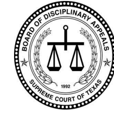

THE BOARD OF DISCIPLINARY APPEALS
SUPREME COURT OF TEXAS

IN THE MATTER OF SIDNEY KATHERINE POWELL STATE BAR NO. 16209700	§ § §	CASE NO. 69537

SIDNEY POWELL'S REPLY TO THE BAR'S RESPONSE TO HER MOTION TO DISMISS

Sidney Powell ("Ms. Powell"), files her reply to the Reply to the Commission on Lawyer Discipline ("Commission" or "Bar") Response to Her Motion to Dismiss the Causes of Action Filed by Plaintiff.

INTRODUCTION

1. Ms. Powell's Motion to Dismiss was filed under Tex.R.Civ.P. Rule 91a. Rule 91a provides for the dismissal of a cause of action that has no basis in law or fact. See Tex. R. Civ. P. 91a cmt.; *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 754 (Tex.App.—Beaumont 2014, pet. denied) (dismissal is appropriate under FRCP 12(b)(6) if complaint does not state a claim on which relief can be granted). Ms. Powell was not charged with "a serious crime" under Rule 1.06(GG), TEX. RULES DISCIPLINARY PROCEDURE. The Georgia parties agreement that the offenses here did not involve moral turpitude forecloses this action and requires dismissal.

2. Rule 91a, which is similar to Fed.R.Civ.P. 12(b)(6), allows the court to dispose quickly of a baseless cause of action as a matter of law without considering any evidence. See *Id.*; Tex. R. Civ. P. 91a cmt. Ms. Powell timely filed the Motion within 60 days after being served with the first pleading containing the claims of compulsory disbarment, identified the challenged causes of action, and provided the grounds for dismissal. See *HMT Tank Serv. v. American Tank & Vessel, Inc.*, 565 S.W.3d 799, 807 (Tex.App.—Houston [14th Dist.] 2018, no pet.). Therefore, BODA should consider the motion as provided for under the rules and dismiss the Commission's

action.

3. The Bar's causes of action have no basis in law because the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the Bar to the relief sought. Tex. R. Civ. P. 91a.1; e.g., *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 654–55 (Tex.2020). A cause of action has no basis in fact if no reasonable person could believe the facts pleaded. Tex. R. Civ. P. 91a.1; *Davis v. Homeowners of America Insurance Company*, No. 05-21-00092-CV, 2023 WL 3735115, at *2 (Tex. App.—Dallas May 31, 2023, no pet.), *Drake v. Walker*, No. 05-14-00355-CV, 2015 WL 2160565 (Tex.App.—Dallas 2015, no pet.) (memo op.; 5-8-15).

4. A court must rule on the motion to dismiss within 45 days after it is filed. Tex. Gov't Code § 22.004(g); Tex. R. Civ. P. 91a.3(c) & cmt. There is no statutory consequence (e.g., denial by operation of law) for noncompliance with the deadline, and the court is not divested of its jurisdiction to issue a ruling after the deadline passes. See *Reaves v. City of Corpus Christi*, 518 S.W.3d 594, 602 (Tex.App.—Corpus Christi 2017, no pet.); *Koenig v. Blaylock*, 497 S.W.3d 595, 598–99 (Tex.App.—Austin 2016, pet. denied).

5. The court is not required to conduct an oral hearing. It may decide the issue on the briefs. Tex. R. Civ. P. 91a.6; see *In re Butt*, 495 S.W.3d 455, 461 (Tex.App.—Corpus Christi 2016, orig. proceeding).

6. The court must give the parties 14 days notice of the hearing date. Tex. R. Civ. P. 91a.6; e.g., *Gaskill v. VHS San Antonio Partners*, 456 S.W.3d 234, 238–39 (Tex.App.—San Antonio 2014, pet. denied).

7. Therefore, BODA should set a hearing on the Motion without oral argument and issue a ruling as required by the rules and precedent.

ARGUMENTS & AUTHORITIES

8. The Bar's Procrustean approach to the rule requiring compulsory discipline reflects its complete misunderstanding, ignorance, or wilful blindness to the law, "crimes of moral turpitude," and controlling precedent. The Bar concedes that the provision requiring discipline for a crime of a *felony* of moral turpitude does not apply: "Petitioner acknowledges that Respondent did not plead guilty to a felony, and the determination of whether her crimes constitute moral turpitude, in this instance, is a moot issue." Pet.R. at ¶6. But it misses the point. A felony must be one of moral turpitude to trigger compulsory discipline. That is why even a remarkably serious offense such as possession of cocaine does not trigger disbarment, but a misdemeanor theft from a client could. *See In re Lock*, 54 S.W.3d 305, 311 (Tex. 2001). Possession of cocaine is not a crime of moral turpitude per se. *Id*.

9. As for misdemeanors, only the misdemeanors specified in the Rule will trigger compulsory discipline: "theft, embezzlement, or fraud," or conspiracy to commit the foregoing. As a matter of law, the misdemeanors required to warrant compulsory discipline per the text of the rule itself are crimes of moral turpitude. By conceding Ms. Powell's offenses were not crimes of moral turpitude (or "moot'), the Commission has conceded its claim for compulsory discipline – the motion to dismiss must be granted.

10. The Bar speciously claims Ms. Powell must be disbarred because the misdemeanors alleged against her involve theft, but the Bar's argument defies the text of the Georgia statutes and tortures their meaning. Ms. Powell was charged only with the misdemeanor charges of conspiracy to commit "election interference" under GA. CODE ANN. §16-4-8 Ga. Code Ann.

and § 21-2-597 (West).[1] No element of theft, fraud or embezzlement exists in those statutes or the conspiracy statute. No statute alleged against Ms. Powell contains any element of "theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any . . . conspiracy . . . to commit any of the foregoing." Fraud, theft, embezzlement, and its variations are indeed crimes of moral turpitude, and there are specific statutes in Georgia to prosecute those crimes, but Georgia did not indite Ms. Powell under those offenses nor did she plead to those offenses.[2]

11. The same is true in Georgia where an attorney's theft/conversion of a client's assets to himself is a crime of moral turpitude. *Matter of Head*, No. S24Y1274, 2024 WL 4668444 (Ga. Nov. 5, 2024). However, criminal trespass is not – because it is not inherently immoral or dishonest, and because no culpable mental state is required for the offense other than a violation entry without consent or a refusal to leave when requested. The Georgia Court defines moral turpitude as "restricted to the gravest offenses, consisting of felonies, infamous crimes, and those that are malum in se and disclose a depraved mind." *Barker v. State*, 211 Ga. App. 279, 280 (1993).

12. To "conspire to" "commit intentional election interference," "to hinder or delay" an election clerk—the actual offenses to which Ms. Powell plead—have no element that implicates

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[1] "A person commits the offense of conspiracy to commit a crime when he together with one or more persons conspires to commit any crime and any one or more of such persons does any overt act to effect the object of the conspiracy." Ga. Code Ann. § 16-4-8 (West).

"Any person who intentionally interferes with, hinders, or delays or attempts to interfere with, hinder, or delay any other person in the performance of any act or duty authorized or imposed by this chapter shall be guilty of a misdemeanor." Ga. Code Ann. § 21-2-597 (West).

[2] Ga. Code Ann., § 21-2-603. Conspiracy to commit election fraud; Ga. Code Ann., § 21-2-604. Criminal solicitation to commit election fraud; Ga. Code Ann., § 16-8-2. Theft by taking; Ga. Code Ann., § 16-8-3. Theft by deception.

moral turpitude. Likewise, the statute does not have an element of knowledge or willfulness, and it is malum in se. It should be beyond dispute that it is not "a serious offense" when the Georgia Attorney General has declared the crime so insignificant as to not require a defendant to provide fingerprints. *See* 1998-99 Ga. Op. Att'y Gen. 53 (1998).

13. The only way a misdemeanor can become a "serious crime" to mandate compulsory discipline is if the offense itself *is* "theft, embezzlement or fraudulent misappropriation. TEX. R. DISCIPLINARY P. 1.06(GG). The Bar cites the Texas theft statute, but Ms. Powell was not charged with theft—in Georgia or Texas. Importantly, Georgia's criminal code addresses crimes of stealing election materials but Ms. Powell was not charged with those offenses.[3]

14. The Bar spills a lot of ink quoting irrelevant allegations from the original charges, but those are not elements of the offenses and are precluded by law from informing the decision here. In fact, this court's precedent expressly forecloses inquiry into any circumstances underlying the offense–a crucial point the Bar ignores. The test for compulsory discipline is not the defendant's alleged "actions," but rather, the elements of the offense with which she was charged. *In re Lock*, 54 S.W.3d at 307 (the Texas Supreme Court looks "solely to the elements of the crime, and not to any collateral matters,. . . or to the underlying facts of the criminal case").

15. Moreover, the Georgia judge, the Fulton County District Attorney, Ms. Powell and now the Bar, agree that a crime of moral turpitude is not implicated here.[4] Accordingly, the Bar's allegations are baseless harassment and lawfare unbecoming the Bar. The Bar has moved

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[3] For example, Ms. Powell was not charged under Georgia's theft statute, Ga. Code Ann. § 16-8-2 (West) or under similar statutes applicable to elections, such as unlawful possession of ballots, Ga. Code Ann. § 21-2-574.

[4] A *nunc pro tunc* Order was entered on October 23, 2023 by the Honorable Scott McAfee, Judge of the Superior Court of Fulton County, Georgia, stating: "STATE AND DEFENSE AGREE THAT THE SIX (6) MISDEMEANOR COUNTS PLED TO BY MS. POWELL ARE NOT CRIMES OF MORAL TURPITUDE." This Order was included as Exhibit 4 in Ms. Powell's Motion to Dismiss.

to nonsuit its wrongul demand for compulsory discipline in other less prominent cases. *See In the Matter of Phillip Wayne Hayes*, State Bar Card No. 24012803, 2022 WL 17331026, at *1 (where the Bar filed a notice of nonsuit of a compulsory discipline matter after counsel for Hayes argued compulsory discipline was improper). The Bar should do the same here.

CONCLUSION

16. For these reasons, the Bar's repeated attempt to disbar Ms. Powell must be resoundingly rejected, and the matter dismissed.

17. Ms. Powell requests BODA to set a hearing on her Motion to Dismiss, giving the parties a 14 day notice, and grant the Motion to Dismiss on the briefs without oral argument.

Respectfully submitted,

HOLMES LAWYER, PLLC

By: *\/s/ Robert H. Holmes*

Robert H. Holmes
State Bar No. 09908400
19 St. Laurent Place
Dallas, Texas 75225
214-384-3182
rhholmes@swbell.net

COUNSEL FOR MS. POWELL

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been delivered, by email to BODA and the Bar on December 5, 2024.

/s/ Robert H. Holmes
Robert H. Holmes