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6 **IN THE UNITED STATES DISTRICT COURT**

7 **DISTRICT OF NEVADA**

8 LAURA LEIGH,

9 Plaintiff,

10 Case No. **3:11-cv-0608-HDM-WGC**

11 vs.

12 SALLY JEWELL, in her official capacity as
Secretary of the U.S. DEPARTMENT OF
THE INTERIOR, MIKE POST, in his official
13 capacity as Acting Director of the BUREAU
OF LAND MANAGEMENT; AMY LUEDERS
14 in her official capacity as Nevada State
Director of the BUREAU OF LAND
15 MANAGEMENT,

16 Defendants.

17 _____ /
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19 **REPLY TO DEFENDANTS' OPPOSITION (Dkt.90) TO PLAINTIFF'S
MOTION TO FILE THIRD AMENDED COMPLAINT (Dkt.85)**

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21 Plaintiff LAURA LEIGH replies below, to the defendants' opposition (Dkt.90) to her
22 Motion to File the proposed Third Amended Complaint (Motion, Dkt. 85; Proposed Third
23 Amended Complaint, Dkt. 85-1).

24 The plaintiff's motion is brought under Fed.R.Civ.P. Rule 15 and LR 15-1. The
25 defendants challenge the motion on several fronts, each of which is addressed, below.

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RELEVANT PROCEDURAL BACKGROUND

Contrary to the lens through which the defendants portray the procedural background,¹ the court docket reflects the history that follows.

Earlier History

The court has, thus far, granted two TROs (Dkts. 15, 49) and one preliminary injunction (Dkt. 50), each of which centers on the inhumane handling of wild horses by the defendants within the Triple B Complex and Jackson Mountain Herd Management Area.

The defendants moved to dismiss the Jackson Mountain portion of the complaint after the plaintiff requested documents (in discovery) that the defendants generated from the Jackson Mountain roundups. The defendants' motion to dismiss and motion for judgment on the pleadings were filed January 2, 2013. Dkt.70. These motions from the defendants were essentially denied March 26, 2013. Dkt.74.

When the plaintiff renewed her request for the same documents, the defendants resisted again, this time claiming they never understood, until now, the direction of the plaintiff's case, an argument that precipitated yet another motion to dismiss See Dkt.84. The defendants' second motion to dismiss is fully briefed as of this writing.²

The Defendants' Recent Activities

In their most recent attempt at avoiding both court and public scrutiny while rounding up wild horses in the Triple B Complex, the defendants crafted an Environmental Assessment ("EA") they newly reference as the "Three HMA Water and Bait Gather or

¹ Defendants' Response, Dkt.90, pp.4-5.

² To the extent the court considers the defendants' Response a form of Fed.R.Civ.P. Rule 12(b) challenge to the sufficiency of the pleading, to the extent necessary, Ms. Leigh incorporates her discussion and law made in her Response to the defendants' second motion to dismiss. See Response to Motion to Dismiss, Dkt.93.

1 Project Area” (“Three HMA Bait/Water Trap Plan” or “Plan”) and which the defendants
2 readily admit and acknowledge is a “tiered” approach meant to compliment the existing
3 Triple B Complex decision.³ The Three HMA Bait/Water Trap Plan (1) prohibits any
4 form of public or press observation or public scrutiny of the intended activity,⁴ (2) limits
5 BLM’s own COR’s observation of the contractor’s interaction with wild horses to only 25
6 percent of the time, where COR is assigned responsibility for ensuring and enforcing
7 humane treatment of wild horses, (3) fails to identify the chosen contractor(s) to
8 conduct the bait/water trap operations.

9 The Three HMA Bait/Water Trap Plan incorporates the same geographical region
10 and herd management areas and targets the same wild horses who are remaining
11 residents of the Triple B Complex. The proposed Third Amended Complaint
12 incorporates wrongs emanating from the defendants’ recent Plan.

13
14 ***General Comparison of the Second and Third Amended Complaints (Dkts. 42-1 and 85-1).***

15 The proposed Third Amended Complaint (Dkt. 85-1) differs from the Second
16 Amended Complaint (Dkt. 42-1) in the following principal respects:

- 17 1. Generally, both the Second and Third Amended Complaints address “humane”
18 handling of wild horses at the Triple B Complex and Jackson Mountain HMA. In
19 addition, the Third Amended Complaint seeks to redress constitutional, First
20 Amendment infringements to plaintiff’s right of access based on the defendants
21 most recently announced Plan which modifies wild horse roundup methods at
22 the Triple B Complex, *vis-a-vis* the Plan;
- 23 2. The Third Claim for Relief in Dkt.85-1 asserts a new, separate claim that

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25 ³ This is, in essence, a new name coined by the defendants that references the
26 identical geographical regions identified previously as the Triple B Complex and it
targets the same Triple B Complex horses.

27 ⁴ Noteworthy is that public observation of bait/water trapping in herd
28 management areas elsewhere are successfully employed. Plaintiff has personal
knowledge and experience in observing a BLM bait/water trap operation.

1 addresses constitutional, First Amendment infringements based on the
2 defendants' recently announced bait/water trap Plan. See, Dkt.85-1, pp.31-33,
3 ¶¶ 86 to 91. In comparison, the Second Amended Complaint's Third Claim asked
4 for declaratory relief. See Dkt.42-1, pp. 30-32, ¶¶ 98-105. The "declaratory relief"
5 claim found in the former Third Claim for Relief (Second Amended Complaint),
6 was dismissed where the allegations were repetitive of that already contained in
7 the "prayer" of the complaint. See Order, Dkt.74, p.5, confirming the following:

8 Plaintiff asserts that this claim merely seeks declaratory
9 judgment with respect to the claims asserted in her first and
10 second causes of action and does not assert a
11 programmatic challenge. *Because plaintiff includes a*
12 *request for declaratory judgment in her prayer for relief, her*
13 *third claim is duplicative and will therefore be dismissed.*

14 Order, Dkt.74, p.5. Emphasis added.

15 3. The Third Amended Complaint, Dkt.85-1, adds allegations elsewhere in the
16 complaint to support the new Third Claim for Relief that addresses constitutional
17 First Amendment infringements on plaintiff's right of access. See, specifically,
18 Dkt. 85-1 at the following pages:

19 pp.2-3, ¶ 3
20 p.3, ¶ 4, l. 22-25
21 p.4, ¶ 5, l. 1-5
22 p.5, ¶ 8, l. 23-26
23 p.6, ¶ 8, l. 2-7
24 pp.7-8, ¶ 13
25 p. 8, ¶¶ 14, 15.

26 4. The Second Claim addressing Jackson Mountain adds preliminary First
27 Amendment allegations that are also inclusive with the new Third Claim. See,
28 Dkt. 85-1, p.8, ¶¶13-15, p.30 ¶85; see Third Claim for Relief, pp.31-32, ¶¶88-89.

1 5. The plaintiff made additional supplements that do not add other claims, but
2 instead, bring the pleading to current events. The best example of this is where
3 the defendants' chosen contractor, whose name was prominently discussed in
4 previously versions of the plaintiff's pleading, is removed from the proposed
5 Third Amended Complaint, particularly where no contractors are identified
6 currently by the defendants. See, *Kroll v. Incline Village General Imp. Dist.*, 598
7 F.Supp.2d 1118 (D. Nev. 2009)(appropriate for plaintiff to bring a case up to date
8 with events that have taken place since the original filing).

9 These are the principal changes.

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STANDARD OF REVIEW AND RELEVANT LAW

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Amending / Supplementing Pleading

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The denial of a motion to amend a pleading is reviewed for abuse of discretion.

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Jackson v. Bank of Haw., 902 F.2d 1385, 1387 (9th Cir.1990); *Hall v. City of Los*

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Angeles, 697 F.3d 1059, 1072 (9th Cir. 2012).

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"Rule 15 advises the court that 'leave shall be freely given when justice so requires.'

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This policy is 'to be applied with extreme liberality.' *Owens v. Kaiser Found. Health*

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Plan, Inc., 244 F.3d 708, 712 (9th Cir.2001)(quoting *Morongo Band of Mission Indians*

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v. Rose, 893 F.2d 1074, 1079 (9th Cir.1990))." *Eminence Capital, LLC v. Aspeon, Inc.*,

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316 F.3d 1048, 1051 (9th Cir. 2003)

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In *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), the Supreme

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Court offered the following factors a district court should consider in deciding whether to

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grant leave to amend:

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In the absence of any apparent or declared reason-such as

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undue delay, bad faith or dilatory motive on the part of the

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movant, repeated failure to cure deficiencies by

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amendments previously allowed, undue prejudice to the

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opposing party by virtue of allowance of the amendment,

- 1 challenge to Jackson Mountain conduct which prejudices the defendants;⁷
2 4. the prior complaints never discuss or allege bait trapping;⁸ and
3 5. the Third Claim for Relief, because it does not include a sub-caption, apparently
4 does not give the defendants fair notice of the claim.⁹
5

6 ***The Defendants' "Law of the Case" Argument***

7 Perhaps it is a "first" that this particular court would hide its significant ruling within a
8 footnote of a decision.

9 Not even a strained reading of the court's order, let alone a fair one, could cause
10 reasonable persons to conclude that the court's footnoted language marks the "law of
11 the case," to forever ban the plaintiff from asserting a constitutional, First Amendment
12 challenge to the defendants' conduct.

13 In truth, the plaintiff was pushed afar from prior roundups at both Triple B and
14 Jackson. Yes, she griped about her treatment within her second amended pleading to
15 advise the court that the conduct was occurring, particularly where the region is too
16 remote for general members of the public to venture, there. No, she did not assert a
17 separate claim for a constitutional violation where her most immediate concern for
18 emergency relief focused on the inhumane treatment of the Jackson Mountain horses
19 resulting from helicopter gathers occurring during "foaling season."

20 The court is certainly aware, under the "law of the case" doctrine, a court will
21 generally refuse to reconsider an issue that has already been decided by the same
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23 ⁷ See defendants' Response, Dkt.90, p.8, l. 11-13. Compare, proposed Third
24 Amended Complaint, Dkt. 85-1, p.8, ¶¶13-15, p.30 ¶85; see Third Claim for Relief,
pp.31-32, ¶¶88-89.

25 ⁸ See defendants' Response, Dkt.90, p.9, l. 3-18.

26 ⁹ Response, Dkt.90, p.8, l. 18-19. This argument does not warrant significant
27 treatment. Nothing in the rules requires or mandates sub-captions to describe the type
28 relief sought. Rather, fair notice is found in the allegations themselves. Also, this is not
a Fed.R.Civ.P. Rule 12(b) motion to dismiss.

1 court or a higher court in the same case. See *Jeffries v. Wood*, 114 F.3d 1484,
2 1488–89 (9th Cir.1997) (en banc).¹⁰

3 The court’s footnoted discussion does not rise to that which could be considered a
4 “ruling” or a “decision” to which the “law of the case” would attach. Even so, exceptions
5 to the doctrine would significantly come into play under these facts if the “law of the
6 case” somehow, applied to forever ban Ms. Leigh’s assertion of First Amendment
7 concerns.

8 We have recognized exceptions to the law of the case
9 doctrine, however, where “(1) the decision is clearly
10 erroneous and its enforcement would work a manifest
11 injustice, (2) intervening controlling authority makes
12 reconsideration appropriate, or (3) substantially different
13 evidence was adduced at a subsequent trial.” (Citations
14 omitted).

15 *Gonzalez*, 677 F.3d at 390.

16 Where, however, the court’s footnoted discussion could not, in a stretch, be
17 determined a “decision” or “ruling” in the case, the court’s analysis should not get to
18 “exceptions.” Even then, the courts broad discretion to review and modify prior rulings is
19 clear. “[The] law of the case should not be applied woodenly in a way inconsistent with
20 substantial justice.” *United States v. Miller*, 822 F.2d 828, 832 (9th Cir. 1987).

21 Also, the defendants’ announcement that impermissibly strips the public and Ms.
22 Leigh of reasonable access to observe roundup, handling, shipping and disposition of
23 horses within the areas defined in this lawsuit, was made May 15, nearly two months
24 after the court’s order from which the defendants’ “law of the case” contention is

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26 ¹⁰ Overruled to the extent interpreted as inconsistent with stated exceptions to
27 the “law of the case” as being not exceptions to the Ninth Circuit’s general “law of the
28 circuit” rule. *Gonzalez v. Arizona*, 677 F.3d 383, 390 (9th Cir. 2012) *cert. granted*, 133
S. Ct. 476, 184 L. Ed. 2d 296 (U.S. 2012) and *aff’d sub nom.*, *Arizona v. Inter Tribal
Council of Arizona, Inc.*, 133 S. Ct. 2247 (U.S. 2013).

1 extrapolated.¹¹ How the defendants' decision occurring *after* the court's footnoted
2 discussion, could be read as a ruling which insulates all further or future government
3 action that would cause basic First Amendment infringements, is problematical.

4 Whether the defendants' distorted characterization of the court's action was one
5 made in desperation or was inadvertent, the contention nonetheless caused the plaintiff
6 hard work to squarely address and dispel what is clearly not true.

7
8 ***Defendants Contend the Third Amended Complaint
is Brought Tardily and Causes Prejudice***

9 The defendants contend, "Plaintiff's undue delay in moving to amend her complaint
10 would be prejudicial to the Federal Defendants, particularly where Plaintiff seeks to
11 bring a new claim for the first time in this litigation." Dkt.90, p.7, l. 10-12.

12 The defendants do not explain how they would suffer prejudice. The defendants do
13 not define how prejudice would occur when the plaintiff brought her proposed Third
14 Amended Complaint within about a month following the defendants' very first notice of
15 their intended change to the manner in which they would round up those wild horses in
16 the areas defined by this lawsuit.

17 The defendants offer the *City of Los Angeles v. San Pedro Boat Works* case as
18 principal authority on "prejudice."¹² The district court in *San Pedro* denied the filing of an
19 amended pleading where the City of Los Angeles ("City") waited three years to bring
20 additional claims against "BCI Coca Cola" ("Coca Cola"), a party to the case who was
21 being asked to pay environmental clean-up costs in a CERCLA claim. New claims
22 included "alter ego" and three other significant claims not brought previously. Coca Cola
23 affirmatively asserted they would be required to begin anew with heavy litigation work,
24 re-reviewing several thousand pages of documents produced in discovery, and they
25 would be compelled to re-depose the multitude of witnesses who had given testimony

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27 ¹¹ The court's order, Dkt.74 was entered March 26, 2013.

28 ¹² *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440 (9th Cir. 2011)

1 previously, to ferret out the facts underlying the newly asserted claims. With this strong
2 affirmative showing of considerable expense and time that Coca Cola could have
3 avoided had the claim been brought more timely, the district court easily concluded
4 Coca Cola would have been significantly prejudiced had the amended pleading been
5 allowed.

6 The prejudice facing Coca Cola in the *San Pedro* matter is not representative of the
7 facts of this case. The defendants provide not a scintilla of proof of prejudice as did
8 Coca Cola in the *San Pedro* case.

9 In this case, unlike *San Pedro*, discovery has just begun and the defendants have
10 remained somewhat obstructive when providing requested documents. In comparison,
11 discovery in *San Pedro* was ongoing three years before the claims were amended.

12 In the instant matter, it was about a month after the defendants first announced their
13 “tiered” bait/water trap plan in the Triple B Complex region, when the plaintiff filed her
14 motion to amend the complaint to address the defendants’ newly defined intended
15 conduct. The time disparity between that on which the defendants rely in *San Pedro*
16 (three years) compared with the time that elapsed in this case (about a month) does not
17 appear to be a representative comparison.¹³

18 ***The Defendants contend the new pleading incorporates***
19 ***a First Amendment challenge to Jackson Mountain***
20 ***which prejudices the defendants***

21 This contention raises First Amendment violations occurring previously at Jackson
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25 ¹³ The defendants also offer *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d
26 1149 (9th Cir. 1989) as authority that the court’s discretion is even more broad when
27 the complaint had been amended previously. Plaintiff reads the *Ascon* decision as
28 allowing the court to consider a prior amendment as a factor in the process. But *Ascon*
offer no facts demonstrating they suffer prejudice with the Third Amended Complaint.

1 Mountain and which would now, more clearly, likely repeat in the future.¹⁴

2 The court in its now, nearly famous footnote addressing the Second Amended
3 Complaint, confirmed the plaintiff raised First Amendment contentions but had not
4 formulated a separate claim which sufficiently provides the defendants fair notice of the
5 claim.¹⁵

6 That portion of the proposed Third Amended Complaint addressing *past* First
7 Amendment infringements at Jackson Mountain is admittedly, tardy. It is potentially
8 tardy if viewed in a vacuum while not considering the defendants' pervasive move
9 toward the bait/water trapping that targets the Triple B Complex wild horse herds. Also,
10 the defendants have resisted every effort thus far, to disclose relevant documents that
11 would confirm animal deaths and reports, including veterinarian reports, generated
12 during the Jackson Mountain roundups that occurred both before and following the
13 court's issued TRO for Jackson Mountain, and which raises further, the concerning
14 notion that the public and Ms. Leigh have been completely eliminated from observing or
15 independently knowing of, or confirming mortalities and handling of the wild horses at
16 the Jackson Mountain roundups.

17 Admittedly, however, the plaintiff is tardy in raising this particular, finite issue at this
18 time. Even so, the "tardiness" here does not compare to the significant tardiness that
19 occurred in those cases on which the defendants rely as being, somehow, persuasive
20 for their cause.

21 Meanwhile, the defendants offer no facts of any nature demonstrating that they
22 would suffer prejudice if the plaintiff were allowed to proceed with the claim re. First
23 Amendment violations occurring at Jackson Mountain. The *only* perceived prejudice
24 they could potentially incur is the revelation of what transpired at Jackson Mountain

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26 ¹⁴ See Proposed Third Amended Complaint, Dkt. 85-1, p.8, ¶¶13-15, p.30 ¶85;
27 see Third Claim for Relief, pp.31-32, ¶¶88-89.

28 ¹⁵ Order, Dkt.74, p.2, n.1.

1 roundups with wild horses captured there, should the defendants be required to
2 disclose the documents they generated that pertain to Jackson Mountain roundups that
3 the plaintiff has asked for repeatedly and which the defendants have, thus far,
4 successfully resisted in providing.

5 Next, discovery has only commenced. Where is the prejudice? Each time a request
6 through briefings to the U.S. Magistrate Judge is presented where documents
7 pertaining to Jackson Mountain are requested, the defendants resist, claiming new
8 reason to seek a new dismissal motion while attempting to negate the “production of
9 documents” by knocking out the “in issue” relevance of such documents, to ultimately
10 avoid having to produce them.

11 It would appear that actual “prejudice” should be a heavy factor in determining
12 whether the “tardiness” of an amendment caused the defendants any prejudice before
13 the particular claim for relief is denied simply because an amendment to the pleading is
14 “tardy.”

15 The defendants offer not a scintilla of a fact that supports “prejudice.” Plaintiff should
16 not be placed in the role of having to second-guess at this point, how the defendants
17 could possibly be prejudiced by including the First Amendment claim to Jackson
18 Mountain. From a pleading standpoint, the Third Amended Complaint would appear to
19 suffice in making the claim. See Dkt. 85-1, p.8, ¶¶13-15, p.30 ¶85; see Third Claim for
20 Relief, pp.31-32, ¶¶88-89.

21 Finally, an important First Amendment claim such as press access or the public’s
22 right to view government activity, albeit tardy (if the claim is even considered “tardy” in
23 this instance) should have at least some deference attached to it as a weighing factor in
24 allowing the amendment.¹⁶

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28 ¹⁶ Plaintiff was not able to find controlling law on this point, before filing.

1 ***The Defendants' contention that prior complaints***
2 ***never discuss or allege bait trapping***

3 It is true that prior versions of the complaint do not address bait/water trapping as
4 interfering with the plaintiffs' First Amendment rights. It is true, that the first instance
5 bait/water trapping is alleged as being problematic from a "humane" treatment
6 standpoint or as a violation of rights, is with the proposed Third Amended Complaint.

7 This is so because, until just recently, the defendants had not publicly stated their
8 intent to institute a bait/water trap operation in the Triple B Complex area. In fact, the
9 defendants themselves contended until now, that bait trapping in remote, large
10 geographical regions would be prohibitive (presumably because it would be difficult to
11 monitor, leaving "humane" issues in question).

12 In prior publications the defendants acknowledge that bait/water trapping is not
13 suitable for use in large geographical regions. Even the defendants acknowledge this
14 concept within their own Response. See, defendants' Response, Dkt.90, p.8, n.3 ("[b]ait
15 trapping is not suitable for the removal of excess horses over large areas....").

16 The Triple B Complex is an incredibly vast, remote region, comprising over **1.6**
17 ***million acres***, 30 miles northwest of Ely within the Great Basin which the defendants
18 tout as "one of the largest deserts in the world."¹⁷

19 Plaintiff provided the BLM her concerns with bait/water trapping. Her comments
20 were recently read to a BLM RAC meeting she was not able to attend due to ongoing
21 health conditions.¹⁸ The bait/water trap method in vast regions such as at those regions
22 contemplated in this lawsuit is harmful to the horses and also harmful to the plaintiff's
23 First Amendment right of access.

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25 ¹⁷ See, BLM's description of the Triple B Complex at the following web address:
26 [http://www.blm.gov/nv/st/en/fo/ely_field_office/blm_programs/wild_horses_and_burros/
27 triple_b__maverick/About_the_HMA.html](http://www.blm.gov/nv/st/en/fo/ely_field_office/blm_programs/wild_horses_and_burros/triple_b__maverick/About_the_HMA.html).

28 ¹⁸ See Plaintiff's public comments to RAC meeting at Exhibit 8 to her Motion for
TRO at Dkt.97-3.

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CONCLUSION

For reasons discussed, plaintiff respectfully requests that her motion to amend be granted and that the proposed Third Amended Complaint become the operative pleading to this suit.

Respectfully July 10, 2013

LAW OFFICE OF GORDON M. COWAN

s/

Gordon M. Cowan Esq. (SBN 1781)
Attorney for Plaintiff LAURA LEIGH

CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b); LR 5-1

I certify that on the date indicated below, I filed the foregoing document(s) with the Clerk of the Court using the CM/ECF system, which would provide notification and a copy of same to counsel of record.

Dated: July 10, 2013

s/

G.M. Cowan