NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA

NO. 43,647

IN THE MATTER OF THE MARRIAGE OF	**§**	**IN THE DISTRICT COURT OF**
ALLISON GELBE-PINKUS AND MARK PINKUS	**§**	**510th JUDICIAL DISTRICT**
AND IN THE INTEREST OF TODD PINKUS, THOMAS PINKUS AND LUCY PINKUS, CHILDREN	**§**	**DENTON COUNTY, TEXAS**

MOTION FOR SANCTIONS

COMES NOW, **ALLISON GELBE-PINKUS ("ALLISON")**, Petitioner, who files this her *Motion for Sanctions* for knowingly, intentionally, and maliciously disclosing **ALLISON GELBE-PINKUS'** protected health records and violating court orders and rulings governing discovery, and in support of the same would show as follows:

I. PROCEDURAL FACTS

1. On February 1, 2019, Respondent, **MARK PINKUS ("MARK")** filed his *Motion to Compel Production of Petitioner's Medical Records* seeking all of **ALLISON's** protected health records, including, but not limited to any substance abuse treatment records, from throughout the parties' marriage.

2. On February 3, 2019, **ALLISON** filed her *Motion for Protection* requesting that this Court deny **MARK's** *Motion to Compel* and grant a protective order preventing the disclosure of **ALLISON's** protected health information.

3. On February 11, 2019, counsel for both parties appeared before this Court on various issues, including but not limited to **MARK's** compel of **ALLISON's** medical records and **ALLISON's** motion for protection regarding the same. After hearing the arguments of counsel, this Court ruled that all medical records were to be produced directly by **ALLISON**

and/or her counsel to the Court for in-camera inspection to determine their relevancy and their discoverability.

4. On February 12, 2019, one day following the Court's ruling for in-camera inspection of the records, **MARK's** counsel hand-delivered a letter detailing **ALLISON's** purported substance abuse history and enclosing therein a copy of **ALLISON's** drug rehabilitation records from 2017 to the Custody Evaluator. No authorization for release of the records was ever signed or provided at the time of delivery. Notably the records themselves contain a stamp prohibiting the recipient of the records from re-disclosing the same.

5. On February 13, 2019, **MARK**, by and through his counsel, filed his *Motion for Temporary Orders* attaching thereto **ALLISON's** confidential and protected substance abuse treatment records from 2017. Not only were the records re-disclosed without authorization and in violation of the prohibition contained therein, neither **MARK** nor his counsel identified the Motion and the attachments thereto as confidential or containing sensitive information as required by Rule 21c of the Texas Rules of Civil Procedure. While the records are certainly not authenticated and constitute hearsay, the fact remains that **ALLISON's** highly sensitive, private, and federally protected records have now been made a matter of public record by the actions of **MARK** and his counsel.

6. That same day, **ALLISON** filed her *Motion for Confidentiality Order* seeking the imposition of a confidentiality order to prevent disclosure of sensitive personal and mental health records to third parties. **ALLISON** further requested therein that the Court direct the District Clerk to label as confidential **MARK's** *Motion for Temporary Orders* and all attachments thereto to prevent further public disclosure of **MARK's** mental health records.

5. On February 18, 2019, the parties and their respective counsel appeared for a hearing on **MARK's** request to modify the temporary orders and **ALLISON's** request for a Confidentiality Order. At that time, the Court declined to hear any substantive issues regarding additional temporary orders until the Court could review the medical records submitted for in-camera inspection and make a ruling on the same. During argument before the Court, **ALLISON's** counsel raised the disclosure issue of her 2017 substance abuse treatment records. **MARK's** counsel vehemently objected to discussing the same without a proper Motion before the Court and argued that a Confidentiality Order could be entered to prevent any disclosure of the sensitive information once the records were released by the Court. Regarding the previous

disclosure of the records, **MARK's** counsel simply stated that the records had already been disclosed and that, unfortunately, the parties could not "un-ring that bell". The Court indicated that it would not be hearing any further argument or evidence on said matter until a proper motion was filed with the Court.

Despite all efforts made by **ALLSION** and her counsel to prevent further disclosure of her records and to rectify the previous violations, including but not limited to the Motion for Protective Order and the confidentiality motion, **MARK** and his counsel have continued in their unbridled use of **ALLISON's** protected drug treatment records. **ALLISON** now requests that **MARK** and his counsel be sanctioned by this Court for continuing to engage in a pattern of discovery abuse and contemptuous behavior, as illustrated above, and by disclosing and utilizing **ALLISON's** unauthenticated drug rehabilitation records in violation of Texas and Federal law.

II. ARGUMENT AND APPLICABLE LAW

In direct contravention of discovery rulings and orders designed to protect **ALLISON's** drug treatment records and prevent their re-disclosure, **MARK** and his counsel have continued in their rabid use and disclosure of **ALLISON's** records from 2017 to bolster **MARK's** requested relief and should thus be sanctioned under Rule 215 of the Texas Rules of Civil Procedure, or alternatively, under the Court's inherent power.

The purpose behind imposing sanctions on a party and/or an attorney is to secure that party and/or attorney's compliance with the rules, punish those that violate the rules, and deter others from violating the same. *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992). In terms of discovery abuse, the trial court may impose appropriate sanctions authorized by Rule 215.2(b)(1), (2), (3), (4), (5) and (8) on a party and/or an attorney if that party and/or attorney is found to be abusing the discovery process in seeking, making, or resisting discovery. Tex. R. Civ. P. 215.3. As such, a party and/or that party's attorney can be sanctioned for offensive and/or defensive tactics employed during the discovery process. *Electronic Data Sys. Corp. v. Tyson*, 862 S.W.2d 728, 736 (Tex.App.—Dallas 1993, orig. proceeding).

While most sanctions are imposed under the authority of a specific statute or rule (*see* Tex. Civ. Prac. & Rem. Code §§10.002, 10.004. 105.001-105.004; Tex. R. Civ. P. §215), sanctions may also be imposed under a trial court's inherent power. *Ezeoke v. Tracy*, 349 S.W.3d 679, 685 (Tex.App.—Houston [14th Dist.] 2011, no pet.); *Kutch v. Del Mar Coll*, 831 S.W.2d 506, 510 (Tex.App.—Corpus Christi 1992, no writ). A trial court may issue sanctions

under its inherent power to the extent necessary to alleviate, counteract, and deter bad faith abuse of the judicial process and interference with the core functions of the trial court. *Kutch*, 831 S.W.2d at 510. The Court of Criminal Appeals has specifically identified these core functions as hearing evidence, deciding issues of fact raised by the pleadings, deciding questions of law, entering final judgment, and enforcing that judgment. *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239-40 (Tex.Crim.App. 1990). Generally, violations of a court order relating to the court's management and administration of a particular legal claim will constitute a significant interference with the trial court's court functions so as to support the imposition of sanctions. *Kutch*, 831 S.W.2d at 511-12.

In imposing sanctions, whether under a rule or statute or under the court's inherent power, the trial court must insure that the sanctions are just. *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991); *Kutch*, 831 S.W.2d at 511. This means that the sanction must be directly related to the offensive conduct and should be no more severe than necessary to secure full compliance. *Id*. The trial court may consider whether a party or that party's attorney has engaged in improper discovery procedures (*see e.g., Sanchez v. Brownsville Sports Ctr., Inc.*, 51 S.W.3d 643, 659 (Tex.App—Corpus Christi 2001, pet. granted, judgm't vacated w.r.m.) or whether a pattern of discovery abuse has occurred. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 242-43 (Tex. 1985). Although the trial court is generally tasked with considering lesser sanctions first, in the case of egregious misconduct (which includes violation of earlier court orders or a blatant disregard for the discovery process), the trial court is not required to use a lesser sanction before imposing death penalty sanctions – a sanction that has the effect of adjudicating the dispute without regard to the merits. *Cire v. Cummings*, 134 S.W.3d 835, 840-41 (Tex. 2004).

MARK and his attorney's callous disregard for the rules of discovery and the rulings and orders set forth by this Court, as illustrated above, has violated **ALLISON's** constitutionally protected rights to privacy, has caused damage to **ALLISON** by publicly disclosing her protected mental health information and substance abuse treatment records, and has resulted in the accumulation of attorney's fees and expenses which would have otherwise, if not for the actions of **MARK** and his counsel, been unnecessary. Further, these wrongfully obtained and unauthenticated records have been used by **MARK** and his lead attorney in developing and

implementing their trial strategy, including but not limited to requesting gross limitations of **ALLISON's** parental rights.

As further support for her requested relief herein, **ALLISON** would show that the disclosure of **ALLISON's** substance abuse treatment records without a valid authorization or court order is in violation of the Texas Medical Records Privacy Act and HIPAA regulations designed to protect such disclosures. Effective as of September 1, 2012, the Texas Medical Records Privacy Act, Chapter 181 of the Health and Safety Code, prohibits a covered entity's disclosure (meaning release, transfer, provided access, or otherwise divulgement of information outside of the entity holding the information) of any protected health information (which includes drug treatment records) without first obtaining the individual's consent or authorization. *See* Tex. Health & Safety Code §181.151. Under Chapter 181, a covered entity specifically refers in pertinent part to any person who comes into possession of protected health information, which includes law firms and lawyers. *See* Tex. Health & Safety Code §181.001(2)(B). Violations of the Texas Medical Records Privacy Act include the following:

(1) $5,000 for each violation that occurs in one year, regardless of how long the violation continues during that year, committed negligently;

(2) $25,000 for each violation that occurs in one year, regardless of how long the violation continues during that year, committed knowingly or intentionally; or

(3) $250,000 for each violation in which the covered entity knowingly or intentionally used protected health information for financial gain.

See Tex. Health & Safety Code §181.201(b). Additionally, if the violations have occurred with enough of a frequency so as to constitute a pattern or practice, the court in which an action is pending under this statute may assess a civil penalty not to exceed $1,500,000.00. *See* Tex. Health & Safety Code §181.201(c). The factors that determine the amount of the penalty to be imposed include in pertinent part:

(1) the seriousness of the violation, including the nature, circumstances, extent and gravity of the disclosure . . .

(3) whether the violation poses a significant risk of financial, reputational, or other harm to an individual whose protected health information is involved in the violation;

(5) the amount necessary to deter a future violation; and

(6) the covered entity's efforts to correct the violation.

See Tex. Health & Safety Code §181.201(d)(1), (3), (5), & (6).

While **ALLISON** understands that enforcement actions for violations of the Texas Medical Records Privacy Act are instituted by the Office of the Attorney General of the State of Texas, the Act provides a framework for the potential liability to be assessed and the seriousness of the violations perpetrated by **MARK** and his counsel in knowingly and intentionally disclosing **ALLISON's** drug treatment records without authorization and in vehemently resisting any and all efforts to correct the disclosures.

In further support of the sanctions requested herein, **ALLISON** would show that the actions of **MARK** and his counsel also violate federally-mandated laws governing the confidentiality of substance abuse treatment records. Pursuant to 42 U.S.C. 290dd-2, records containing the identity, treatment, diagnosis, or prognoses of any individual in substance abuse education, prevention, treatment, rehabilitation, or research are confidential and may only be disclosed in very limited circumstances, including, but not limited to, consent of the patient or court order following a showing of good cause. *See* 42 U.S.C. 290dd-2(b)(2). When seeking a court order for disclosure of substance abuse records, the requesting party must use a fictitious name and otherwise redact any other patient identifying information from the request. *See* 42 C.F.R. 2.64. Further, any hearing on the request must be held in chambers or in some other manner to ensure that the identity of the patient is not disclosed to a non-party. *Id.* Any person who violates the federally-mandated procedures for maintaining the confidentiality of substance abuse records is subject to criminal penalties, fines under Title 18 of the US Code, as well as more stringent state-imposed penalties. 42 C.F.R. §§2.2-2.4, 2.20. Although **ALLISON** is not seeking the imposition of criminal penalties at this time, the severity of the penalties provided for under federal law underscore the importance of ensuring the confidentiality of **ALLISON's** substance abuse treatment records moving forward and the harm that has resulted from **MARK** and his counsel's disclosure of the same.

MARK and his counsel have maintained and have repeatedly stated in open court that **ALLISON's** mental health and stability is the central issue in this suit, without any admissible evidence or expert testimony to substantiate the same. As such, he and **MARK** have been unapologetic in their continued disclosure of **ALLISON's** protected mental health information and substance abuse treatment records and have failed to take any steps to remedy their violations of this Court's orders and their violations of the Texas Medical Records Privacy Act

and federal laws. In their own words, "It's already been distributed. It's already been disclosed on the Internet to anybody who wants access to it. Regrettably, that which has occurred has already occurred. We cannot un-ring that bell . . .all I wanted was, we keep sensitive data from here on out quiet . . .What's happened in the past, that's a bell that cannot be un-rung."

Unfortunately, **MARK** and his counsel are correct. The disclosure of **ALLISON's** protected health information is "not a bell that can be un-rung". The damage to **ALLISON** and her children has already been done. Therefore, the question for this Court should not be "how can we un-ring that bell" but "how do we prevent that bell from being rung repeatedly and maliciously by **MARK** and his counsel going forward." That is exactly what sanctions are designed to do and what **ALLISON** is requesting herein– to secure **MARK** and his counsel's compliance with the rules, punish them for violating the rules, and deter others from violating the same.

III. RELIEF REQUESTED

Based on the foregoing, and in accordance with Rule 215 of the Texas Rules of Civil Procedure, or in the alternative, the inherent power of this Court, **ALLISON** requests that this Court jointly and severally sanction **MARK** and his counsel for their flagrant disregard for the rules of discovery and the orders and rulings of this Court as follows:

(1) Imposing a monetary sanction in the amount of $25,000.00 as costs and expenses related to the attorney's fees incurred by **ALLISON** as a result of their actions;

(2) Striking **MARK's** pleadings as they relate to **ALLISON's** mental health or substance abuse, prohibiting **MARK** from supporting his claims regarding **ALLISON's** mental health/substance abuse or opposing **ALLSION's** claims as to stability and the authenticated and discoverable medical records entered into evidence to establish the same;

(3) Prohibiting **MARK** from introducing any mental health or substance abuse records of **ALLISON**;

(4) Excluding any and all evidence of **ALLISON's** alleged substance abuse, whether via testimony or otherwise;

(5) Ordering **MARK** and/or his to pay reasonable expenses, including but not limited to attorney's fees incurred in bringing this action and defending **ALLISON's** rights; and

(6) Any other sanctions which the Court deems just under the circumstances.

ALLISON would show that lesser sanctions would be ineffective considering the history and pattern of **MARK** and his counsel's contemptuous behavior, abuse of the discovery process, and violations of the orders of this Court as set forth above.

IV. PRAYER

WHEREFORE PREMISES CONSIDERED, **ALLISON GELBE-PINKUS** prays that the Court grant this Motion and all relief requested herein.

ALLISON GELBE-PINKUS prays for attorney's fees, costs, and expenses and for all further relief to which she may be justly entitled.

ALLISON GELBE-PINKUS prays for general relief.

Respectfully Submitted,

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NOTICE OF HEARING

The above motion is set for hearing on February 23, 2019 at _____.M. in the 510th District Court of Denton County, Texas.

SIGNED on _____.

_____
JUDGE OR CLERK

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been delivered or forwarded to all counsel and unrepresented persons as listed below, [ ] by personal delivery or receipted delivery service, or [ ] by certified or registered mail, return receipt requested, by depositing the same, postpaid, in an official deposit under the care and custody of the United States Postal Service, or [ ] by facsimile to the recipient's facsimile number identified below, or [X] by e-service to the recipient's email address identified below and the electronic transmission was reported as complete, on this the 19th day of February, 2019, in accordance with the Rule 21a of the Texas Rules of Civil Procedure:

Aimee Pingenot Key

_____

Karl E. Hays