **RESPONSE TO OBJECTION NO. 14:**

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

10 Franklin, as an attorney for the Club in this matter (and has been since before
11 Vulcan filed suit on September 8, 2008; see Supp. Franklin Decl. at ¶ 3), has “personal
12 knowledge” of what documents he has obtained from the Club’ prior lawyer as part
13 of his defense of the Club this action, including, as stated in ¶ 36 of the Franklin Decl.,
14 the document attached thereto as Exhibit GG. Thus, the statement of Franklin Decl.
15 at ¶ 36 is within Franklin’s knowledge, proving Vulcan’s Rule 602 objection is
16 without merit.

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

21 The issue for the trial judge under Rule 901 is whether there is prima
22 facie evidence, circumstantial or direct, that the document is what it is
23 purported to be. If so, the document is admissible in evidence. [Citations]
24 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.

25 *Alexander Dawson*, 586 F.2d at 1302 (citations omitted); *see also Black*, 767 F.2d at
26 1342 (indicating a showing “so that a reasonable juror could find in favor of
27 authenticity or identification” is a sufficient prima facie showing of authenticity for
28 purposes of Rule 901). There are several “illustrations” listed in Rule 901 of

1 “authentication or identification conforming with” Rule 901(a), at least two of which
2 are relevant here: Rule 901(b)(1) (“[t]estimony that a matter is what it is claimed to
3 be”) and Rule 901(b)(4) (“[a]pppearance, contents, substance, internal patterns, or other
4 distinctive characteristics, taken in conjunction with circumstances”).¹²

5 Here, the document at issue comprises what appears to be a draft lease (with
6 “bwf\leases\gunclub.lse” printed in the bottom left-hand corner of the page marked
7 “20”), and a “letter of Transmittal” from CalMat dated February 10, 1992. (Franklin
8 Decl. at ¶¶ 36, Ex. GG). Brian Ferris of Vulcan has given testimony that he believes
9 he did draft the “draft lease” portion of this document, based on the presence of his
10 initials (“bwf”) on the “draft lease.” *See* Franklin Decl. ISO Opp.” at Ex. X, 47:1-14
11 [at 223 per the Court’s pagination]). Further, as stated in Franklin’s Decl., the
12 document was obtained from Robert Carter, from the file he maintained regarding the
13 Club. (Franklin Decl. at ¶¶ 36). Robert Carter was the Club’s attorney regarding the
14 negotiation of the Lease. *See* Franklin Decl. at Ex. HH (February 24, 1992, letter from
15 Robert Carter to Brian Ferris [of CalMat, i.e., Vulcan] stating Mr. Carter represents
16 the Club and that and listing his comments in response to his review of “the proposed
17 Easement and Lease which have been submitted to my client[.]”). Finally, it is worth
18 noting that Vulcan has not cited any evidence intended to (let alone actually)
19 suggesting the document at issue is not what it purports to be. The foregoing facts are
20 clearly sufficient “so that a reasonable juror could find in favor of authenticity or
21 identification” (*Black*, 767 F.2d at 1342), meaning Vulcan’s Rule 901 objection is
22 meritless.

23 _____
24 ¹² Though Rule 901(b)(8) (ancient documents) is not expressly applicable at
25 this time (the document at issue is less than a year away from being twenty
26 years old and thus an ancient document), the fact that this document is
27 nearly twenty years old, in light it being found in the possession of the
28 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).

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

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

14 First, the documents at issue (including their contents) are not hearsay, as the
15 documents are non-hearsay admissions of a party-opponent. Fed. R. Evid.
16 801(d)(2)(D) ("A statement is not hearsay if . . . a statement by the party's agent or
17 servant concerning a matter within the scope of the agency or employment, made
18 during the existence of the relationship."). The draft lease is attached to a letter of
19 transmittal with a Calmat (i.e., Vulcan) logo, and it is clear that statements in the
20 document are created by an employee or agent of Vulcan "concerning a matter within
21 the scope of the agency or employment, made during the existence of the
22 relationship."

23 Second, though a trial date has not been set in this matter, is possible that these
24 documents will fall within the hearsay inadmissibility exception known as the
25 "ancient document exception." Fed. R. Evid. 803(16) ("[s]tatements in a document
26 in existence twenty years or more the authenticity of which is established"). The letter
27 of transmittal is dated February 20, 1992, meaning they will be within the express
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1 scope of the ancient document exception within approximately eight months of the
2 filing of this document (i.e., on February 20, 2012).

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

9 Fed. R. Evid. 401, 402. Rules 401 and 402 state collectively that evidence
10 which is not relevant is not admissible, and “‘relevant’ evidence means evidence
11 having any tendency to make the existence of any fact that is of consequence to the
12 determination of the action more probable or less probable than it would be without
13 the evidence.”

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

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

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

26
27 ¹³ The Club does not believe it has asserted that it is relying on the
28 handwritten notes on what appears to be the draft lease portion of Exhibit
GG, so that issue is not responded to herein.

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

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

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

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

4 **OBJECTION NO. 15:**

5 Franklin Decl., p. 6, 37 and Exhibit HH.

6 "Attached as Exhibit HH to this Declaration is a true and correct copy of
7 what appears to be a letter discussing the terms of a proposed easement
8 and lease, dated February 24, 1992, from Robert Carter to Brian Ferris.
9 This document, which has been produced to Vulcan in this Action, was
10 provided to me by the Club's former attorney, Robert Carter, from the file
11 he maintained regarding the work he did for the Club."

12 Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of
13 Authentication/Foundation. Fed. R. Evid. 901. Mr. Franklin provides no
14 testimony that he has personal knowledge of the document such that he
15 is able to authenticate it as required by the Federal Rules of Evidence.
16 See, e.g., *Estremera v. United States* 442 F3d 580, 584-585 (7th Cir.
17 2006) (declaration of attorney insufficient to authenticate documents
18 where knowledge was based only upon interviews with
19 witnesses and review of documents); see also, Request to Strike below.
20 In fact, Mr. Franklin admits he cannot authenticate the document as he
21 is only able to state what it "appears to be."

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

25 Relevance. Fed. R. Evid. 401, 402. The document is irrelevant for the
26 purposes the Gun Club offers them in light of the parties' final executed
27 lease.

28 **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

1 of his defense of the Club this action, including, as stated in ¶ 37 of the Franklin Decl.,
2 the document attached thereto as Exhibit HH. Also, as one of the attorneys for the
3 Club in this matter, he has personal knowledge of the fact that this document was
4 provided to Vulcan in this action. Thus, the statement of Franklin Decl. at ¶ 37 is
5 within Franklin's knowledge, proving Vulcan's Rule 602 objection is without merit.

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

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

16 *Alexander Dawson*, 586 F.2d at 1302 (citations omitted); *see also Black*, 767 F.2d at
17 1342 (indicating a showing "so that a reasonable juror could find in favor of
18 authenticity or identification" is a sufficient prima facie showing of authenticity for
19 purposes of Rule 901).

20 Though Rule 901(b)(8) (ancient documents) is not expressly applicable at this
21 time (the document at issue is less than a year away from being twenty years old and
22 thus an ancient document), circumstances show the document is authentic per Rule
23 901(b)(4) (authentication based on "[a]pppearance, contents, substance, internal
24 patterns, or other distinctive characteristics, taken in conjunction with
25 circumstances").

26 Authentication is shown by the following facts: the document 1) is nearly
27 twenty years old, 2) includes a fax "ACTIVITY REPORT" with a date of February 24,
28 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

1 lease at issue in this case (*See* Franklin Decl. at Ex. HH, at 1), and 5) is plainly
2 referenced in a letter dated March 5, 1992, produced by Vulcan in this matter (the
3 letter refers to Robert Carter’s “comments of February 24” [i.e., the date of the
4 document at issue] regarding a lease and easement). (*See* Supp. Franklin Decl. at ¶ 7,
5 Ex. 2). Further, Vulcan has not offered any evidence suggesting the document at issue
6 is not authentic. It is obvious “a reasonable juror could find in favor of authenticity
7 or identification” based on the foregoing facts. *Black*, 767 F.2d at 1342.

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

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

22 First, “[a] statement is not hearsay if it is not “offered in evidence to prove the
23 truth of the matter asserted.” Fed. R. Evid. 801(c). The club does not intend the
24 document/statement at issue to be introduced to prove what the specific terms of a
25 draft lease were (i.e., what Vulcan apparently contends is “the matter asserted”), it is
26 being offered to show the *specific statement(s)* the Club expressed to Vulcan
27 regarding the draft lease apparently at issue (i.e., it does not discuss “the possibility
28 of the Club being responsible for cleaning up Spent Ammunition at the Property).

1 (Defendant’s Response to Plaintiff’s Statement of Uncontroverted Facts at 50,
2 Additional Fact 36); Fed. R. Evid. 801 advisory committee’s note (“Note to
3 Subdivision (c) If the significance of an offered statement lies solely in the fact
4 that it was made, no issue is raised as to the truth of anything asserted, and the
5 statement is not hearsay.”); *see Scheele*, 231 F.3d at 500 (police officer’s statement that
6 he heard threat a tape recording is not hearsay to the extent the statement is offered
7 only to prove that the threat was made); *Munoz*, 36 F.3d at 1233 (“It is quite true that
8 an out-of-court statement is not hearsay if it is used only to show that the statement
9 was made and that the listener heard the words uttered.”). Because the evidence at
10 issue is a is not offered to prove the truth of the matter asserted, Vulcan’s objection
11 cannot be sustained.

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

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

26 Fed. R. Evid. 401, 402. Rules 401 and 402 state collectively that evidence
27 which is not relevant is not admissible, and “‘relevant’ evidence means evidence
28 having any tendency to make the existence of any fact that is of consequence to the

1 determination of the action more probable or less probable than it would be without
2 the evidence.”

3 To be “relevant,” evidence need not be conclusive proof of a fact sought
4 ~~to be proved, or even so general that it is an “ultimate fact” to be proved.~~ The Advisory Committee Notes
5 to the 1972 Proposed Rules remind us that “[r]elevancy is not an inherent
6 characteristic of any item of evidence but exists only as a relation between an item of
7 evidence and a matter properly provable in the case.” In that relation, “[t]he fact to be
8 proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of
9 consequence in the determination of the action.” *Id.*

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

11 Vulcan’s relevance objection is unsound. The Club contends that *this entire*
12 *case* can be boiled down to one question: did the parties intend for the Club to be
13 contractually required to remove/remediate the firearm projectiles and fragments
14 thereof (and related material) present on the property it leased from Vulcan as of the
15 end of the last express lease term between the Club and Vulcan (i.e., November 6,
16 2006)? The evidence has not only a tendency, but a *strong* “tendency to make the
17 existence of a[] fact that is of consequence [i.e., that the parties *never* expressed a
18 contractual intent that the Club was required to remove/remediate firearm projectiles
19 at the leased property] more . . . probable than it would be without the evidence.” Fed.
20 R. Evid. 401.

21 The is evidence clearly relevant, in that it tends to disprove the lynchpin of
22 Vulcan’s case: that the parties had the mutual contractual intent that the Club would
23 remove/remediate the firearm projectiles (and related materials) at the leased property.
24 Vulcan’s relevance objection is nothing more than an unfounded attempt to challenge
25 evidence that is clearly detrimental to its case (and thus relevant), meaning the
26 objection should be overruled.

27 **OBJECTION NO. 16:**

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

1 “Attached as Exhibit II to this Declaration is a true and correct copy of
2 what appears to be a draft lease attached to a letter discussing the terms
3 of a proposed easement and lease, dated March 5, 1992, from Brian
4 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.”

5 Objections. Lack of Personal Knowledge. Fed. R. Evid. 602. Lack of
6 Authentication/Foundation. Fed. R. Evid. 901. Mr. Franklin provides no
7 testimony that he has personal knowledge of the document such that he
8 is able to authenticate it as required by the Federal Rules of Evidence.
9 *See, e.g., Estremera v. United States* 442 F3d 580, 584–585 (7th Cir.
10 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.”

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

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

15 **RESPONSE TO OBJECTION NO. 16:**

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

22 Franklin, as an attorney for the Club in this matter (and has been since before
23 Vulcan filed suit on September 8, 2008; see Supp. Franklin Decl. at ¶ 3), has “personal
24 knowledge” of what documents he has obtained from the Club’s prior lawyer as part
25 of his defense of the Club this action, including, as stated in ¶ 38 of the Franklin Decl.,
26 the document attached thereto as Exhibit II. Thus, the statement of Franklin Decl. at
27 ¶ 38 is within Franklin’s knowledge, proving Vulcan’s Rule 602 objection is without
28

1 merit.

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

10 Vulcan apparently chooses to ignore on point Ninth Circuit authority like *Orr*
11 and *Maljack* and instead (mis)cites a Seventh Circuit case (*Estremera*, 442 F.3d at
12 584-85) that is completely off point. The question at issue in *Estremera* was whether
13 an affidavit “based on the attorney’s review of the relevant documents” was based on
14 sufficient personal knowledge to satisfy Rule 56(e), where the attorney *did not*
15 *introduce* “into the record the documents he relied on in his affidavit.” *Id.*
16 Additionally, even though Vulcan plainly indicates *Estremera* concerns authentication
17 of documents, *Estremera* never mentions either Rule 901 or authentication.

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

25 Additionally, though Rule 901(b)(8) (ancient documents) is not expressly
26 applicable at this time (the document at issue is less than a year away from being
27 twenty years old and thus an ancient document), circumstances show the document is
28 authentic per Rule 901(b)(4) (authentication based on “[a]pppearance, contents,

1 substance, internal patterns, or other distinctive characteristics, taken in conjunction
2 with circumstances”). Authentication is shown by the following facts: the document:
3 1) is nearly twenty years old; 2) was reviewed by Ferris and he stated that though he
4 didn’t “recall writing it, . . . it appeared to be from” him (Supp. Franklin Decl. at ¶ 8,
5 Ex. 3); 3) was found in the possession of its apparent intended recipient, the Club’s
6 attorney handling the negotiation of a lease at issue in this case (see Franklin Decl. at
7 Ex. HH at 1), and 5) it plainly references the letter dated February 24, 1992 (Franklin
8 Dec. at Ex. HH). Further, Vulcan has not offered any evidence suggesting the
9 document at issue is not authentic. It is obvious “a reasonable juror could find in
10 favor of authenticity or identification” based on the foregoing facts. *Black*, 767 F.2d
11 at 1342.

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

17 First, “[a] statement is not hearsay if it is not “offered in evidence to prove the
18 truth of the matter asserted.” Fed. R. Evid. 801(c). The club does not intend the
19 document/statement at issue to be introduced to prove what the specific terms of a
20 draft lease were (i.e., what Vulcan apparently contends is “the matter asserted”), it is
21 being offered to show the *specific statement(s)* Vulcan made to the Club regarding the
22 draft lease apparently at issue (i.e., it does not discuss “the possibility of the Club
23 being responsible for cleaning up Spent Ammunition at the Property). (Defendant’s
24 Response to Plaintiff’s Statement of Uncontroverted Facts at 50, Additional Fact 36);
25 Fed. R. Evid. 801 advisory committee’s note (“Note to Subdivision (c) If the
26 significance of an offered statement lies solely in the fact that it was made, no issue
27 is raised as to the truth of anything asserted, and the statement is not hearsay.); *see*
28 *Scheele*, 231 F.3d at 497, 500 (police officer’s statement that he heard threat a tape

1 recording is not hearsay to the extent the statement is offered only to prove that the
2 threat was made); *Munoz*, 36 F.3d at 1233 (“It is quite true that an out-of-court
3 statement is not hearsay if it is used only to show that the statement was made and that
4 the listener heard the words uttered.”). Because the evidence at issue is not offered
5 to prove the truth of the matter asserted, Vulcan’s objection cannot be sustained.

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

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

23 Fourth, at least two other hearsay inadmissibility exceptions apply: Rule
24 803(6), the “business records exception”; and Rule 807, the “residual exception,”
25 which provides an exception for “statement[s] not specifically covered by Rule 803
26 or 804 but having equivalent circumstantial guarantees of trustworthiness . . .” It is
27 relevant to note that document (save irrelevant handwritten notes) was produced in
28 this action by Vulcan and is over nineteen years old. In addition, as to the substance

1 of the document at issue, Vulcan has provided no evidence contrary thereto. Based
2 on that evidence, there is a “equivalent circumstantial guarantee[] of trustworthiness”
3 making the residual exception applicable. Because Vulcan’s hearsay objection is
4 unfounded, it should be overruled.

5 Fed. R. Evid. 401, 402. Rules 401 and 402 state collectively that evidence
6 which is not relevant is not admissible, and “‘relevant’ evidence means evidence
7 having any tendency to make the existence of any fact that is of consequence to the
8 determination of the action more probable or less probable than it would be without
9 the evidence.”

10 To be “relevant,” evidence need not be conclusive proof of a fact sought
11 to be proved, or even strong evidence of the same. All that is required is
12 a “tendency” to establish the fact at issue. The Advisory Committee
13 Notes to the 1972 Proposed Rules remind us that “[r]elevancy is not an
14 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.*

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

16 Vulcan’s relevance objection is unsound. The Club contends that *this entire*
17 *case* can be boiled down to one question: did the parties intend for the Club to be
18 contractually required to remove/remediate the firearm projectiles and fragments
19 thereof (and related material) present on the property it leased from Vulcan as of the
20 end of the last express lease term between the Club and Vulcan (i.e., November 6,
21 2006)? The evidence has not only a tendency, but a *strong* “tendency to make the
22 existence of a[] fact that is of consequence [i.e., that the parties *never* expressed a
23 contractual intent that the Club was required to remove/remediate firearm projectiles
24 at the leased property] more . . . probable than it would be without the evidence.” Fed.
25 R. Evid. 401.

26 The evidence is clearly relevant, in that it tends to disprove the lynchpin of
27 Vulcan’s case: that the parties had the mutual contractual intent that the Club would
28 remove/remediate the firearm projectiles (and related materials) at the leased property.

1 Vulcan's relevance objection is nothing more than an unfounded attempt to challenge
2 evidence that is clearly detrimental to its case (and thus relevant), meaning the
3 objection should be overruled.

4 **OBJECTION NO. 17:**

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

6 "Attached as Exhibit JJ to this Declaration is a true and correct copy of
7 what appears to be a draft lease attached to a letter discussing the terms
8 of a proposed easement and lease, dated April 17, 1992, from Robert
9 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."

10 Objections. Lack of Personal Knowledge. Fed R. Evid. 602. Lack of
11 Authentication/Foundation. Fed. R. Evid. 901. Mr. Franklin provides no
12 testimony that he has personal knowledge of the document such that he
13 is able to authenticate it as required by the Federal Rules of Evidence.
14 See, e.g., *Estremera v. United States* 442 F3d 580, 584-585 (7th Cir.
15 2006) (declaration of attorney insufficient to authenticate documents
16 where knowledge was based only upon interviews with
17 witnesses and review of documents); see also, Request to Strike, below.
18 In fact, Mr. Franklin admits he cannot authenticate the document as he
19 is only able to state what it "appears to be."

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21 of court statements improperly being offered for the truth of what they
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24 purposes the Gun Club offers them in light of the parties' final executed
25 lease.

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28 unless evidence is introduced sufficient to support a finding that the witness has
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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

1 knowledge” of what documents he has obtained from the Club’s prior lawyer as part
2 of his defense of the Club this action, including, as stated in ¶ 39 of the Franklin Decl.,
3 the document attached thereto as Exhibit JJ. Also, as one of the attorneys for the
4 Club in this matter, he has personal knowledge of the fact that this document was
5 provided to Vulcan in this action. Thus, the statement of Franklin Decl. at ¶ 39 is
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11 The issue for the trial judge under Rule 901 is whether there is prima
12 facie evidence, circumstantial or direct, that the document is what it is
13 purported to be. If so, the document is admissible in evidence. [Citations]
14 It then remains for the trier of facts to make its own determination of the
15 authenticity of the admitted evidence and the weight which it feels the
16 evidence should be given.

15 *Alexander Dawson*, 586 F.2d at 1302 (citations omitted); *see also Black*, 767 F.2d at
16 1342 (indicating a showing “so that a reasonable juror could find in favor of
17 authenticity or identification” is a sufficient prima facie showing of authenticity for
18 purposes of Rule 901).

19 Though Rule 901(b)(8) (ancient documents) is not expressly applicable at this
20 time (the document at issue is less than a year away from being twenty years old and
21 thus an ancient document), circumstances show the document is authentic per Rule
22 901(b)(4) (authentication based on “[a]pppearance, contents, substance, internal
23 patterns, or other distinctive characteristics, taken in conjunction with
24 circumstances”).

25 Authentication is shown by the following facts: the document 1) is nearly
26 twenty years old, 2) includes the correct address for Ferris (see transcript of deposition
27 of Brian Ferris at 16:25-17:8); and 3) was found in the possession of its apparent
28 author, the Club’s attorney handling the negotiation of a lease at issue in this case.

1 (See Franklin Decl. at Ex. HH, at 1). Further, Vulcan has not offered any evidence
2 suggesting the document at issue is not authentic. It is obvious “a reasonable juror
3 could find in favor of authenticity or identification” based on the foregoing facts.
4 *Black*, 767 F.2d at 1342.

5 Vulcan’s citation to *Estremera*, 442 F.3d at 584-85, is completely off point.
6 The question at issue in *Estremera* was whether an affidavit “based on the attorney’s
7 review of the relevant documents” was based on sufficient personal knowledge to
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9 he relied on in his affidavit.” *Id.* Additionally, even though Vulcan plainly indicates
10 *Estremera* concerns authentication of documents, *Estremera* never mentions either
11 Rule 901 or authentication. Based on facts proving authentication and Vulcan’s
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15 other than one made by the declarant while testifying at the trial or hearing, offered
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18 Supreme Court pursuant to statutory authority or by Act of Congress.”

19 First, “[a] statement is not hearsay if it is not “offered in evidence to prove the
20 truth of the matter asserted.” Fed. R. Evid. 801(c). The club does not intend the
21 document/statement at issue to be introduced to prove what the specific terms of a
22 draft lease were (i.e., what Vulcan apparently contends is “the matter asserted”), it is
23 being offered to show the *specific statement(s)* the Club expressed to Vulcan
24 regarding the draft lease apparently at issue (i.e., it does not discuss “the possibility
25 of the Club being responsible for cleaning up Spent Ammunition at the Property).
26 (Defendant’s Response to Plaintiff’s Statement of Uncontroverted Facts at 50,
27 Additional Fact 36); Fed. R. Evid. 801 advisory committee’s note (“Note to
28 Subdivision (c) If the significance of an offered statement lies solely in the fact

1 that it was made, no issue is raised as to the truth of anything asserted, and the
2 statement is not hearsay.); *see Scheele*, 231 F.3d at 500 (police officer’s statement that
3 he heard threat a tape recording is not hearsay to the extent the statement is offered
4 only to prove that the threat was made); *Munoz*, 36 F.3d at 1233 (“It is quite true that
5 an out-of-court statement is not hearsay if it is used only to show that the statement
6 was made and that the listener heard the words uttered.”). Because the evidence at
7 issue is a is not offered to prove the truth of the matter asserted, Vulcan’s objection
8 cannot be sustained.

9 Second, though a trial date has not been set in this matter, is possible that this
10 document will fall within the hearsay inadmissability exception known as the “ancient
11 document exception.” Fed. R. Evid. 803(16) (“[s]tatements in a document in
12 existence twenty years or more the authenticity of which is established”). The
13 document is dated April 17, 1992, meaning the document will be within the express
14 scope of the ancient document exception within approximately ten months of the filing
15 of this document (i.e., on April 17, 2012).

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

22 Fed. R. Evid. 401, 402. Rules 401 and 402 state collectively that evidence
23 which is not relevant is not admissible, and “‘relevant’ evidence means evidence
24 having any tendency to make the existence of any fact that is of consequence to the
25 determination of the action more probable or less probable than it would be without
26 the evidence.”

1 To be “relevant,” evidence need not be conclusive proof of a fact sought
2 to be proved or disproved. ~~to be proved or disproved. All this is a “trivial” matter.~~ The Advisory Committee Notes
3 to the 1972 Proposed Rules remind us that “[r]elevancy is not an inherent
4 characteristic of any item of evidence but exists only as a relation between an item of
5 evidence and a matter properly provable in the case.” In that relation, “[t]he fact to be
6 proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of
7 consequence in the determination of the action.” *Id.*

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

9 Vulcan’s relevance objection is unsound. The Club contends that *this entire*
10 *case* can be boiled down to one question: did the parties intend for the Club to be
11 contractually required to remove/remediate the firearm projectiles and fragments
12 thereof (and related material) present on the property it leased from Vulcan as of the
13 end of the last express lease term between the Club and Vulcan (i.e., November 6,
14 2006)? The evidence has not only a tendency, but a *strong* “tendency to make the
15 existence of a[] fact that is of consequence [i.e., that the parties *never* expressed a
16 contractual intent that the Club was required to remove/remediate firearm projectiles
17 at the leased property] more . . . probable than it would be without the evidence.” Fed.
18 R. Evid. 401.

19 The is evidence clearly relevant, in that it tends to disprove the lynchpin of
20 Vulcan’s case: that the parties had the mutual contractual intent that the Club would
21 remove/remediate the firearm projectiles (and related materials) at the leased property.
22 Vulcan’s relevance objection is nothing more than an unfounded attempt to challenge
23 evidence that is clearly detrimental to its case (and thus relevant), meaning the
24 objection should be overruled.

25 **OBJECTION NO. 18:**

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

27 “Attached as Exhibit LL to this Declaration is a true and correct copy of
28 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

1 is able to authenticate it as required by the Federal Rules of Evidence.
2 *See, e.g., Estremera v. United States* 442 F3d 580, 584–585 (7th Cir.
3 2006) (declaration of attorney insufficient to authenticate documents
4 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.”

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

7 **RESPONSE TO OBJECTION NO. 18:**

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

14 Franklin, as an attorney for the Club in this matter (and has been since before
15 Vulcan filed suit on September 8, 2008; see Supp. Franklin Decl. [Docket Document
16 76-1] at ¶ 3), has “personal knowledge” of what documents were produced by Vulcan
17 in this action, including, as stated in ¶ 41 of the Franklin Decl., the document attached
18 thereto as Exhibit LL. Thus, the statement of Franklin Decl. at ¶ 41 is within
19 Franklin’s knowledge, proving Vulcan’s Rule 602 objection is without merit.

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

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

9 Thus, unless Vulcan is attempting to raise the argument that this document (a
10 document Bates stamped with a Vulcan identifier, nonetheless) was not produced to
11 the Club by Vulcan in this action (which the Club obviously denies), Vulcan’s Rule
12 901 objection must fail and should therefore be overruled.

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

18 First, the document at issue (including its contents) is not hearsay, as the
19 document is a non-hearsay admission of a party-opponent. Fed. R. Evid. 801(d)(2)(D)
20 (“A statement is not hearsay if . . . a statement by the party’s agent or servant
21 concerning a matter within the scope of the agency or employment, made during the
22 existence of the relationship.”). The document is clearly an Azusa Rock, Inc. (i.e.,
23 Vulcan) time card, meaning any statements therein are created by an employee or
24 agent of Vulcan “concerning a matter within the scope of the agency or employment,
25 made during the existence of the relationship.”

26 Second, though a trial date has not been set in this matter, is possible that this
27 document will fall within the hearsay inadmissibility exception known as the “ancient
28 document exception.” Fed. R. Evid. 803(16) (“[s]tatements in a document in

1 existence twenty years or more the authenticity of which is established”). The
2 document is dated March 16, 1992, meaning the document will be within the express
3 scope of the ancient document exception within approximately nine months of the
4 filing of this document (i.e., on March 16, 2011).

5 Third, at least two other hearsay inadmissability exceptions apply: Rule 803(6),
6 the “business records exception” (the document clearly concerns the day to day
7 activities of Vulcan’s heavy equipment operators); and Rule 807, the “residual
8 exception,” which provides an exception for “statement[s] not specifically covered by
9 Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness
10 . . .” Rule 807 applies here because the document at issue is over nineteen years old,
11 was produced in discovery by Vulcan, was identified (as a part of a packet of time
12 cards) as a Kirst (i.e., Vulcan) time card by Cowan (see transcript of deposition of
13 Preston Claude Cowan at 97:3-99:21), and Vulcan has provided no evidence that the
14 document does not have “trustworthy as to the circumstantial guarantees of
15 trustworthiness” on a par with those documents covered by Rule 803 or 804. Thus,
16 Vulcan’s hearsay objection should be overruled.

17 **OBJECTION NO. 19:**

18 Franklin Declaration, 42 and Exhibit MM.

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

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

1 **RESPONSE TO OBJECTION NO. 19:**

2 Vulcan’s objection has no merit on its face and appears to serve no purpose
3 other than to waste the Club’s and the Court’s time. First, it appears Vulcan would
4 apparently would prefer that, instead of filing an excerpt of the document at issue, a
5 document the contents of which cannot be disputed (as the Club provided a internet
6 link to the location of that document), the Club should have filed the entirety of the
7 103-page Best Management Practices for Lead at Outdoor Shooting Ranges. Second,
8 Vulcan’s comment that the “one page . . . fails to include many relevant standards” is
9 worthless, as it does not explain how the “many relevant standards” are supposedly
10 relevant to the fact at issue.¹⁴ Vulcan’s is patently unreasonable and has no basis in the
11 Federal Rules of Evidence, and thus should be overruled.

12 **RESPONSE TO VULCAN’S REQUEST TO STRIKE**

13 Though the alleged basis for Vulcan’s Request to Strike is completely
14 undermined as stated above, the Club will now respond to the Request to Strike.

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

16 Vulcan’s Request to Strike includes the following quote *without attribution*:
17 “‘In a summary judgment motion, documents authenticated through personal
18 knowledge must be “attached to an affidavit that meets the requirements of [Rule
19 56(e)] and the affiant must be a person through whom the exhibits could be admitted
20 into evidence.”[’]” (alterations in Vulcan’s Objections). The quote is clearly taken
21 from *Orr*, 285 F.3d 764 at 773-774. It is unclear why Vulcan did not provide a
22 citation for this quote, a troubling fact when it is recognized that the quoted sentence
23 has a *drastically* different meaning when read in context.

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

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

6 *Orr*, 285 F.3d 773-74 (emphasis added). *Orr* also confirms that, as long as there is no
7 dispute that production actually occurred, “documents produced by a party in
8 discovery [a]re deemed authentic when offered by the party-opponent”) (citing, among
9 others, *Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 889 n.12
10 (9th Cir.1996)). Because none of the documents offered by the Club fail to meet the
11 *Orr* standard for authentication, Vulcan’s authentication challenges are all meritless.

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

13 Vulcan contends that, “[t]o meet the requirements of Rule 56, documents ‘are
14 required to be authenticated by affidavits or declarations of persons with *personal*
15 *knowledge* through whom they could be introduced at trial.’ *Zoslaw v. MCA*
16 *Distributing Corp.*, 693 F.2d 870, 883 (9th Cir. 1982) (emphasis added).” Vulcan,
17 however, is confusing the requirements of Rule 56(e)(1) (as it existed prior to the 2010
18 amendments)¹⁵ with Rule 56 in general.

19 That is, *Zoslaw* does not stand for the broad proposition that, under “Rule 56,
20 documents ‘are required to be authenticated by affidavits or declarations . . .[.]’ it
21 stands for the narrow proposition that a *former Rule 56(e)(1) affidavit* (i.e., “[a]
22 supporting or opposing affidavit”) “must be made on personal knowledge”
23 *Zoslaw*, 693 F.2d at 883; Fed. R. Civ. P. 56 (amended 2010).¹⁶ Indeed, under Rule 56
24

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

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

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

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

15 ¹⁷ Fed. R. Civ. P. 56(c)(1) (“A party asserting that a fact cannot be or is
16 genuinely disputed must support the assertion by: citing to particular parts
17 of materials in the record, including depositions, *documents*, electronically
18 stored information, *affidavits or declarations . . .*”) (italics added); Fed. R.
19 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).

20 ¹⁸ Federal Rule of Civil Procedure 56(e) does not require that all
21 documents be authenticated through personal knowledge when
22 submitted in a summary judgment motion. Such a requirement
23 is limited to situations where exhibits are introduced by being
24 attached to an affidavit. Compare [now former] Fed.R.Civ.P.
25 56(e) (bearing the heading “Form of Affidavits”), with
26 Fed.R.Evid. 901(b) (providing ten methods to authenticate
27 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)

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

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

2 Vulcan’s application of *Hoffman v. Applicators Sales & Serv., Inc.*, 439 F.3d
3 9, 14-15 (1st Cir. 2006) is equally untenable. Vulcan quotes *Hoffman* as follows:
4 “documents do not automatically become part of the record [on summary judgement]
5 just because they are products of discovery.” The Club does not dispute the
6 correctness of that general statement, though the Club notes it is found in out-of-
7 circuit precedent. The Club does dispute, however, Vulcan’s misapplication of that
8 statement; namely Vulcan’s apparent attempt to argue that documents produced by a
9 party-opponent and *actually submitted* with summary judgment briefing are not
10 treated as authentic.

11 *Hoffman* addresses a unique type of document not at issue here. The document
12 at issue in *Hoffman* was a chart (attached to an affidavit) that summarized *other*
13 documents, documents *that had been produced in discovery* but were *not* attached to
14 the affidavit. *See Hoffman*, 439 F.3d at 13-14. The *Hoffman* court thus made the point
15 that the presence of citations (in the chart) to information supposedly produced in
16 discovery, without something more, was insufficient to consider the chart
17 authenticated. *Id.* at 14-16.²⁰ The fact that *Hoffman* correctly notes that a former Rule
18 56(e) “authenticating affidavit” (i.e., a “supporting or opposing affidavit”) requires
19 personal knowledge (*id.* at 16), does not support the much broader contention ascribed
20 to *Hoffman* by Vulcan (i.e., “documents offered for summary judgment must be
21 authenticated by someone with personal knowledge”). As with *Zoslaw*, Vulcan is

22
23 ¹⁹ Though the Request to Strike cites *Estremera*, the Club’s position on
24 Vulcan’s misuse of *Estrema* need not be repeated again herein, and is
incorporated by reference from above.

25 ²⁰ *See id.* at 15-16. (“Even supposing . . . corroborating evidence
26 existed in the discovery documents, those documents were not
27 before the judge, and the judge had no duty to search for them
28 outside the record in order to see if they contained proper
supporting data.”)

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

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

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

8 **5. Conclusion**

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

12 Date: June 20, 2011

MICHEL & ASSOCIATES, P.C.

13
14 /s/Scott M. Franklin

15 Scott M. Franklin
16 Attorney for Defendants
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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.

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

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

Executed on June 20, 2011.

/s/Christina Sanchez
CHRISTINA SANCHEZ