

<p>DISTRICT COURT, LARIMER COUNTY, STATE OF COLORADO 201 LaPorte Ave. Fort Collins, CO 80521</p>	
<p>Plaintiff: <b>STACY LYNNE</b></p> <p>v.</p> <p>Defendants:</p> <p><b>NOAH BEALS</b>, Senior Planner, City of Fort Collins, in his individual and official capacity</p> <p><b>JEREMY CALL</b>, Senior Associate – Logan Simpson Design, Contractor for the City of Fort Collins, in his individual and official capacity</p>	<p>▲ COURT USE ONLY ▲</p>
<p><i>Attorney for Plaintiff:</i> Theresa L. Corrada, #22301 Benezra &amp; Culver, P.C. 633 17th Street, Suite 1450 Denver, CO 80202 (303) 716-0254 phone (303) 716-0327 fax <a href="mailto:tlcorrada@bc-law.com">tlcorrada@bc-law.com</a></p>	<p>Case No: 18CV220 Div./Ctrm: 3C</p>
<p><b>DEFENDANT CALL'S REPLY IN SUPPORT OF MOTION TO DISMISS</b></p>	

Defendant Jeremy Call, by and through undersigned counsel, submits the following Reply in Support of his Motion to Dismiss.

## **Substantial Truth**

In his Motion to Dismiss, Call argues that the statement attributed to him (that Lynne was on a “misinformation campaign”) cannot support a defamation claim because the allegations set out in the Complaint show that the gist of the statement was true. In cases involving matters of public concern,<sup>1</sup> the plaintiff has a heightened burden and must prove a statement’s falsity by clear and convincing evidence. *Lockett v. Garrett*, 1 P.3d 206, 210 (Colo.App. 1999). Lynne’s Complaint contains no plausible “clear and convincing” basis for concluding that Call’s statement that Lynne was on a “misinformation campaign” was materially false.

On page 5 of the Objection,<sup>2</sup> Lynne argues that she has shown Call’s statement was false through her allegations that she is “explicitly meticulous in the accurate dissemination of information.” But this argument disregards the fact that one can tell the technical truth about something and still misinform. The Complaint establishes that Lynne told multiple business owners that “votes” were taken at the meeting about the revisions to the sign code. The statement was technically true, in that the presenters had apparently used the word “vote” to refer to an informal clicker poll. But Lynne’s “true” statement nevertheless misinformed the business owners by leading them to believe the City was moving forward on proposed amendments without their involvement.

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<sup>1</sup> On page 10, Lynne admits that the alleged defamation related to a matter of public concern.

<sup>2</sup> Plaintiff’s Objection contains pages of irrelevant material, including a purported transcript of a phone call with an insurance adjuster, praise of the concept of due process, and an argument about sovereign immunity. Because this material is irrelevant and unrelated to any argument Call made in his Motion, it will not be addressed here.

In ruling on a C.R.C.P. 12(b)(5) motion to dismiss, the meaning of allegedly defamatory words is a matter of law left to the court—not a factual allegation to which it must defer. Accordingly, the Court is not required to accept Lynne’s interpretation of Call’s statement to mean that she was lying. See *Fry v. Lee*, 2013 COA 100, ¶ 29.

Therefore, Ms. Lynne’s allegation that everything she told the business owners was true does not provide a clear and convincing basis for concluding that Call’s statement was substantially false. A statement of opinion relating to matters of public concern which does not contain a provably false factual connotation, or which cannot reasonably be interpreted as stating actual facts about an individual, receives full constitutional protection. *Lockett v. Garrett*, 1 P.3d 206, 210 (Colo.App. 1999).

### **Lack of Actual Malice**

Lynne agrees that the defamation she alleges pertains to a matter of public concern, and that she must prove that the defendant published the defamatory statement with actual malice (see Objection, p. 10). *Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103, 1106 (Colo.1982). However, Lynne points to no factual allegations in her Complaint that would establish, with convincing clarity, that Call had a high degree of awareness that the statements he made were probably false. *Id.* at 1108-1109; *DiLeo v. Koltnow*, 200 Colo. 119, 613 P.2d 318 (1980).

Lynne’s bald assertions that Call’s lies were “intentional” and “malicious” and that he “conspired” with City actors to lie about her are unavailing. See *Vickery v. Evelyn V. Trumble Living Tr.*, 277 P.3d 864, 869 (Colo. App. 2011) (The Court must disregard speculative and conclusory statements.). Likewise, conclusory allegations that Call

acted with actual malice must be disregarded. *Fry v. Lee*, 2013 COA 100, ¶ 57. Since Lynne is unable to point to any factual allegation in her complaint that, if proven, would establish actual malice on the part of Mr. Call, her claim must be dismissed.

### **Conclusion**

“[B]ecause the threat of protracted litigation could have a chilling effect on the constitutionally protected right of free speech, prompt resolution of defamation actions, by summary judgment or motion to dismiss, is appropriate.” *Barnett v. Denver Pub. Co., Inc.*, 36 P.3d 145, 147 (Colo.App. 2001). Defendant Jeremy Call moves the Court to dismiss Plaintiff’s claim with prejudice and award him his reasonable attorney fees.

Respectfully submitted this 1st day of February, 2019.

**BENEZRA & CULVER, P.C.**

By: s/Theresa L. Corrada

*Attorney for Defendant*

*In accordance with C.R.C.P. 121 § 1-26(7), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.*

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she has served the foregoing via ICCES on the following via mail or electronically:

Stacy Lynne  
Kimberly B. Schutt

By: s/Theresa L. Corrada