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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to Federal Rules of Civil Procedure 59(e) and 60(b), Cummins
4 respectfully asks this Court to reconsider its November 16, 2012 Order granting
5 Defendants Amanda Lollar, Bat World Sanctuary’s motion for summary judgment
6 (Document No. 103 (“Order”)). Reconsideration and relief from judgment are justified
7 because there are new facts and clear error in the Court’s prior decision.

8 After the matter was briefed and submitted to this Court, there were new facts. This
9 evidence is material and was not available to Plaintiff nor presented to the Court before
10 the matter was submitted. The significance of this new evidence is substantial and
11 directly impacts and changes the facts on which the Court based its Order.

12 There was clear error in the Court’s prior decision. A motion for summary
13 judgment is only appropriate in “the absence of a genuine issue of material fact.” (MSJ
14 Order, (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).) Thus, if triable
15 issues of fact remain, granting summary judgment would be clear error. Triable issues
16 remain.

17 Based on this new evidence and clear error in the Court’s prior decision, the Court
18 is justified in granting Cummins’ Motion to Reconsider the Court’s Order and for
19 Relief from Judgment.

20 **II. FACTUAL AND PROCEDURAL BACKGROUND**

21 Defendants' Motion for Summary Judgment/Motion for Partial Summary
22 Judgment ("Motion") came on for hearing on August 10, 2012. At the hearing, the
23 Court granted Plaintiff Mary Cummins' ("Plaintiff") request to file a supplemental brief
24 and permitted Defendants to file a supplemental reply. Plaintiff submitted her
25 supplemental brief on September 12, 2012, and Defendant submitted their
26 supplemental reply on September 21, 2012. The Motion was then submitted for
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1 decision. The Court granted Defendants' Motion for Summary Judgement November
2 16, 2012.

3 **III. ARGUMENT**

4 **A. Reconsideration Of Defendants' Motion For Summary Judgment Is** 5 **Appropriate Under Rule 59(e)**

6 Motions for reconsideration of summary judgments are proper under Federal
7 Rule of Civil Procedure 59(e) if filed within 10 days after the entry of the judgment
8 *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985); see also Fed. R. Civ. Proc.
9 59(e). The Court entered judgment on November 16, 2012. (Judgment, Document No.
10 103.) Plaintiff's Motion to Reconsider is thus filed within 10 days of the Court's entry
11 of judgment, therefore satisfying the threshold requirement of Rule 59(e).

12 Motions for reconsideration brought under Rule 59(e) are appropriate where
13 "the district court is presented with newly-discovered evidence or committed clear
14 error; the initial decision was manifestly unjust; or if there is an intervening change in
15 controlling law." *United States v. Westlands Water District*, 134 F. Supp. 2d 1111, 1130
16 (E.D. Cal. 2001), citing *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir.
17 1999).

18 The Court did not have the benefit of new evidence in making its decision in this
19 case. This new evidence did not exist until after November 8, almost a month after the
20 matter was submitted on September 12, 2012.

21 The Court committed a clear error in its order. Plaintiff proved that Amanda
22 Lollar, Bat World sanctuary made the defamatory posts in questions, the items were
23 not the truth, they were not mere opinion, the items were libel per se, Defendants
24 accused Plaintiff of committing State and Federal crimes, the libel was made with
25 malice and Plaintiff is a limited public figure but not in regard to the libel. For these
26 reasons the Court must reconsider Defendants' Motion for Summary Judgment.

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1 **B. Reconsideration Of Defendants’ Motion For Summary Judgment Is**
2 **Appropriate Under Rule 60(b)**

3 Motions for reconsideration are also proper under Federal Rule of Civil
4 Procedure 60(b) in certain circumstances. *Backlund v. Barnhart*, 778 F.2d at 1388, see
5 also *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1442 (9th Cir. 1991). Motions for
6 reconsideration pursuant to Rule 60(b) are “generally appropriate in three instances: 1)
7 where there has been an intervening change of controlling law, 2) new evidence has
8 come to light, or 3) when necessary to correct a clear error or prevent manifest
9 injustice.” *United States v. Westlands Water District*, 134 F. Supp. 2d 1111, 1130 (E.D.
10 Cal. 2001), citing *Sch. Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d
11 1255, 1263 (9th Cir.).

12 **(1) New Evidence has come to light**

13 Relief based on Rule 60(b)(2) on the grounds of newly discovered evidence is
14 warranted if “(1) the moving party can show evidence relied on in fact constitutes
15 ‘newly discovered evidence’ within the meaning of Rule 60(b); (2) the moving party
16 exercised due diligence to discover this evidence; and (3) the newly discovered
17 evidence must be of ‘such magnitude that production of it earlier would have been
18 likely to change the disposition of the case.’” *Feature Realty, Inc., v. City of Spokane*,
19 331 F.3d 1082, 1093 (9th Cir. 2003), quoting *Coastal Transfer Co. v. Toyota Motor*
20 *Sales, U.S.A., Inc.*, 833 F.2d 208, 211 (9th Cir. 1987). Evidence is “newly discovered”
21 under Rule 60(b) where, as here, it was neither in the moving party’s possession at the
22 time of the trial nor discoverable with reasonable diligence. *Coastal Transfer Co. v.*
23 *Toyota Motor Sales, U.S.A., Inc.*, 833 F.2d at 212.

24 November 4, 2012 Plaintiff received physical proof that Defendants’ Amanda
25 Lollar, Bat World Sanctuary, Tiffany Krog, Rebecca Dmytryk, Annette Stark and Eric
26 Shupps’ defamation and libel per se caused Plaintiff financial damages. The
27 defamation caused Plaintiff to be fired from permanent well paying employment.
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1 October 11, 2012 Plaintiff was hired for full time employment. October 15, 2012
2 Plaintiff's new boss received a copy of Defendants' defamation and believed what was
3 posted. It included the blogs, websites made by Defendants. Plaintiff was fired that day
4 because of the defamation posted by Defendants. Plaintiff received a copy of the email
5 which included links to the defamatory blogs and websites (Exhibit 1 Declaration
6 Cummins, Exhibit 2).

7 October 22, 2012 the Second Court of Appeals of Texas reversed the Texas
8 District Court's most recent order in the case 352-248169-10.

9 Therefore, Plaintiff's Motion for Reconsideration should be granted to consider
10 the effect of this new evidence which clearly shows that Defendants defamed Plaintiff,
11 Defendants' defamation has caused severe financial damage, and the Order and
12 judgment should therefore be vacated or modified.

13 **(2) Clear error in the Court's prior decision**

14 Summary judgment should be granted "if the pleadings, the discovery and
15 disclosure materials on file, and any affidavits show that there is no genuine issue as to
16 any material fact and that the movant is entitled to a judgment as a matter of law." Fed.
17 R.Civ. P. 56(c)(2); accord *Mattos v. Agarano*, 590 F.3d 1082, 1085 (9th Cir. 2010).
18 Material facts are those that affect the outcome of the case. *Anderson v. Liberty Lobby,*
19 *Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). An issue is genuine
20 "if the evidence is such that a reasonable jury could return a verdict for the nonmoving
21 party." *Id.*

22 The Court rejected Plaintiff's claim for defamation against Defendants Amanda
23 Lollar, Bat World Sanctuary stating that (a) truth is a defense, (b) some statements
24 were actually opinion, (c) Plaintiff is a limited public figure, and (d) there was no
25 malice. Plaintiff will clearly show that this is not the case. What Defendants posted
26 was not the truth, they were not mere opinion, while Plaintiff is a limited public figure
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1 in regard to animals, Plaintiff is not in regard to the defamatory statements, the
2 statements were made with malice.

3 **(a) The items were not the truth**

4 Defendants in their motion for summary judgement only bring up two weak and
5 unimportant statements which are not central to this case. Plaintiff was asked in
6 deposition if she found the statements to be defamatory and Plaintiff said yes. These
7 are not the main items of defamation in this case.

8 Defendant Lollar posted on her YouTube channel devoted solely to Plaintiff that
9 the deposition in the videos was “court ordered.” The deposition in the videos was not
10 court ordered. All of the legal documents show that the deposition in the videos was by
11 agreement. Therefore the statement was not true.

12 That is the ONLY statement the Court mentions in its order in regard to
13 defamation. In the order the Court states that one statement is not defamatory but the
14 truth. This case is not about that one insignificant statement. Just because ONE
15 statement is not defamatory does not mean that every other statement, word, website,
16 blog, comment made by defendants is not defamatory! Defendant Lollar made over 40
17 websites, blogs, pages about Plaintiff with the help of Eric Shupps who works for her.
18 The statement also was not the truth.

19 Defendant Amanda Lollar, Bat World Sanctuary admitted in deposition that she
20 stated that Plaintiff is a “convicted criminal,” who was found guilty of “fraud,”
21 “forgery,” “theft.” Defendant Lollar admitted in deposition that she stated that Plaintiff
22 “hacked” into Defendants email and website. Hacking is a Federal crime. Defendant
23 Lollar admitted in deposition that she stated Plaintiff is a “stalker,” “cyberstalker.”
24 Stalking is a state and federal crime. Defendant stated that Plaintiff commits animal
25 cruelty and neglect. These are crimes. Stating that someone has committed a crime is
26 not just defamation but defamation per se.

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1 **(b) The items were not opinion**

2 The Court order states that certain of the Internet postings are opinion and not
3 actionable. The Court order also states that Plaintiff cannot prove that these allegedly
4 defamatory statements were authored by Defendant Lollar. That is clearly not the case.

5 1. The Court stated “an essential element of libel . . . is that the publication in
6 question must contain a false statement of fact.” “[T]he courts have regarded as
7 opinion any ‘broad, unfocused and wholly subjective comment,’” “such as that the
8 Plaintiff was a “shady practitioner,” a “booby,” “babbler.”

9 Defendant did not state that Plaintiff was “shady,” a “booby” or a “babbler.
10 Defendant clearly stated and admitted in deposition that she stated that Plaintiff was a
11 “convicted criminal” who was found guilty of “forgery,” “fraud,” “theft,” was a
12 “stalker,” “cyberstalker,” and a “hacker.” These are all crimes just like murder, rape
13 and robbery. These are statements of fact. They are not mere vague opinion.

14 Defendants statements were not just defamation but defamation per se. “A
15 plaintiff need not show special damages (e.g., damages to the plaintiff's property,
16 business, trade, profession or occupation, including expenditures that resulted from the
17 defamation) if the statement is defamation per se. A statement is defamation per se if it
18 defames the plaintiff on its face, that is, without the need for extrinsic evidence to
19 explain the statement's defamatory nature. See [Cal. Civ. Code § 45a](#); Yow v. National
20 Enquirer, Inc. 550 F.Supp.2d 1179, 1183 (E.D. Cal. 2008). For example, an allegation
21 that the plaintiff is guilty of a crime is defamatory on its face pursuant to Cal. [Civil](#)
22 Code § 45a.”¹

23 2. The Court stated that Plaintiff stated in deposition that she did not know who
24 made all of these statements. That is not correct! Plaintiff knows and stated exactly
25 who made the statements.
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¹ <http://www.citmedialaw.org/legal-guide/california-defamation-law>

1 In deposition Defendant Lollar admitted that she stated that Plaintiff is a
2 “convicted criminal” who was found guilty of “forgery,” “fraud,” “theft,” was a
3 “stalker,” “cyberstalker,” and a “hacker.” Defendant admitted that she authored all of
4 those statements under oath. Defendant admitted that she committed libel per se.

5 The depositions in this case were taken April 2012. After the depositions
6 Plaintiff sent subpoenas to Yahoo, Twitter, WordPress, Facebook, YouTube/Google/
7 Blogger in order to get the identities of the anonymous posters. Plaintiff received the
8 identities of the anonymous posters August 27, 2012. The results of the subpoenas
9 clearly show that the anonymous posters are the Defendants, i.e. Amanda Lollar, Eric
10 Shupps, Rebecca Dmytryk, Tiffany Krog, and Annette Stark. The results show that
11 Amanda Lollar did indeed make those defamatory statements and others. Plaintiff
12 stated this in her reply to Defendants motion for summary judgement.

13 **(c) Plaintiff is not a limited public figure in regard to the defamation**

14 The Court stated that Plaintiff “is a limited public figure in the field of animal
15 welfare - rescue, rehabilitation, and care.” Plaintiff may possibly be a limited public
16 figure in regard to animal issues only. Plaintiff is not a “public figure” for all purposes
17 and all contexts. “As with all limited-purpose public figures, the alleged defamation
18 must be relevant to the plaintiff’s voluntary participation in the public controversy (if
19 the issue requires expertise or specialized knowledge, the plaintiff’s credentials as an
20 expert would be relevant).” “For limited-purpose public figures, the actual malice
21 standard extends only as far as defamatory statements involve matters related to the
22 topics about which they are considered public figures.”²

23 The defamation in this case is not related to animal issues. Defendant stated that
24 Plaintiff was a “convicted criminal.” Defendant stated that Plaintiff committed the
25 crimes of “fraud,” “forgery,” “theft,” “stalking,” “cyberstalking,” and “hacking.” These
26 crimes have nothing to do with animals.

27
28 ² <http://www.citmedialaw.org/legal-guide/proving-fault-actual-malice-and-negligence>

1 **(d) The items were made with malice**

2 “In a legal sense, ‘actual malice’ has nothing to do with ill will or disliking
3 someone and wishing him harm. Rather, courts have defined "actual malice" in the
4 defamation context as publishing a statement while either (1) knowing that it is false;
5 or (2) acting with reckless disregard for the statement's truth or falsity.” In this case
6 Defendant acted with actual malice. Defendant knew that all of her statements were
7 false. Defendant acted with reckless disregard for the statement’s truth or falsity.

8 Defendant Lollar posted on her Yahoo group that Plaintiff was a convicted
9 criminal May 10, 2011. Defendant immediately sent two cease and desist emails May
10 11, 2012 to Defendant’s attorney Randy Turner stating that the post were false and
11 defamatory. Defendant told the court that she removed the posts in question
12 immediately but she did not.

13 The Court stated that “Because Cummins neither disputes this deposition
14 testimony nor provides any evidence to controvert the testimony, her evidence of
15 Lollar’s receipt of her cease and desist emails, without evidence that Lollar continued
16 to post the statements thereafter, is not sufficient to foreclose summary judgment on
17 the issue of malice.”

18 Defendant Lollar did NOT remove the statements from the Internet immediately
19 as she stated. A print out of the post made on May 25, 2011 clearly shows that the post
20 in question was still there (Exhibit 3, page 2). A print out of the post on Board Reader
21 **May 12, 2012** shows that the post was still there (Exhibit 4). The post has since been
22 removed because Plaintiff complained to the host and demanded its removal. Plaintiff
23 did show the court that the post was not removed.

24 The Court stated “Cummins does not address the issue of malice with respect to
25 the false statement that she was charged with criminal contempt.” Plaintiff was
26 NEVER charged with “criminal contempt.” In fact in the Court’s July 17, 2012 order
27 the Court stated “this Court explained that Plaintiff was found in civil contempt, not
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1 criminal contempt (Order Denying Mot. For Prelim. Inj., filed July 17, 2012 [Doc.
2 #49].) Even after the Court stated this in an official order to the Defendant, the
3 Defendant continued to post that Plaintiff was charged with “criminal contempt.”

4 The Court stated “Cummins, however, provides no evidence that Lollar
5 continued to post that statement after this Court’s July 17, 2012 Order.” Plaintiff did
6 provide proof that Defendant continues to post this false statement to this very day
7 (Exhibit 5, page 2). These posts are still on the Internet to this very day! This is clear
8 evidence of actual malice.

9 **IV. CONCLUSION**

10 The Court order stated that “Cummins fails to show that a genuine issue of
11 material fact remains.” Plaintiff has shown that a genuine issue of material fact
12 remains. The Court order only mentions a few of the weakest defamatory statements
13 made by Defendant. That is all that Defendant mentioned in their motion for summary
14 judgment. Defendant made many highly defamatory statements calling Plaintiff a
15 “convicted criminal.” This has caused grave financial damage to Plaintiff.

16 Motions for reconsideration are appropriate where “the district court is presented
17 with newly-discovered evidence or committed clear error; the initial decision was
18 manifestly unjust; or if there is an intervening change in controlling law.” There is new
19 evidence. The Court committed clear error. The initial decision was manifestly unjust.
20 A motion to reconsider the motion for summary judgment is in order.

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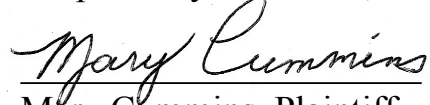
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V. PRAYER

For the foregoing reasons, Plaintiff respectfully requests that the Court grant this Motion for Reconsideration and Relief from Judgment, and permit oral arguments on all issues.

Respectfully submitted,



Mary Cummins, Plaintiff

Dated: November 21, 2012

645 W. 9th St. #110-140

Los Angeles, CA 90015

In Pro Per

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mmmaryinla@aol.com

1 PROOF OF SERVICE BY MAIL
2 (FRCivP 5 (b)) or
3 (CCP 1013a, 2015.5) or
4 (FRAP 25 (d))

5 I am Plaintiff in pro per whose address is 645 W. 9th St. #110-140, Los Angeles,
6 California 90015-1640. I am over the age of eighteen years.

7 I further declare that on the date hereof I served a copy of:

8 **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR**
9 **RECONSIDERATION AND RELIEF FROM JUDGMENT**

10 on the following by placing a true copy thereof enclosed in a sealed envelope
11 addressed as follows for collection and mailing at 645 W. 9th St. #110-140, Los
12 Angeles, CA 90015-1640.

13 **Dean A. Rocco**
14 Jackson Lewis LLP
15 725 South Figueroa, Suite 2500
16 Los Angeles, CA 90017

17 I also emailed a copy to Dean Rocco at RoccoD@jacksonlewis.com


18 **Sandra McMullen**
19 Jackson Lewis LLP
20 725 South Figueroa, Suite 2500
21 Los Angeles, CA 90017

22 I also emailed a copy to Sandra McMullen at Sandra.McMullan@jacksonlewis.com

23 I declare under penalty of perjury, under the laws of the State of California, that the
24 foregoing is true and correct.

25 Executed this day, November 21, 2012, at Los Angeles, California

26 Respectfully submitted,

27 

28 Mary Cummins, Plaintiff
Dated: November 21, 2012
645 W. 9th St. #110-140
Los Angeles, CA 90015