CAUSE NO. DC-22-02562

COMMISSION FOR LAWYER DISCIPLINE,	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	
SIDNEY POWELL (File Nos. 202006349, 202006347, 202006393, 202006599, 202100006, 202100652, 202101297, 202101300, 202101301, 202103520, 202106068, 202106284, 202106181)	§	DALLAS COUNTY, TEXAS
	§	
Defendant.	§	116th JUDICIAL DISTRICT

REPLY TO BAR'S RESPONSE TO SIDNEY POWELL'S MOTION FOR PARTIAL SUMMARY JUDGMENT, RULES §§ 3.03(a)(1); 3.03(a)(5); AND 8.03(a)(3)

TO THE HONORABLE ANDREA K. BOURESSA:

Sidney Powell ("Ms. Powell") files her Reply to the Bar's Response to her Motion for Partial Summary Judgment against the Commission for Lawyer Discipline ("Bar") on Claims 3, 4 and 6.

A. INTRODUCTION

The Bar's claims against Ms. Powell boil down to the assertion that, for whatever doctrinal reason, the freedoms of speech and petition are circumscribed when attorneys make statements to courts in election fraud cases. Certainly in the

typical law suit there is no reason to doubt that approach. However, "[a]n election contest, however, is not a typical lawsuit." *Moss v. Bush*, 828 N.E.2d 994, 997 (Ohio 2005). Election cases must, regardless of the particular statutory scheme involved, be litigated in "a very short time after an election," and therefore "a prospective contestor has limited time to investigate all the facts surrounding an election, particularly where, as here, the challenge is to a statewide election." *Id.* at 998. "Yet the **election contest statutes exist to ensure that the will of the electorate is correctly recorded**." *Id.* [emphasis added]

The Bar seeks to punish Ms. Powell for her conduct in participating in the filing four lawsuits challenging 2020 Presidential election in four states. Those suits sought to determine the true facts in statewide elections, and the Bar treats them as if they were just another ordinary run-of-the-mill car accident lawsuit. That is not or should not be the law.

Based on the Bar's conduct in this case, let alone the two other lawsuits it filed against the Attorney General of the State of Texas and one of his assistants for filing a suit to contest the 2020 Presidential election, the Bar has become the agent of the far left in this country and is engaging in political "lawfare."

Under *Moss v. Bush,* the court held that no attorney should be sanctioned for filing an election fraud case and that was a case where Republicans were seeking

sanctions against Democrats.

B. RESPONSE TO OBJECTIONS TO SUMMARY JUDGEMENT PROOF

1. As to the objections to the affidavit of Harry MacDougald:

a. Mr. MacDougald clearly states that his communications regarding the substance of the complaint and the exhibits to be attached were with Harold Kliendhelder and Juli Haller. See ¶¶ 5 - 11 of MacDougald Affidavit. Mr. MacDougald specifically explains that Ms. Powell was uninvolved in the attachment of the exhibits to the pleadings the Georgia lawsuit. Instead, Mr. MacDougald explains succinctly he worked with Juli Haller and Howard Kleinhelder "in determining which of the documents provided by Ms. Haller would be attached to the complaint as exhibits." See ¶ 7 of MacDougald Affidavit. He "did not confer in any manner with Ms. Powell about the exhibits to be attached or that were attached to the complaint before it was filed. See ¶7 of MacDougald Affidavit.

b. ¶15 is not a legal conclusion, it is a statement of fact by counsel of record in the Georgia Election Fraud Lawsuit supported by underlying facts, to wit: ". . . the date the State of Georgia had approved the Dominion Voting System were not in question." and "Similarly, the omission of portions of Exhibit 6 as a result of the landscape orientation was not material because the

fact, date and result of the test were not in question." *See ¶15 of MacDougald Affidavit*. An improper legal conclusion is one that does not provide underlying facts to support the statement. See *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex.1991).

c. ¶19 is likewise not a legal conclusion, it is a statement of fact by counsel of record in the Georgia Election Fraud Lawsuit based on facts he observed by reading the affidavits supporting the allegations in a lawsuit he filed. Mr. MacDougald further supports his statement with: " . . . Judge Batten gave us a temporary restraining order to secure machines in several counties in Georgia." *See ¶19 of MacDougald Affidavit*. An improper legal conclusion is one that does not provide underlying facts to support the statement. See *Id*.

2. As to the objections to the affidavit of Sidney Powell:

a. ¶¶s 2 and 3 are not irrelevant. That information is helpful in determining whether Ms. Powell is capable of making prudent legal decisions. Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence." Tex.R.Evid. 401; What is relevant "should be a question of what is helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case." *Sunbury v. State*, 88 S.W.3d 229, 234 (Tex. Crim. App. 2002); "What is 'relevant to the

subject matter' is to be broadly construed." *In re Nat'l Lloyds Ins. Co.*, 507 S.W.3d 219, 223 (Tex. 2016).

b. ¶6 is not a legal conclusion. Ms. Powell states: "I played no role in compiling or filing and had no actual knowledge of the exhibits attached to the complaint downloaded from the Georgia Secretary of State's office that were filed in Case No. 1:20-cv-04809-TCB, United States District Court, Northern District of Georgia." *See ¶6 of Powell Affidavit*. Ms. Powell's statements coupled with the factual statements in of Mr. MacDougald clearly support Ms. Powell's statements. *See ¶15 of MacDougald Affidavit*. An improper legal conclusion is one that does not provide underlying facts to support the statement. See *Anderson*, 808 S.W.2d at 55.

c. The statements Ms. Powell made in ¶¶11, 13, 15, 18 and 20 are not bare bones "legal conclusions," they are admissible statements of fact as to what Ms. Powell did and others did. In ¶11 she testifies "complaint[s]. . . were drafted primarily by other attorneys . . . in Virginia, while I was working in South Carolina." In ¶11 she testifies: "Harry MacDougald accepted the difficult, high-pressured and time-pressured job and compiling and making the actual filing. In ¶13 she testifies: "Mr. MacDougald finalized and filed the complaint and selected and filed the exhibits provided by others . . . ." In ¶14

she testifies: "Scott Hagerstrom and Gregory J. Rohl were our local counsel in Michigan. They too accepted the difficult, high-pressured and time-pressured job and compiling and making the actual filing." In ¶15 she testifies: "Messrs. Hagerstrom and Rohl finalized and filed the complaint and selected and filed the exhibits provided by others . . . ." In ¶17 she testifies: "Michael D. Dean and Daniel J. Eastman were our local counsel in Wisconsin who accepted the difficult, high-pressured and time-pressured job and compiling and making the actual filing." In ¶18 she testifies: Messrs. Dean and Eastman finalized and filed the complaint and selected and filed the exhibits provided by others . . . ." In ¶19 she testifies: Alexander Kolodin and Christopher Viskovic were our local counsel in Arizona who accepted the difficult, high-pressured and time-pressured job and compiling and making the actual filing." In ¶20 she testifies: Messrs. Kolodin and Viskovic finalized and filed the complaint and selected and filed the exhibits provided by others . . . ." Ms. Powell clearly states the facts supporting her position that others, those named above, finalized and filed the complaints and selected and filed the exhibits in the Election Fraud Lawsuits. Those statements are not legal conclusions. An improper legal conclusion is one that does not provide underlying facts to support the statement. See *Anderson*, 808 S.W.2d at 55.

C. Response to Arguments and Authorities

3. Ms. Powell's Motion for Summary Judgment, Rules §§ 3.03(a)(1); 3.03(a)(5); and 8.03(a)(3) is neither a hybrid nor joint motion for summary judgment. It is a traditional motion for summary judgment supported by summary judgment proof; therefore, it is not premature. Moreover, Plaintiff has had adequate time for discovery, to wit:

3.1. This is a baseless and illegitimate suit based solely on the political motivations of thirteen disgruntled Democrats who filed numerous grievances against Ms. Powell for legitimate suits she filed seeking relief to investigate fraud in the 2020 Presidential Election. The Bar's petition is based on hearsay and without even consulting any of the alleged Complainants and without adequate investigation by the Bar.

3.2. The Bar has the burden of proof on all the claims in its petition the Bar should have had the evidence necessary to controvert this motion when it allegedly investigated the various grievances before they became Complaints. Moreover this case has been on file for over nine months and the Bar has only taken three depositions, has served Requests for Production and Interrogatories to which Ms. Powell has fully responded. *See Restaurant Teams Int'l v. MG Secs. Corp.*, 95 S.W.3d 336, 339–41 (Tex.App.–Dallas 2002, no pet.).

3.3. This case was filed on March 1, 2022, the case has been pending for over 10 months; however, the Commission has had since December 1, 2020, the date the first grievance was filed, to conduct investigations and complete discovery in this matter. That is approximately 760 days, basically 2 years and 1 month, to conduct investigations and complete discovery. The Bar elevated thirteen of some nineteen alleged grievances to complaints after supposedly conducting thorough investigations on each as required by the State Bar Disciplinary Rules.

3.4. This motion will have been on file for at over 175 days before the submission.

3.5. The following discovery has taken place:

3.5.1. The Commission has conducted the following oral depositions in this case at which Ms. Powell was present and had opportunity to cross-examine the witnesses: (i) August 25, 2022, Ms. Powell; (ii) September 30, 2022, Joshua Merritt; and (iii) December 14, 2022, Lewis Sessions.

3.5.2. Ms. Powell has conducted the following oral depositions, at which the Bar was present and had opportunity to cross-examine the witnesses: (i) September 12, 2022, Congressman Ted Lieu; (ii)

September 12, 2022, Paul Zoltan; (iii) September 30, 2022, Joshua Merritt; (iv) October 10, 2022, Janet Lachman; (v) October 11, 2022, Paula Goldman; and (vi) December 14, 2022, Lewis Sessions.

3.5.4. Neither party has noticed another deposition.

3.5.5. Ms. Powell has produced over 51,000 pages of document, a Privilege Log, and responded to the interrogatories of the Commission. The Commission has yet to challenge one item on the Privilege Log or file any additional motion to compel.

3.5.6. The parties have agreed on Level 3 Discovery Plan which provides that fact discovery ends on January 20, 2023, only 7 days from the date of the submission of this motion.

3.5.7. The discovery deadlines have been specific.

4. A Ms. Powell is entitled to summary judgment on the Bar's Claim Nos. 3, 4 and 6 because she has disproved at least one element of each cause of action of Claims 3, 4 and 6 as a matter of law - knowledge. *Stanfield v. Neubaum*, 494 S.W.3d 90, 96 (Tex. 2016); *Boerjan v. Rodriguez*, 436 S.W.3d 307, 310 (Tex. 2014); *Nall v. Plunkett*, 404 S.W.3d 552, 555 (Tex. 2013); *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995); see Tex. R. Civ. P. 166a(c).

5. Contrary to the Bar's allegation §8.04(a)(3) does require knowledge. It is

notable that the Bar fails to provide any cases that allow for a finding of a violation of §8.04(a)(3) without conduct that was *knowing*. Yet there are a number cases where *knowing* engagement in dishonesty and misrepresentation in violation of Rule 8.04(a)(3):

(i) *Curtis v. Comm'n for Law Discipline,* 20 S.W.3d 227, 234 (Tex. App. 2000) ("From the record presented, we find that the trial court could have reasonably inferred that Curtis knowingly engaged in conduct involving dishonesty or misrepresentation.").

(ii) *Vickery v. Comm'n for Law Discipline*, 5 S.W.3d 241, 264 (Tex. App. 1999) ("Having told the court he and Helen had a property division, knowing it represented only a portion of their assets, and knowing Helen did not understand the import of the proceedings or the extent of their assets, Vickery misrepresented to the court that he and Helen had a just and right property division.").

(iii) *Acevedo v. Comm'n For Law Discipline*, 131 S.W.3d 99, 106 (Tex. App. 2004) ("The deemed admissions also establish that Acevedo was aware Stiles could not read the documents because she was unable to read the small print and that he misrepresented the true purpose of the documents. These findings clearly support Judge Ashby's rulings that Acevedo entered into a

prohibited transaction with his client in violation of Rule 1.08 and engaged in dishonesty and misrepresentation in violation of Rule 8.04(a)(3).")

6. Furthermore, the Bar alleges that "While intent to deceive would be required to establish fraudulent conduct, the same is not true for conduct 'merely' involving 'dishonesty, deceit, or misrepresentation.'" In support, they cite: *Eureste v. Comm'n for Lawyer Discipline*, 76 S.W.3d 184, 198 (Tex. App. 2002). While *Eureste* stands for the proposition that an intent to deceive can support a finding of fraudulent conduct, it does not support the Bar's claim that there does not need to be an intent to deceive "for conduct 'merely' involving 'dishonesty, deceit, or misrepresentation.'" In fact, federal courts that have applied the same Rule disagree with the Bar's broad and mistaken interpretation of 8.04(a)(3). This issue was most recently addressed in 2020, where a Southern District of Texas Court held that "Violation of Rule 8.04(a)(3) requires proof of fraudulent intent or an intent to deceive." *In re Berleth*, No. MC H-19-2011, 2020 WL 522710, at *24 (S.D. Tex. Jan. 31, 2020). **The Bar has no provided no proof of Ms. Powell's intent.**

7. The burden in a motion for summary judgment shifts to the nonmovant after the movant has established that it is entitled to summary judgment as a matter of law. *Chavez v. Kansas City S. Ry.*, 520 S.W.3d 898, 900 (Tex.2017); *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511 (Tex.2014); *State v.*

$90,235, 390 S.W.3d 289, 292 (Tex.2013). Once the movant has established that it is entitled to summary judgment as a matter of law, the nonmovant must produce summary-judgment evidence to raise a fact issue. *Amedisys, Inc*, 437 S.W.3d at 511. Ms. Powell has established she is entitled to a summary judgment on Claims 3, 4 and 6 - Rules §§ 3.03(a)(1); 3.03(a)(5); and 8.03(a)(3); therefore, **the burden has shifted to the Bar**.

8. The Bar has not provided a scintilla of evidence to support its opposition to this motion. Where is the evidence to support *knowing* or *intent*? There is none. "Evidence does not exceed a scintilla if it is 'so weak as to do no more than create a mere surmise or suspicion' that the fact exists." *Kia Motors Corp. v. Ruiz*, 432 S.W.3d 865, 875 (Tex. 2014). The lack of even a scintilla of evidence is true for Claims 3, 4 and 6 - Rules §§ 3.03(a)(1); 3.03(a)(5); and 8.03(a)(3). **Ms. Powell is entitled to a partial summary judgment on Claims 3, 4 and 6 - Rules §§ 3.03(a)(1); 3.03(a)(5); and 8.03(a)(3).**

9. A defendant is also entitled to summary judgment on a plaintiff's cause of action if the plaintiff affirmatively pleads facts that conclusively negates a cause of action. *Tex. Dep't of Corr. v. Herring*, 513 S.W.2d 6, 9 (Tex. 1974); *see, e.g.*, *Washington v. City of Hous.*, 874 S.W.2d 791, 794 (Tex. App.–Texarkana 1994, no

writ) (pleadings can negate a claim when alleged facts demonstrate that statute of limitations has run or that a defense would bar recovery). If the pleading negates the claim, the court can grant a summary judgment without first giving the plaintiff an opportunity to amend its pleading. *Tex. Dep't of Corr.*, 513 S.W.2d at 9. **Ms. Powell is entitled to a partial summary judgment on the allegations regarding the "Spyder" Affidavit.**

10. A defendant is also entitled to summary judgment on a plaintiff's cause of action if the plaintiff has not pled sufficient facts to state a cause of action and, even though the plaintiff was given an opportunity to amend, the pleading defect remains. *See Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 699 (Tex. 1994). If a petition alleges too few facts to demonstrate a viable, legally cognizable right to relief, it must be dismissed. See *DeVoll v. Demonbreun*, No. 04–14–00116–CV, 2014 WL 7440314, at *3 (Tex.App.–San Antonio Dec. 31, 2014, no. pet.) ("Because DeVoll did not allege facts demonstrating reliance or harm, his fraud claim has no basis in law."); *Drake v. Chase Bank*, No. 02–13–00340–CV, 2014 WL 6493411, at *1 (Tex.App.–Fort Worth Nov. 20, 2014, no. pet. h.) (mem.op.) ("Drake pleaded no underlying claim or facts that would support an award of damages for harm to his credit.... Thus, Drake's harm-to-credit claim has no basis in law."). In short, a plaintiff must plead sufficient facts to supply a legal basis for his claim. *Guillory v. Seaton,*

LLC, 470 S.W.3d 237, 240 (Tex. App.–Houston [1st Dist.] 2015, pet. denied). **The Bar failed to plead sufficient facts to support Claims 3, 4 and 6.**

11. The consensus view of experienced judges is that counsel should be entitled to rely on the representations of the client, without having to assess the client's credibility. *United States v. Allmendinger*, No. 3:10CR248, 2017 WL 455553 (E.D. Va. Feb. 1, 2017), *vacated on other grounds*, 894 F.3d 121 (4th Cir. 2018); *Royal v. Netherland*, 4 F. Supp. 2d 540, 556 (E.D. Va. 1998); *Xcentric Ventures, L.L.C. v. Borodkin*, 908 F. Supp. 2d 1040, 1048-49 (D. Ariz. 2012), *aff'd*, 798 F.3d 1201 (9th Cir. 2015) ; *Jeffreys v. Rossi*, 275 F. Supp. 2d 463, 481 (S.D.N.Y. 2003), *aff'd sub nom. Jeffreys v. City of New York*, 426 F.3d 549 (2nd Cir. 2005) (quoting *Healey v. Chelsea Res., Ltd.*, 947 F.2d 611, 626 (2d Cir.1991)); *Canal Ins. Co. v. Hopkins*, 238 S.W.3d 549, 557 (Tex. App.–Tyler 2007, pet. denied). **Ms. Powell entitled to rely on the representations of her clients, without having to assess their credibility.**

D. PRAYER

For these reasons, Ms. Powell asks the Court to grant this motion and sign an order for partial summary judgment denying Claims 3, 4 and 6 and all theories of law under or through those claims. Alternatively, Ms. Powell asks for an order specifying the facts that are established as a matter of law by this motion.

Respectfully submitted,
HOLMES LAWYER, PLLC

By: */s/ Robert H. Holmes*
Robert H. Holmes
State Bar No. 09908400
19 St. Laurent Place
Dallas, Texas 75225
Telephone: 214-384-3182
Email: rhholmes@swbell.net

S. MICHAEL MCCOLLOCH PLLC
S. Michael McColloch
State Bar No. 13431950
6060 N. Central Expressway
Suite 500
Dallas, Texas 75206
Tel: 214-643-6055
Fax: 214-295-9556
Email: smm@mccolloch-law.com

and

KAREN COOK, PLLC
Karen Cook
State Bar No. 12696860
6060 N. Central Expressway
Suite 500
Dallas, Texas 75206
Tel: 214-643-6054
Fax: 214-295-9556
Email: karen@karencooklaw.com

COUNSEL FOR POWELL

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been delivered, by efileTexas.gov to all attorneys of record on January 9, 2023.

/s/ Robert H. Holmes
Robert H. Holmes

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Robert Holmes on behalf of Robert Holmes
Bar No. 9908400
rhholmes@swbell.net
Envelope ID: 71630601
Status as of 1/10/2023 2:51 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Kristin Brady	24082719	kristin.brady@texasbar.com	1/9/2023 5:51:53 PM	SENT
S. Michael McColloch	13431950	smm@mccolloch-law.com	1/9/2023 5:51:53 PM	SENT
Brittany Paynton		brittany.paynton@texasbar.com	1/9/2023 5:51:53 PM	SENT
Karen Cook	12696860	karen@karencooklaw.com	1/9/2023 5:51:53 PM	SENT
Robert H.Holmes		rhholmes@swbell.net	1/9/2023 5:51:53 PM	SENT
Rachel Craig		rachel.craig@texasbar.com	1/9/2023 5:51:53 PM	SENT
Todd Hill		thill@collincountytx.gov	1/9/2023 5:51:53 PM	SENT