

2017

**Heartwood Home Health & Hospice, LLC, Plaintiff/Appellant, v.
Rita Huber and Glenna Molyneux, Defendants/Appellees : Brief of
Appellee**

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; hosted by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

Gary R. Guelker, Resnick & Louis PC; Janet I. Jenson, Jenson & Associates PLLC; attorneys for appellant.

Robert H. Wilde, Blackburn-Stoll LC; attorneys for appellees.

Recommended Citation

Brief of Appellant, *Heartwood Home Health v. Huber*, No. 20170221 (Utah Court of Appeals, 2017).
https://digitalcommons.law.byu.edu/byu_ca3/3747

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs (2007–) by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

HEARTWOOD HOME HEALTH &
HOSPICE, LLC,

Plaintiff/Appellant,

vs.

RITA HUBER and GLENNA
MOLYNEUX,

Defendants/Appellees.

Case No. 20170221-CA

OPENING BRIEF OF APPELLANT

Appeal from a Judgment
Entered by the Third Judicial District Court,
Honorable John Paul Kennedy Presiding

ROBERT H. WILDE
BLACKBURN-STOLL, LC
257 East 200 South, Suite 800
Salt Lake City, Utah 84111
Telephone: 801-521-7900
Facsimile: 801-521-7965
Attorneys for Appellees

GARY R. GUELKER
RESNICK & LOUIS, PC
JANET I. JENSON
JENSON & ASSOCIATES, PLLC
747 East South Temple, Suite 130
Salt Lake City, Utah 84102
Telephone: 801-579-0800
Facsimile: 801-579-0801
Attorneys for Appellant

LIST OF ALL PARTIES TO THE DISTRICT COURT PROCEEDING

The following is a complete list of all parties to the proceeding in the Third Judicial District Court whose judgment is sought to be reviewed in this appeal:

Plaintiff: Heartwood Home Health & Hospice, LLC.

Defendants: Rita Huber, Glenna Molyneux, Merrill B. Nielson, Good Shepherd Home Care & Hospice, Inc.

TABLE OF CONTENTS

JURISDICTION7

STATEMENT OF THE ISSUES7

PERTINENT STATUTES AND RULES9

STATEMENT OF THE CASE9

 I. COURSE OF PROCEEDINGS IN THE DISTRICT COURT9

 II. RELEVANT FACTS12

 A. Background12

 B. Heartwood’s Decision to File the Lawsuit14

 C. Facts Uncovered During Discovery and Presented in Opposition
 to Defendants’ Summary Judgment Motion20

 1. Evidence of Ms. Huber contacting Heartwood’s
 Employees20

 2. Evidence of Ms. Molyneux contacting Heartwood’s
 Patients22

 D. District Court’s Ruling on Defendants’ Motions for Summary
 Judgment and Rule 11 Sanctions24

SUMMARY OF THE ARGUMENT27

ARGUMENT28

 I. THE DISTRICT COURT ERRED WHEN IT IMPOSED RULE 11
 SANCTIONS AGAINST HEARTWOOD.

 A. Standard for Rule 11 Sanctions28

 B. Heartwood Satisfied the Requirements of Rule 11 When It
 Submitted the Challenged Complaint30

C.	The District Court Erred When It Determined That Rule 11 Imposes an Ongoing Duty to Review The Sufficiency of Previously Filed Pleadings	36
D.	Even If Heartwood Had an Ongoing Duty to Review The Sufficiency of Its Complaint, There Were Still Sufficient Facts That Allowed Heartwood to Oppose Defendants’ Summary Judgment Motion	40
1.	Evidence of Ms. Huber Recruiting Heartwood’s Employees	41
2.	Evidence of Ms. Molyneux Recruiting Heartwood’s Patients	43
3.	The District Court’s Decision to Grant Defendants’ Summary Judgment Motion Did Not Justify Its Decision to Impose Rule 11 Sanctions	45
II.	THE DISTRICT COURT ERRED WHEN IT GRANTED DEFENDANTS’ SUMMARY JUDGMENT MOTION	47
A.	Standard for Summary Judgment	48
B.	The District Court Erred When It Dismissed Heartwood’s Claims for Breach of Contract Based on a Lack of Evidence	49
C.	Heartwood’s Breach of Contract Claims are Not Barred by HIPAA	52
D.	The District Court Erred When It Determined that Defendants’ Employment Contracts Are Unenforceable	54
E.	The District Court Erred When It Dismissed Heartwood’s Tort Claims	55
	CONCLUSION	59

TABLE OF AUTHORITIES

Cases

<i>Arab African Int'l Bank v. Epstein</i> 10 F.3d 168 (3d Cir. 1993)	29
<i>Barnard v. Sutliff</i> 846 P.2d 1229 (Utah 1992)	8, 29, 34, 35
<i>Bensalem Twp. v. Int'l Surplus Lines Ins. Co.</i> 38 F.3d 1303 (3d Cir. 1994)	30
<i>CDC Restoration & Constr., LC v. Tradesmen Contractors, LLC,</i> 2012 UT App 60, 274 P.3d 317	48
<i>Cooter & Cell v. Hartmax Corp</i> 496 U.S. 384 (1990)	29
<i>Corporation of the Presiding Bishop v. Associated Contractors, Inc.</i> 877 F.2d 938 (11th Cir.1989)	36
<i>digEcor, Inc. v. eDigital Corp.</i> 2009 U.S. Dist. LEXIS 28199 (D. Utah Apr. 2, 2009)	54
<i>Doering v. Union Cnty. Bd. of Chosen Freeholders</i> 857 F.2d 191 (3d Cir. 1988)	30,34
<i>Electrical Distribs., Inc. v. SFR, Inc.</i> 166 F.3d 1074, 1079 (10 th Cir. 1999)	54
<i>Envirotech Corp. v. Callahan</i> 872 P.2d 487 (Utah App. 1994)	18, 56, 58
<i>Espinoza v. Gold Cross Services, Inc.,</i> 2010 UT App 151, 234 P.3d 156	52
<i>Gaiardo v. Ethyl Corp.</i> 835 F.2d 479 (3d Cir.1987)	36, 37

<i>Griffen v. City of Oklahoma City</i> 3 F.3d 336 (10th Cir. 1993)	36
<i>Hilton Hotels Corp. v. Banov</i> 899 F.2d 40 (D.C.Cir.1990)	37
<i>Leigh Furniture & Carpet Co. v. Isom</i> 657 P.2d 293 (Utah 1982)	19, 58
<i>Mary Ann Pensiero, Inc., v. Lingle</i> 847 F.2d 90 (3d Cir. 1988)	30
<i>Mellon Bank Corp. v. First Union Real Estate Equity & Mortgage Invest.,</i> 951 F.2d 1399 (3rd Cir. 1991)	35
<i>Migliore v. Livingston Financial, L.L.C.</i> 2015 UT 9	12
<i>Morse v. Packer</i> 2000 UT 86, 15 P.3d 1021	28, 38
<i>Morse v. Packer</i> 1999 UT 5, 973 P.2d 422	7
<i>Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered,</i> 681 P.2d 1258 (Utah 1984)	41, 42, 47
<i>Oliveri v. Thompson</i> 803 F.2d 1265 (2nd Cir.1986)	36, 38
<i>Pratt v. Prodata, Inc.</i> 885 P.2d 786, 787 (Utah 1994)	58
<i>Prince, Yeates & Geldzahler v. Young</i> 2004 UT 26, 94 P.3d 179	18, 57
<i>Robbins v. Findley</i> 645 P.2d 623, 627 (Utah 1982)	54
<i>Seaton v. Mayberg</i> 610 F.3d 530, 533 (9th Cir. 2010)	52

<i>State v. Hester</i> 2000 UT App 159, 3 P.3d 725	46
<i>Teamsters Local Union No. 430 v. Cement Express, Inc.</i> , 841 F.2d 66 (3d Cir. 1988)	29, 45
<i>Tahfs v. Proctor</i> , 316 F.3d 584 (6th Cir. 2003)	29
<i>United Energy Owners Comm., Inc. v. United Energy Management Sys., Inc.</i> , 837 F.2d 356 (9th Cir.1988)	37
<i>USA Power, LLC v. Pacificorp</i> 2010 UT 31, 235 P.3d 749	41, 48
<u>Rules</u>	
Rule 11, Utah Rules of Civil Procedure	37

JURISDICTION

The district court entered a final judgment in this matter on February 15, 2017. (R. at 978). Heartwood Home Health & Hospice, LLC, appealed this judgment to the Utah Supreme Court by timely filing a Notice of Appeal with the district court on March 13, 2017. (R. at 985). On June 12, 2017, the Utah Supreme Court assigned the appeal to the Utah Court of Appeals. (R. at 1052). Therefore, this Court has jurisdiction over the appeal pursuant to Utah Code Ann. § 78A-4-103(2)(j).

STATEMENT OF THE ISSUES

1. Whether the district court erred when it imposed sanctions against Heartwood pursuant to Rule 11 based on its determination that Heartwood had failed to produce sufficient facts to withstand the defendants' summary judgment motion, even though Heartwood had a good faith belief that there was significant circumstantial evidence to support its claims. (R. at 585).

The standard of review for evaluating the imposition of Rule 11 sanctions involves a three-tiered approach: "(1) findings of fact are reviewed under the clearly erroneous standard; (2) legal conclusions are reviewed under the correction of error standard; and (3) the type and amount of sanction to be imposed is reviewed under an abuse of discretion standard." *Morse v. Packer*, 1999 UT 5, ¶ 10, 973 P.2d 422 (citing *Barnard v. Sutliff*, 846 P.2d 1229, 1234 (Utah 1992)).

2. Whether the district court erred when it entered a summary judgment dismissing Heartwood's claims against Ms. Huber and Ms. Molyneux based on the district

court's determination that Heartwood failed to present sufficient evidence to support such claims. (R. at 472).

Summary judgment is appropriate when the evidence shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Federate Capital Corp. v. Conor Libby*, 2016 UT 41, ¶ 7, 384 P.3d 221. Because a summary judgment challenge presents only legal issues, Utah appellate courts review the grant of summary judgment for correctness. *Id.*

PERTINENT STATUTES AND RULES

Rule 11, Utah Rules of Civil Procedure, a copy of which is included as part of the addendum to this brief.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS IN THE DISTRICT COURT

Heartwood commenced this action on November 1, 2012 when it filed a complaint in Utah's Third District Court against defendants Rita Huber and Glenna Molyneux (collectively "the defendants") claiming that the defendants had (i) breached their employment contracts with Heartwood, (ii) breached certain fiduciary duties owed to Heartwood, and (iii) tortuously interfered with contracts between Heartwood and its hospice care patients. (R. at 13). The complaint alleged that the defendants were both health care workers who had once worked for Heartwood and then subsequently began working for Heartwood's competitor, Good Shepherd Home Care and Hospice, Inc. ("Good Shepherd"). (R. at 14-19). All of Heartwood's claims were based on allegations

that the defendants, after leaving their employment with Heartwood, began using Heartwood's patient contact information to contact Heartwood's patients and to persuade them to switch to Good Shepherd for their hospice care. (R. at 13-26).

On October 15, 2013, almost one year after the case was commenced, the defendants served Heartwood with a Motion for Rule 11 Sanctions (R. at 440) in which they demanded that Heartwood withdraw its complaint on the grounds Heartwood had "no factual support for any of its claims against these Defendants." (R. at 445). As part of their motion, the defendants further stated that "[i]t is anticipated that the claims against these Defendants will be dismissed in response to the motion for summary judgment which will follow if Plaintiff chooses not to move the court to dismiss its claims against these Defendants." (R. at 446). However, the defendants did not immediately file their Rule 11 motion with the court. They instead served the motion on Heartwood in accordance with the Rule 11 "safe harbor" provision.¹

After being served with the defendants' Rule 11 motion, Heartwood declined to withdraw its complaint. As a result, defendants filed a summary judgment motion on November 8, 2013 in which they sought the dismissal of Heartwood's claims against them. (R. at 297). Defendants also filed their Rule 11 motion with district court on this same day.

¹ See Utah R.Civ. P. 11(c)(1)(A) (Rule 11 motion "shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper ... is not withdrawn or appropriately corrected.")

(R. at 440). The parties then agreed to stay any ruling on defendants' Rule 11 motion until after the district court ruled on the defendants' summary judgment motion. (R. at 506).

On February 25, 2014, the district court held a hearing on defendants' summary judgment motion. (R. at 554). At the conclusion of the hearing, the district court granted defendants' motion for the reasons stated in a written decision, dated March 11, 2014. (R. at 584). Based on the district court's ruling, the defendants formally filed their Rule 11 motion on February 25, 2014. (R. at 555).

After further briefing was completed, the district court held a hearing on defendants' Rule 11 motion on April 21, 2014. (R. at 642). The district court ultimately issued an Order in which it concluded that Heartwood had violated Rule 11 by continuing to pursue its claims against the defendants after being served with defendants' Rule 11 motion. (R. at 679-85). As part of its decision, the district court ordered Heartwood to reimburse defendants for the reasonable attorney's fees they incurred in defending against Heartwood's claims "after it became clear that the claims lacked evidentiary support and legal basis." (R. at 683). On August 21, 2014, the district court issued a subsequent Order in which it determined that defendants were entitled to receive reimbursement from Heartwood in the amount of \$10,528.50 for their attorneys' fees. (R. at 718).

On September 19, 2014, Heartwood appealed the district's decision to impose Rule 11 sanctions to this Court. However, this Court determined that it lacked jurisdiction to consider the appeal. *See Heartwood Home Health & Hospice v. Huber*, 2016 UT App 183 at ¶ 13. This determination was based on a retroactive application of the Utah Supreme

Court's decision in *Migliore v. Livingston Financial, LLC*, 2015 UT 9, 347 P.3d 394, in which the Supreme Court held that an order imposing Rule 11 sanctions was not a "collateral" matter that could be appealed independently from the underlying case. Since Heartwood's claims against defendants Merrill B. Nielson and Good Shepherd Home Care & Hospice, Inc. were still pending in the district court at the time, this Court concluded that it lacked jurisdiction to hear the appeal regarding Rule 11 sanctions.

On February 15, 2017, the district court entered a final judgment that resolved all of Heartwood's claims against the various defendants. Heartwood subsequently filed a timely Notice of Appeal on March 13, 2017.

II. RELEVANT FACTS

A. Background

Heartwood is a licensed home health care agency and hospice that offers care to elderly and homebound patients who need a wide range of skilled medical services from qualified medical professionals and various services from home health aides. (R. at 14, 40).

In approximately 2000/2001, Heartwood hired defendant Glenna Molyneux for the position of home health aide. As a home health aide, Ms. Molyneux was responsible for providing personal care to patients in their homes, including bathing, meal preparation, minor housekeeping, etc. (R. at 473).

On March 26, 2012, Heartwood hired defendant Merrill Nielson, R.N.,² for its Director of Nursing position. As the Director of Nursing, Mr. Nielson was responsible for supervising all of Heartwood's nursing staff and aids. If needed, Mr. Nielson would also have direct contact with some of Heartwood's patients in their homes. (R. at 473).

In approximately April 2012, Heartwood hired defendant Rita Huber, R.N., for the position of nurse case manager. As a nurse case manager, Ms. Huber was responsible for coordinating her patients' care with Heartwood's physicians, social workers and home health aides. (R. at 473).

As a condition of their employment with Heartwood, both Ms. Molyneux and Ms. Huber signed a document entitled "CONFIDENTIALITY/NON-DISCLOSURE AGREEMENT." Both of these Confidentiality/Non-Disclosure Agreements stated, in part, as follows:

In order for HEARTWOOD HOME HEALTH AND HOSPICE to be successful in providing top quality care to people, we must have the confidence and trust of the people we work with. Confidentiality is essential if we are to be worthy of this trust....

* * *

Knowledge of employees and patients is specifically the privilege of your employment here. If your employment should end with HEARTWOOD HOME HEALTH AND HOSPICE, you are prohibited to contact any employee, patient, or other professional relationship that you have that was a result of being an employee of HEARTWOOD HOME HEALTH AND HOSPICE....

² Mr. Nielson is named as a defendant in Heartwood's Complaint. However, he did not join Ms. Huber and Ms. Molyneux's Rule 11 motion and therefore he is not a party to this appeal.

(R. at 474).

B. Heartwood's Decision to File the Lawsuit.

On Saturday, October 20, 2012, Heartwood's owner, Lee Vasic, contacted the law firm Jenson & Guelker, PLLC, via telephone regarding concerns that Heartwood's former Director of Nursing, Merrill Nielson, was violating a confidentiality and non-solicitation agreement that he had signed with Heartwood. (R. at 613). During this conversation with counsel, Mr. Vasic explained that Mr. Nielson had resigned from Heartwood on October 11, 2012 and had started working for Heartwood's competitor, Good Shepherd Home Care & Hospice. (*Id.*). The very next week, Heartwood had a high number of its hospice care patients transfer their care from Heartwood to Good Shepherd. (*Id.*).

During this conversation, Mr. Vasic stated that he also had a video of Mr. Nielson from the day Mr. Nielson resigned from Heartwood showing Mr. Nielson making copies of medical records. (R. at 613). In addition, Mr. Vasic stated that a number of Heartwood's employees had reported seeing Mr. Nielson travelling in a Good Shepherd van in the vicinity of Heartwood's patients. (*Id.*). Based on these facts, Mr. Vasic believed that Mr. Nielson had copied patient contact information from Heartwood and then used that information to visit Heartwood's patients in an effort to have them transfer their care from Heartwood to Good Shepherd. (*Id.*). Finally, Mr. Vasic stated that Mr. Nielson's actions were done in violation of a confidentiality and non-solicitation agreement that Mr. Nielson had signed with Heartwood. (R. at 613-14).

On Monday, October 22, 2012, Mr. Vasic scheduled a face-to-face meeting with

Heartwood's attorneys to discuss his concerns regarding Mr. Nielson. During this meeting, Mr. Vasic revealed that one of Heartwood's home health aides, Glenna Molyneux, had resigned from Heartwood the previous Friday (October 19, 2012) and that she had also gone to work for Good Shepherd. (R. at 614). Mr. Vasic also explained that during the four days since Ms. Molyneux had left Heartwood, four of the patients she had treated for Heartwood had transferred their services over to Good Shepherd. (*Id.*).

Given the close proximity of time between the date of Ms. Molyneux's departure and the dates the foregoing patients transferred to Good Shepherd, Mr. Vasic concluded that Ms. Molyneux had also contacted her patients in order to persuade them to leave Heartwood and to follow her to Good Shepherd. (R. at 614). Mr. Vasic further explained that Ms. Molyneux had also signed the confidentiality and non-solicitation agreement set forth above. (*Id.*)

During their meeting with Mr. Vasic, Heartwood's attorneys inquired into why Ms. Molyneux and Mr. Nielson may have gone to work for Good Shepherd, as opposed to some other hospice agency. Mr. Vasic explained that one of Heartwood's former nurses, Rita Huber, had left Heartwood in July 2012 to begin working for Good Shepherd. (R. at 614-15). Mr. Vasic stated that he believed Ms. Huber had persuaded Ms. Molyneux and Mr. Nielson to begin working for Good Shepherd. This belief was based on the fact that Ms. Huber had lunch with several employees of Heartwood, including multiple lunches with Mr. Nielson, during the first few weeks after she began working for Good Shepherd. (*Id.*). Mr. Vasic also explained that like Mr. Nielson and Ms. Molyneux, Ms. Huber had also

signed the aforementioned confidentiality and non-solicitation agreement which precluded her from contacting her former co-workers at Heartwood. (*Id.*).

On Monday, October 22, 2012, and based on the foregoing information, Heartwood's attorneys drafted a cease and desist letter to Good Shepherd which requested that Good Shepherd advise Ms. Molyneux, Ms. Huber and Mr. Nielson to cease contacting Heartwood's patients and its staff. The letter was faxed and hand-delivered to Good Shepherd's owner, Scott Jolley. (R. at 615).

On Tuesday, October 23, 2012, Mr. Vasic informed Heartwood's attorneys that Heartwood had received another transfer request that day from one of the patients Ms. Molyneux had treated while she worked for Heartwood in which the patient stated that she was transferring to Good Shepherd. (R. at 615). Mr. Vasic also provided his attorneys with additional information which strongly suggested that Ms. Molyneux, Ms. Huber and Mr. Nielson were attempting to persuade Heartwood's patients to follow them to Good Shepherd. For example:

a. On October 13, 2102 one of Heartwood's nursing aides reported that she was visiting a patient when she encountered Merrill Nielson and Glenna Molyneux in the patient's home wearing their Good Shepherd uniforms. The two immediately left the home, but not before they left a Good Shepherd business card and refrigerator magnet with the patient. The nursing aide explained to the patient that Ms. Molyneux and Mr. Nielson had quit Heartwood to begin working for another company. This patient decided to remain with Heartwood. (R. at 615).

b. Heartwood's chaplain, Wayne Bippes, reported that he had spoken with one of Heartwood's patients during the week of October 14, 2012, who stated that she had been visited by Merrill Nielson and Rita Huber who asked her to transfer her care to Good Shepherd. This patient decided to remain with Heartwood. (R. at 615-16).

c. Mr. Bippes reported that during the week of October 14, 2012, he observed a Good Shepherd van leaving a Heartwood patient's home as he was coming to visit the patient. The patient stated that she had been approached by a Good Shepherd employee who wanted her to transfer her service. This patient decided to remain with Heartwood. (R. at 616).

Based on the fact that a significant number of Heartwood's patients continued to transfer their care to Good Shepherd after Heartwood's cease and desist letter, Heartwood's attorneys concluded that litigation was needed to stop Ms. Molyneux, Ms. Huber and the other defendants from violating their confidentiality and non-solicitation agreements. (R. at 616). Furthermore, Heartwood and its attorneys agreed that litigation needed to commence immediately in order to stop any further losses to Heartwood from its patients transferring. (*Id.*). Therefore, on Tuesday, October 23, 2012, Heartwood's attorneys drafted a complaint against Ms. Molyneux and Ms. Huber for (i) breach of contract, (ii) breach of the duty of confidentiality, (iii) breach of the duty of loyalty, and (iv) intentional interference with economic relations. (R. at 13, 616).

In a Declaration filed in opposition to defendants' Rule 11 motion, Heartwood's attorney explained why he believed the claims contained in Heartwood's complaint had

both a factual and legal basis such that the complaint complied with the requirements of

Rule 11:

15. I believe the facts given to me by Mr. Vasic, as outlined above, provided me with an adequate factual and legal basis for the claims against Ms. Molyneux and Ms. Huber, especially in light of the limited amount of time that I had to draft the Complaint.

16. With respect to the claim for breach of contract, it was my opinion that the agreement constituted a legal and binding contract because it simply required the defendants to accept certain terms and conditions of their employment with Heartwood. Furthermore, based on the evidence presented to me, I believed a reasonable person could conclude that Ms. Huber and Ms. Molyneux breached their agreements by contacting Heartwood's employees and patients.

17. As an alternative to its claim for breach of contract, I also asserted a claim that Ms. Molyneux and Ms. Huber breached a duty of confidentiality owed to Heartwood. This was based on my research of case law stating that "[a] former employee may not use confidential information obtained during the course of his or her employment to compete after termination with his or her former employer." *Envirotech Corp. v. Callahan*, 872 P.2d 487, 496 (Utah App. 1994). Based on the evidence presented to me, I believed a reasonable person could conclude that Ms. Huber and Ms. Molyneux breached this duty of loyalty by using Heartwood's proprietary information, i.e., the names and addresses of its patients, their need for hospice care and their specific medical needs and diagnoses, to contact these patients and persuade them to transfer to Good Shepherd.

18. In addition to the foregoing claims, I asserted a claim that Ms. Molyneux and Ms. Huber breached a duty of loyalty owed to Heartwood. In analyzing this duty, courts have held that "an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency." *Prince, Yeates & Geldzahler v. Young*, 2004 UT 26, ¶ 20, 94 P.3d 179. I asserted this claim because it was unclear at the time whether any solicitation of the Heartwood's patients by the defendants occurred before or after the defendants' employment with Heartwood ended. To the extent solicitation occurred during their employment with Heartwood, the duty of loyalty would apply.

19. The final claim I asserted against Ms. Huber and Ms. Molyneux was for intentional interference with economic relations. In order to prevail on this claim, Heartwood was required to prove “(1) that the defendant intentionally interfered with the plaintiff’s existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff.” *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982). I believed a reasonable person could conclude that Ms. Huber and Ms. Molyneux ... committed this tort by interfering with Heartwood’s relationship with its patients and employees through the use of confidential information they obtained only through and during their employment with Heartwood, i.e., the identity of Heartwood’s patients and employees, the addresses of Heartwood’s patients and the patients’ medical needs. Defendants were precluded from using this information by virtue of the duty of confidentiality they owed to Heartwood. I believed there was a sufficient basis to assert this claim.

20. As part of their Rule 11 Motion, defendants argue that the claims I asserted on Heartwood’s behalf had no legal basis because HIPAA does not create a private right of action. I am familiar with HIPAA and I was aware that HIPAA does not create a private right of action at the time I filed the Complaint. However, Heartwood’s claims were not dependent on any alleged violation of HIPAA. Rather, they were based on defendants’ decision to contact patients and employees of Heartwood in violation of defendants’ employment agreement and their fiduciary duties. Therefore, since the claims were not dependent on HIPAA, it is my legal opinion that they were not barred due to the absence of any statutory private right of action under HIPAA.

(R. at 599-601).

On October 24, 2012, Heartwood commenced this action by causing a copy of the Complaint and Summons to be served on the defendants in accordance with Utah R.Civ. P. 3(a)(2). (R. at 7, 10, 618-19). After the Complaint was served, the flow of patients from Heartwood to Good Shepherd that had been occurring for the previous five days stopped immediately. (R. at 618-19). As such, Heartwood did not seek immediate injunctive relief from the district court as it had originally planned to do. (*Id.*).

C. Facts Uncovered During Discovery and Presented in Opposition to Defendants' Summary Judgment Motion.

During the course of discovery, Heartwood obtained additional evidence from the parties which created a strong inference that the defendants had contacted former employees and patients after they left Heartwood to begin working for Good Shepherd. In addition, all of these facts were presented to the district court as part of Heartwood's opposition to defendants' summary judgment motion.

1. Evidence of Ms. Huber contacting Heartwood's employees

Heartwood discovered and presented evidence to the district court which created a strong inference that after leaving Heartwood for Good Shepherd, Ms. Huber contacted Ms. Molyneux and Mr. Nielson in an effort to persuade them to leave Heartwood and begin working for Good Shepherd. For example, Heartwood presented facts which showed that by July 2012, Ms. Huber had become unhappy with her employment at Heartwood and that she began looking for work elsewhere. (R. at 474). Ms. Huber proceeded to contact Good Shepherd for employment after viewing online that Good Shepherd had a job opening for a registered nurse. (*Id.*). Ms. Huber was eventually hired by Good Shepherd and she began working there on August 6, 2012. (*Id.*).

After leaving Heartwood, Ms. Huber proceeded to have multiple contacts with several of her former co-workers at Heartwood, including defendants Glenna Molyneux and Merrill Nielson. (R. at 474). This was confirmed by Heartwood's owner, Lee Vasic,

who testified that Mr. Nielson and Ms. Huber had lunch together several times during the two weeks after Ms. Huber left Heartwood. (R. at 474-75).

During the contacts between Ms. Huber and Mr. Nielson, the two of them would sometimes discuss whether or not Good Shepherd had any job openings, as Mr. Nielson was unhappy working for Heartwood. (R. at 475). Then, in early August 2012, Mr. Nielson submitted a job application to Good Shepherd and subsequently had an interview with Good Shepherd for a nursing position. (*Id.*) Approximately two months after Ms. Huber began working for Good Shepherd, Mr. Nielson resigned from his position at Heartwood on October 11, 2012. (*Id.*) Mr. Nielson then began working for Good Shepherd on the very next day. (*Id.*)

During the conversations between Ms. Molyneux and Ms. Huber referenced above, the two women would sometimes discuss whether Good Shepherd had any job openings for a home health aide. Ms. Huber eventually told Ms. Molyneux that Good Shepherd had “openings online.” (R. at 475). On approximately October 14, 2012, approximately two months after Ms. Huber began working for Good Shepherd, and only 3 days after Mr. Nielson quit, Ms. Molyneux notified Heartwood’s owner, Lee Vasic, that she would be leaving Heartwood in two weeks.

Finally, Heartwood presented evidence which showed that Ms. Molyneux eventually began working for Good Shepherd on either Thursday, October 18 or Friday, October 19, 2012, which was actually 2 or 3 days before her last day with Heartwood. (R. at 476).

2. Evidence of Ms. Molyneux contacting Heartwood's patients.

Heartwood also discovered and presented evidence to the district court which showed that after quitting Heartwood for Good Shepherd, Ms. Molyneux contacted Heartwood's hospice patients in an effort to persuade them to leave Heartwood and transfer their care to Good Shepherd.

For example, Heartwood presented facts which showed that Ms. Molyneux first started working for Good Shepherd on either Thursday, October 18, or Friday, October 19, 2012 (R. at 476). This was 2-3 three days before her last day of employment with Heartwood. (*Id.*). These were the same days that Heartwood began receiving facsimiles from Good Shepherd that contained signed transfer requests from several Heartwood hospice patients in which the patients stated their desire to transfer their care from Heartwood to Good Shepherd. (R. at 476-77). The dates on which Heartwood received these requests were as follows:

<u>Patient</u>	<u>Date of Transfer Request</u>
S.I.	Friday, October 19, 2012
E.B.	Friday, October 19, 2012
L.N.	Monday, October 22, 2012
B.P.	Monday, October 22, 2012
G.F.	Tuesday, October 23, 2012
I.J.	Approx. November 2, 2012 ³

³ In her deposition, Ms. Molyneux confirmed that patient I.J. transferred her care from Heartwood approximately two weeks after Ms. Molneux left. (R. at 469). Heartwood was unable to find I.J.'s transfer request and therefore it does not know on exactly what date the transfer request was made.

(R. at 476-77). Most importantly, all of the foregoing patients had been assigned to Ms. Molyneux during the time she worked for Heartwood. (*Id.*).

In addition to the foregoing, Heartwood also produced direct evidence which further showed that Ms. Molyneux contacted Heartwood's patients in an effort to persuade them to transfer their care to Good Shepherd. Heartwood showed that during the general course of Good Shepherd's business, Good Shepherd created what was known as a "Start of Care Worksheet" for every one of its hospice patients. (R. at 477). In order to create these worksheets, Good Shepherd's intake coordinator or some other employee used a computer program to fill out a computerized template, which in turn created the written report. (*Id.*). One of the entries contained on Good Shepherd's Start of Care Worksheet is entitled "Referral Source". This entry identifies the person who referred the particular hospice patient to Good Shepherd. (R. at 478). In this case, four of the six patients identified above had Good Shepherd Start of Care Worksheets that identified "Glenna Molyneux" as the person who referred them to Good Shepherd. (*Id.*). In other words, Glenna Molyneux is the individual who referred these four patients to Good Shepherd for their hospice care, despite the fact that they were already receiving care from Heartwood at the time the referral was made.

D. District Court's Ruling on Defendants' Motions for Summary Judgment and Rule 11 Sanctions.

On October 15, 2013, almost one year after the case was commenced and after the foregoing discovery had been completed, the defendants served Heartwood with a Rule 11

Motion for Sanctions in which they requested that Heartwood withdraw its complaint. (R. at 440). After Heartwood declined to withdraw its complaint, the defendants formally filed their Rule 11 motion on November 8, 2013. (*Id.*). The defendants' Rule 11 motion was accompanied by a motion for summary judgment seeking the dismissal of Heartwood's claims against the defendants in their entirety. (R. at 297). A comparison of the two motions reveals that they were both based on substantially the same argument, i.e., that Heartwood could not produce sufficient facts to support each element of the claims being asserted.

At oral argument on defendants' summary judgment motion, Heartwood advised the district court that its claims had been narrowed based on the foregoing discovery and that Ms. Huber was now being sued only for having solicited Heartwood employees who then went to work for Good Shepherd. Further, Heartwood stated that Ms. Molyneux was being sued only for having solicited the Heartwood patients who left Heartwood and transferred their care to Good Shepherd. (R. at 585).

The district court ultimately issued an Order granting the defendants' summary judgment motion. In doing so, the district court dismissed Heartwood's breach of contract claim on the grounds that the relevant "Confidentiality/Non-Solicitation" agreements did not constitute valid contracts between Heartwood and its employees. (R. at 585). It further determined that that the contract claims were preempted by HIPAA. (*Id.*) With respect to Heartwood's remaining claims for breach of fiduciary duty and tortious interference with contract, the district court concluded "that while the Plaintiff may have produced evidence

on some of the elements of its claims it did not produce evidence establishing all of the elements of any of its claims and has accordingly not met its burden on summary judgment.” (R. at 589).

After the district court granted the defendants’ summary judgment motion, the defendants renewed their Motion for Rule 11 Sanctions against Heartwood. On June 20, 2014, the district court issued an Order which granted defendants’ motion based on the following findings of fact and conclusions of law:

These Defendants contend Heartwood’s allegations against them lacked evidentiary support. They argue that the lack of evidentiary support should have been obvious after Mr. Vasic’s deposition and that, by failing to withdraw its claims, Heartwood violated Rule 11. The Court agrees and makes the following specific factual findings in support of its conclusion:

1. Heartwood made allegations against these Defendants in its Complaint for, among other things, improper conduct in soliciting Heartwood’s employees and patients.
2. Heartwood reaffirmed and later advocated based on these allegations in opposing these Defendants’ motion for summary judgment.
3. Heartwood lacked evidentiary support and legal basis for its allegations against these defendants.
4. Although Heartwood may have had reason to believe at the time it filed its Complaint that the allegations against these Defendants would materialize, Heartwood was unable, after conducting discovery, to produce any evidence in support of its allegations.
5. Mr. Vasic made clear in his deposition that Heartwood had no evidence to support its claims against these Defendants.
6. At the end of discovery, it should have been clear to Heartwood that it was unable to support its claims against these Defendants with evidence.

7. It was unreasonable for Heartwood to continue prosecuting its claims against these Defendants after it became clear that the claims lacked evidentiary support or legal basis.
8. Heartwood relied on speculation and assumptions in continuing to prosecute its claims against these Defendants and in opposing these Defendants' motion for summary judgment.
9. By refusing to withdraw its claims against these Defendants after Mr. Vasic's deposition, Heartwood acted in bad faith.

Based on the foregoing factual findings, the Court concludes that Heartwood violated Rule 11 by failing to withdraw its claims against these Defendants after being served under the safe harbor provision and by continuing to advocate for a position that clearly lacked evidentiary support.

(R. at 682-83).

As part of its Order granting defendants' Rule 11 motion, the district court determined that the appropriate sanction was to require Heartwood to compensate defendants "for their reasonable attorneys fees incurred litigating their motion for summary judgment and motion for sanctions." (R. at 683). On August 21, 2014, the district court issued another Order in which it determined that defendants were entitled to receive reimbursement from Heartwood in the amount of \$10,528.50 for their attorneys' fees. (R. at 718-20).

SUMMARY OF THE ARGUMENT

First, Heartwood is seeking review of the district court's decision to impose Rule 11 sanctions against Heartwood based on the district court's determination that Heartwood

should have withdrawn its complaint after discovery and not opposed the defendants' summary judgment motion. The district court's decision to impose sanctions must be reversed. As will be explained more fully below, the district court erred when it failed to focus its inquiry on the objective reasonableness of Heartwood's complaint as of the time the Complaint was filed. Rather, the district court erroneously determined that Rule 11 imposes an ongoing obligation on parties to constantly review the sufficiency of previously filed pleadings. If the proper inquiry had been made, there was absolutely no basis for the district court's imposition of sanctions.

Nevertheless, even if Heartwood did have an ongoing obligation to review the sufficiency of its complaint, there was still no basis for the district court to impose Rule 11 sanctions. At the time defendants filed their Rule 11 motion, Heartwood had uncovered sufficient facts which, at a minimum, provided it with a good faith basis to maintain its complaint and to oppose the defendants' summary judgment motion. Therefore, the district court's decision to impose Rule 11 sanctions against Heartwood must be reversed.

Second, Heartwood is seeking review of the district court's decision to grant the defendants' motion for summary judgment and to dismiss Heartwood's contract and tort claims. The district court's decision must be reversed because it was based on a misinterpretation of the facts and a misapplication of the law. Contrary to the district court's ruling, Heartwood did present sufficient facts to satisfy each of the relevant elements for its claims. Moreover, the district court's determination that the relevant employment contracts constituted unlawful restraints on competition was made in error

because it was based on case law applicable to non-compete provisions, which were not present in the defendant's contracts. Finally, the district court erred when it determined that Heartwood's claims are preempted by Health Insurance Portability Act of 1996 ("HIPAA"). This is because Heartwood's claims were not based on HIPAA or any alleged violations of its provisions. Therefore, the district court's decision to dismiss Heartwood's claims must be reversed.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT IMPOSED RULE 11 SANCTIONS AGAINST HEARTWOOD.

A. Standard for Rule 11 Sanctions.

Rule 11 of the Utah Rules of Civil Procedure places a duty on attorneys and litigants to make a reasonable investigation, under the circumstances, of the facts and law before signing and submitting any pleading or motion. *See Morse v. Packer*, 2000 UT 86, ¶ 28, 15 P.3d 1021. In explaining this standard, however, the Utah Supreme Court stated that Rule 11 does not require absolute precision:

“Rule 11 does not call for the imposition of sanctions whenever there are factual errors; the misstatements must be significant and sanctions will not be imposed when they are not critical and the surrounding circumstances indicate that counsel did conduct a reasonable inquiry.... [T]he fact that a complaint is dismissed for legal insufficiency or does not produce a triable issue does not necessarily mean that a sanction is appropriate.”

Id. (quoting 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d § 1335, at 67, 88 (1990)). Moreover, “Rule 11 does not impose a duty to do perfect or exhaustive research. The appropriate standard is whether the research was objectively

reasonable under all the circumstances.” *Barnard v. Sutliff*, 846 P.2d 1229, 1236 (Utah 1992). In determining whether a party’s submission was reasonable for purposes of Rule 11, courts have emphasized that the inquiry concerns reasonableness not at the time that a Rule 11 motion is filed, but at the time that the challenged “pleading, motion, or other paper was submitted.” *Arab African Int’l Bank v. Epstein*, 10 F.3d 168, 175 (3d Cir. 1993).

In using the “reasonable under the circumstances” standard, the thoroughness of the inquiry required by Rule 11 depends in part upon the time available for investigation. For example, “[a]n inquiry that is unreasonable when an attorney has months to prepare a complaint may be reasonable when he has only a few days before the statute of limitations runs.” *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401-02 (1990).

Courts have also noted that the subsequent dismissal of a case is not alone a basis for Rule 11 sanctions and does not establish frivolousness under the rule. *See, e.g., Teamsters Local Union No. 430*, 841 F.2d at 69 (“Rule 11 may not be invoked because an attorney, after time for discovery, is unable to produce adequate evidence to withstand a motion for summary judgment.”); *Tahfs v. Proctor*, 316 F.3d 584, 595 (6th Cir. 2003) (“A complaint does not merit sanctions under Rule 11 simply because it merits dismissal pursuant to Rule 12(b)(6).”). In fact, courts have stated “litigants misuse the Rule when sanctions are sought against a party or counsel whose only sin was being on the unsuccessful side of a ruling or judgment.... Substantially more is required.” 841 F.2d at 68 (3rd Cir. 1988).

Finally, courts have cautioned that the court should impose sanctions only “‘in the exceptional circumstance’ where a claim or motion is patently unmeritorious or frivolous.” *Doering v. Union Cnty. Bd. of Chosen Freeholders* , 857 F.2d 191, 194 (3d Cir. 1988); *see also Mary Ann Pensiero, Inc., v. Lingle*, 847 F.2d 90, 99 (3d Cir. 1988) (“We do not retreat from our admonition... against routine and indiscriminate invocation of Rule 11: sanctions under this Rule are reserved for only exceptional circumstances.”) (citations omitted). Furthermore, even in those “exceptional circumstances” the court is not required to impose sanctions. *Bensalem Twp. v. Int’l Surplus Lines Ins. Co.*, 38 F.3d 1303, 1314 (3d Cir. 1994).

B. Heartwood Satisfied the Requirements of Rule 11 When It Submitted the Challenged Complaint.

In imposing Rule 11 sanctions against Heartwood, the district court relied heavily on its belief that Heartwood had failed to produce sufficient evidence to defeat defendant’s summary judgment motion. For example, the district court stated that “[a]t the end of discovery, it should have been clear to Heartwood that it was unable to support its claims” and that Heartwood violated Rule 11 by “continuing to prosecute its claims against these Defendants” and by “opposing these Defendants’ motion for summary judgment.” (R. at 665-66).

Despite the district court’s ruling, the fact is that the defendants never filed a Rule 11 motion challenging Heartwood’s opposition to their summary judgment motion. Rather, defendants’ Rule 11 motion only challenged Heartwood’s actual complaint on the grounds that Heartwood did not have a factual basis for its complaint at the time it was

filed. See Defendant’s Motion for Rule 11 Sanctions (R. at 547) (“Defendants ... hereby move the court for sanctions pursuant to Rule 11 Utah R. Civ. P. on the grounds that the Plaintiff *commenced this action* without factual or legal basis for said claims.”) (emphasis added). Therefore, the proper analysis for this Court to follow in determining the appropriateness of sanctions is whether Heartwood satisfied Rule 11 when it filed its complaint. See also *Epstein*, 10 F.3d at 175 (Rule 11 inquiry concerns reasonableness not at the time that a Rule 11 motion is filed, but at the time that the challenged “pleading, motion, or other paper was submitted.”).

In this case, and as evidenced by the declaration filed by Heartwood’s attorney in opposition to the defendants’ Rule 11 motion (R. at 595), there was no basis for the district court to impose Rule 11 sanctions against Heartwood for its decision to file its complaint against the defendants. This is because the allegations set forth in the complaint were not without supporting evidence. Rather, they were based on credible evidence obtained by Heartwood’s attorneys during their investigation of this case. This investigation was reasonable in scope, especially given the speed with which Heartwood’s attorneys needed to act in order to limit Heartwood’s damages. Therefore, since there were sufficient factual bases for the allegations in the Complaint, Heartwood did not violate the requirements of Rule 11 when it initiated this lawsuit.

In his declaration, Heartwood’s attorney sets forth in detail the facts he relied upon in drafting and filing the complaint in this matter. Counsel states that Heartwood’s owner, Lee Vasic, approached the law firm Jenson & Guelker in October 2012 after three of

Heartwood's former employees, Rita Huber, Merrill Nielson and Glenna Molyneux, quit and began working for one of Heartwood's competitors, Good Shepherd (R. at 613-14). Mr. Vasic was concerned that Ms. Huber had been contacting Heartwood's employees to induce them to leave Heartwood and go to work for its competitor, Good Shepherd. (*Id.*). Mr. Vasic also believed that these three employees had been contacting Heartwood's current hospice patients in an effort to persuade these patients to transfer their hospice care from Heartwood to Good Shepherd. (R. at 613-16). Finally, Mr. Vasic stated that each of these employees had signed a confidentiality and non-solicitation agreement that precluded them from contacting Heartwood's patients and employees after their employment with Heartwood ended. (R. at 613-15).

During the initial meetings with his attorneys, Mr. Vasic explained the bases for his belief that the three former employees had been improperly contacting Heartwood's patients and employees. (R. at 613-16). These factual bases are identified above as part of Heartwood's "Statement of the Case" and will not be reiterated again as part of this section. In short, Mr. Vasic's beliefs were based on (i) the close temporal proximity between the time the employees began working for Good Shepherd and the time certain patients transferred their care from Heartwood to Good Shepherd; (ii) reports from Heartwood employees who saw the three defendants visiting Heartwood's patients after the defendants began working for Good Shepherd; and (iii) reports from Heartwood's patients stating that the defendants had visited them and attempted to persuade them (albeit unsuccessfully) to transfer from Heartwood to Good Shepherd.

After meeting with Mr. Vasic, Heartwood's attorneys initially sent a cease and desist letter to Good Shepherd in which they requested that Good Shepherd advise the defendants to cease contacting Heartwood's patients and its staff. (R. at 615). However, it appeared as if the defendants and Good Shepherd had chosen to ignore this letter because on the day after this letter was delivered to them, Heartwood received another transfer request from another of its patients seeking to transfer her care to Good Shepherd. (R. at 615-16).

At this point, Heartwood had seen five of its patients transfer their care to Good Shepherd within the previous five days. (R. at 615-16). As such, Heartwood and its attorneys were concerned that Heartwood would likely lose significantly more patients to Good Shepherd if some legal action were not taken against the defendants. (R. at 616). Therefore, on October 23, 2014, three days after their initial meeting with Heartwood, Heartwood's attorneys drafted the complaint that was served on the defendants soon thereafter. (*Id.*). The intent behind drafting the complaint so quickly was to allow Heartwood to seek preliminary injunctive relief from the Court in order to stop the loss of patients from Heartwood to Good Shepherd. Indeed, after the complaint was served on defendants, there were no further transfer requests made by any of Heartwood's patients. (R. at 601-02). Therefore, Heartwood's attorneys chose not to pursue immediate injunctive relief. (*Id.*).

As part of his Declaration, Heartwood's attorney goes on to explain why he believes the facts he discovered provided a sufficient factual basis for the legal claims in the

Complaint. (R. at 616-18). In short, counsel believed that the facts he obtained regarding Ms. Molyneux and Ms. Huber provided sufficient evidence from which a jury could infer that these defendants had violated their confidentiality and non-solicitation agreements with Heartwood, as well as certain fiduciary duties they owed to Heartwood. (*Id.*)

Based on the foregoing, it is clear that Heartwood's decision to file its complaint against the defendants was "objectively reasonable under all the circumstances." *See Barnard*, 846 P.2d at 1236 (Appropriate Rule 11 standard is whether party's research and investigation was "objectively reasonable under all the circumstances."). It certainly does not present the type of "exceptional circumstance" in which a party has presented a claim that is "patently unmeritorious or frivolous." *Doering*, 857 F.2d at 194.

The case for sanctions against Heartwood is further undermined by the timing of defendants' Rule 11 motion. As explained above, defendants' Rule 11 motion claimed that Heartwood had "**commenced** this action without factual or legal basis for said claims." (R. at 547). In other words, defendants claimed that a Rule 11 violation had occurred at the time the complaint was filed. Nevertheless, defendants filed their Rule 11 motion over a year after being served with the complaint. (R. at 432). *See Mellon Bank Corp. v. First Union Real Estate Equity & Mortgage Invest.*, 951 F.2d 1399, 1413 (3rd Cir. 1991) ("[Defendant's] quest for sanctions is also hampered by its own conduct in pursuit of them..... If [plaintiff's] complaint contained claims so blatantly without merit ... one must wonder why [defendant] waited so long to seek such sanctions.")

Moreover, defendants' Rule 11 motion was filed on the same day as defendants'

summary judgment motion and both motions were based on essentially the argument, i.e., that Heartwood did not have sufficient evidence to support its claims. (R. at 289, 432). The timing of defendants' two motions suggests that defendants' true motivation behind seeking sanctions was not to address a pleading which they believed in good faith to be totally frivolous. If so, it could have filed the motion immediately after receiving the Complaint. Instead, the timing of defendants' motion suggests that it was a litigation tactic designed to provide a basis upon which defendants could seek attorneys' fees if their summary judgment motion was ultimately successful.

In any event, the relevant inquiry for determining the appropriateness of Rule 11 sanctions is whether the party submitting the complaint performed a reasonable investigation under the circumstances prior to filing the challenged pleading. In this case, Heartwood's attorneys did perform a reasonable investigation prior to filing the Complaint in this matter, especially in light of the limited time they had within which to act. Therefore, there was no basis for the district court to impose sanctions on Heartwood or its attorneys.

C. The District Court Erred When It Determined That Rule 11 Imposes an Ongoing Duty to Review the Sufficiency of Previously Filed Pleadings.

In its decision to impose Rule 11 sanctions against Heartwood, it is clear that the district court did not limit its analysis to the objective reasonableness of Heartwood's complaint at the time the complaint was filed. In fact, the district court did not make any findings of fact in this regard. Rather, the district court's decision was based on its legal

determination that Heartwood had an ongoing obligation under Rule 11 to review the sufficiency of its previously filed complaint. *See* 6/20/14 Order at 4 (R. at 679) (Heartwood violated Rule 11 by “continuing to prosecute its claims against these Defendants” and by “opposing these Defendants’ motion for summary judgment.”). However, the district court’s decision in this regard constituted reversible error because there is no controlling legal precedent in Utah that imposes such an obligation under Rule 11.

Utah courts have not yet addressed the precise issue of whether Rule 11 of the Utah Rules of Civil Procedure imposes a continuing obligation to review the sufficiency of previously filed pleadings. However, a number of federal circuit courts, including the Tenth Circuit Court of Appeals, have held that Rule 11 does not place a continuing obligation on parties and their attorneys to review the sufficiency of their pleadings. *See Griffen v. City of Oklahoma City*, 3 F.3d 336, 339 (10th Cir. 1993) (Rule 11 does not impose a continuing obligation on the signer to update previously filed pleadings.); *Corporation of the Presiding Bishop v. Associated Contractors, Inc.*, 877 F.2d 938, 941-42 (11th Cir.1989), *cert. denied*, 493 U.S. 1079 (1990) (“Rule 11 did not impose a continuing obligation on the [plaintiff] to amend its complaint, at least if the complaint was reasonably interposed in the first place.”); *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 484 (3d Cir.1987) (“By its terms Rule 11 does not authorize a sanction for failing to amend or correct a document if information obtained or legal research performed after filing reveals an error.”); *Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2nd Cir.1986) (“Rule 11 applies only to the initial signing of a ‘pleading, motion, or other paper.’ Limiting the application

of rule 11 to testing the attorney's conduct at the time a paper is signed is virtually mandated by the plain language of the rule.”) (*en banc*), *cert. denied*, 480 U.S. 918 (1987).; see also *Hilton Hotels Corp. v. Banov*, 899 F.2d 40, 44-45 (D.C.Cir.1990) (commenting that interpretation of Rule 11 such that no continuing obligation to update pleadings is imposed, is most consistent with attorneys' duties under ethical codes); *United Energy Owners Comm., Inc. v. United Energy Management Sys., Inc.*, 837 F.2d 356, 364-65 (9th Cir.1988) (holding that Rule 11 only applies to misconduct involving signing of papers).

This Court should interpret Utah’s Rule 11 in the same manner as the Tenth Circuit and other federal courts and find that it does not impose a continuing obligation on attorneys to review the sufficiency of prior pleadings. This is because the plain language of Utah’s Rule 11 only authorizes sanctions for “presenting” a document in violation of the Rule:

By presenting a pleading ... to the court ... an attorney ... is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances ... the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Utah R.Civ. P. 11(b).

Utah Rule 11's emphasis on the need for an attorney to perform a reasonable inquiry before presenting a pleading to the court suggests that the rule authorizes sanctions only for unreasonable filings, not for the failure to amend or withdraw a previously filed document. *See Hilton Hotels Corp.*, 899 F.2d at 44; *see Gaiardo*, 835 F.2d at 484 (“Rule

11 sanctions are improper in situations which do not involve signing a paper”). Furthermore, the Advisory Committee Note to Fed.R.Civ.P. 11 states that whether the signer's conduct amounts to a violation of Rule 11 is to be evaluated at the time a paper is signed. *See* Fed.R.Civ.P. 11 advisory committee note. As pointed out by the court in *Oliveri*, “[i]t is difficult to imagine why this comment would be made if the rule were meant to impose a continuing obligation on the attorney.” 803 F.2d at 1274.

In this case, the district court’s decision that Heartwood had an ongoing obligation to review the sufficiency of its complaint was based on the Utah Supreme Court’s decision in *Morse v. Packer*, 2000 UT 86, 15 P.3d 1021, in which the Court was discussing the extent to which Rule 11 applies to oral representations made by attorneys during court hearings. *See id.* at ¶ 31. Specifically, the Court recognized that in certain “limited” circumstances, “oral representations made in the course of advocating a written pleading may also fall within the purview of rule 11.” *Id.* In doing so, the Court stated that Rule 11 precludes a party from “reaffirming to the court and advocating positions” contained in previously filed pleadings if the party subsequently learns that such positions are without merit.

The foregoing language from *Packer* has no application to this case because defendants’ Rule 11 motion was not based on any oral or written representations wherein Heartwood reaffirmed statements made in its complaint. Rather, the motion was based on the complaint itself. *See* Defendant’s Motion for Rule 11 Sanctions (R. at 547) (“Defendants ... hereby move the court for sanctions...on the grounds that the Plaintiff

commenced this action without factual or legal basis for said claims.”). This is evidenced by the fact that defendants’ motion requested Heartwood to withdraw its actual complaint, as opposed to some other subsequently filed paper or oral representation.

It is clear from the district court’s opinion that its decision to impose sanctions on Heartwood was not based Heartwood’s complaint, but rather on Heartwood’s decision to file an opposition to defendants’ summary judgment motion. *See* 6/20/14 Order at 4 (R. at 665-66) (Heartwood violated Rule 11 by “opposing these Defendants’ motion for summary judgment.”). However, Heartwood did not file its memorandum opposing summary judgment until over thirty days after defendants’ filed their Rule 11 motion. There was simply no legal basis for the district court to impose Rule 11 sanctions based on a pleading that was filed after the underlying motion for sanctions.

Instead of basing its ruling on the pleading actually challenged in defendants’ Rule 11 motion, i.e., Heartwood’s complaint, the district court instead based its decision on whether Heartwood should have reviewed the sufficiency of its complaint after receiving the defendants’ summary judgment motion. However, as shown more fully above, Rule 11 does not place a continuous duty on litigants to review the sufficiency of previous filed papers. Rather, the rule applies to the reasonableness of papers at the time they are presented to the court. In this case, Heartwood has submitted sufficient facts which show that Heartwood and its attorneys did perform a reasonable inquiry into the facts of this case before drafting and filing its complaint. Therefore, the district court’s decision to impose Rule 11 sanctions on Heartwood must be reversed.

D. Even If Heartwood Had an Ongoing Duty to Review the Sufficiency of Its Complaint, There Were Still Sufficient Facts That Allowed Heartwood to Oppose Defendants' Summary Judgment Motion.

Even if the district court was correct in its determination that Heartwood had an ongoing obligation under Rule 11 to review the sufficiency of its complaint, the district court still erred when it imposed Rule 11 sanctions on Heartwood. This is because Heartwood had uncovered facts during discovery that made it objectively reasonable for it to oppose defendants' summary judgment motion.

As explained more fully above, all of Heartwood's claims were based on allegations that the defendants, after leaving their employment with Heartwood, began using information they obtained from Heartwood to either (i) contact Heartwood's patients in order to persuade them to begin using Good Shepherd as their hospice provider, or (ii) contact their former co-workers in order to persuade them to quit Heartwood and begin working for Good Shepherd. (R. at 13-26). The district court's decision to impose Rule 11 sanctions was based on its determination that Heartwood had failed to present sufficient evidence to support these allegations. *See* 6/20/14 Order at 4 (R. at 665-66).

Contrary to the district court's conclusion, Heartwood did present sufficient facts in its opposition to summary judgment which, at a minimum, made it objectively reasonable for it to oppose defendants' summary judgment motion. That is because these facts, including the reasonable inferences that could be drawn therefrom, created a genuine issue

of fact as to whether the defendants had contacted Heartwood's patients and employees in an effort to have them switch their medical care or employment over to the defendants' new employer, Good Shepherd. *See Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258, 1261 (Utah 1984) (In determining whether an issue of material fact exists for purposes of summary judgment, all facts and the reasonable inferences to be made therefrom should be construed in a light favorable to the non-moving party). The facts presented by Heartwood are as follows:⁴

1. Evidence of Ms. Huber Recruiting Heartwood's Employees.

Contrary to the district court's ruling, Heartwood did present evidence which, at a minimum, created a compelling inference that Ms. Huber's conversations with her former co-workers played a role in causing at least two of them, Ms. Molyneux and Mr. Nielson, to leave Heartwood and to begin working for Good Shepherd. *See USA Power, LLC v. Pacificorp*, 2010 UT 31, ¶ 33, 235 P.3d 749 (“[W]e agree that circumstantial evidence can suffice to defeat summary judgment in appropriate circumstances; of course a plaintiff is not required to prove his or her case by direct proof alone.”)).

For example, Ms. Huber admitted that after leaving Heartwood to go to Good Shepherd, she contacted several of her former co-workers at Heartwood, including Ms. Molyneux and Mr. Nielson. (R. at 466). More importantly, during her meetings with Mr. Nielson and Ms. Molyneux, Ms. Huber would discuss substantive things regarding Mr.

⁴ These facts are also stated in more detail as part of Heartwood's "Statement of the Case". *See supra*.

Nielson and Ms. Molyneux's employment situation, including employment opportunities at Good Shepherd and the manner in which the Heartwood employees could apply for jobs at Good Shepherd. (R. at 467). Specifically, there were facts showing that Ms. Huber and Mr. Nielson discussed whether or not Good Shepherd had any job openings, as Mr. Nielson was unhappy working for Heartwood. (R. at 467). Similarly, Ms. Huber admitted that she told Ms. Molyneux that Good Shepherd was hiring and that she told Ms. Molyneux how to apply for a job with Good Shepherd online. (R. at 467).

Approximately two months after Ms. Huber began working for Good Shepherd, Ms. Molyneux quit Heartwood and immediately began working for Good Shepherd as well. (R. at 468). Similarly, Mr. Nielson left Heartwood to go to Good Shepherd within weeks of speaking with Ms. Huber about job openings at Good Shepherd. (R. at 466-67). In fact, Mr. Nielson and Ms. Molyneux began working for Good Shepherd within one week of one another. (R. at 467-68). The fact that two of Ms. Huber's former co-workers followed Ms. Huber to Good Shepherd within two months of Ms. Huber's departure from Heartwood, when coupled with Ms. Huber's admission that she discussed job openings at Good Shepherd with these same two employees, undoubtedly creates a strong inference that Ms. Huber played a role in these two employees' departure from Heartwood. *Mountain States Tel. & Tel. Co.*, 681 P.2d at 1261 (Utah 1984) (For purposes of summary judgment, court must construe all facts and the reasonable inferences to be made therefrom in a light favorable to the non-moving party).

2. Evidence of Ms. Molyneux Recruiting Heartwood's Patients.

Contrary to the district court’s ruling, Heartwood also presented sufficient evidence from which a reasonable person could have concluded that Ms. Molyneux did contact and solicit Heartwood’s patients after she accepted Good Shepherd’s employment offer. For example, Heartwood presented facts which showed that Ms. Molyneux first interviewed with Good Shepherd on Monday, October 14, 2012, the same day that she notified Heartwood that she would be leaving the company. (R. at 468). Three or four days later, on either Thursday, October 18, or Friday, October 19, 2012, Good Shepherd made her an offer of employment, which she accepted. (*Id.*) At that point, Heartwood immediately began receiving facsimiles from Good Shepherd that contained signed transfer requests from several Heartwood hospice patients in which the patients stated their desire to transfer their care from Heartwood to Good Shepherd. (*Id.*) The dates Heartwood upon which received these requests are as follows:

<u>Patient</u>	<u>Date of Transfer Request</u>
S.I.	Friday, October 19, 2012
E.B.	Friday, October 19, 2012
L.N.	Monday, October 22, 2012
B.P.	Monday, October 22, 2012
G.F.	Tuesday, October 23, 2012
I.J.	Approx. November 2, 2012

(R. at 468-69). Perhaps most importantly, all the foregoing patients had been assigned to Ms. Molyneux during the time she worked for Heartwood. (*Id.*)

The fact that six Heartwood patients, all of whom had been assigned to Ms. Molyneux, transferred their care to Good Shepherd within days of Ms. Molyneux accepting

employment with Good Shepherd creates a strong inference that Ms. Molyneux contacted these patients and informed them that she had been hired by Good Shepherd. This inference is further supported by evidence showing that Ms. Molyneux visited one of Heartwood's patients after she began working for Good Shepherd while wearing her Good Shepherd uniform. (R. at 469). While this patient ultimately stayed with Heartwood, the incident confirms that Ms. Molyneux visited Heartwood's patients even after her employment with Heartwood ended. All of this this evidence, standing alone, is sufficient to establish that Ms. Molyneux breached her employment agreement with Heartwood. *See USA Power, LLC*, 2010 UT 31 at ¶ 33 (circumstantial evidence can suffice to defeat summary judgment.).

Nevertheless, Heartwood produced additional evidence which further showed that Ms. Molyneux contacted Heartwood's patients to inform them that she had been hired by Good Shepherd. Heartwood presented evidence which showed that Good Shepherd creates what are known as "Start of Care Worksheets" for each of its hospice patients. (R. at 469). One of the entries contained on these worksheets is entitled "Referral Source." This entry identifies the person or entity that referred the particular hospice patient to Good Shepherd. (R. at 4669-70). In this case, four of the six patients identified above as having transferred their care to Good Shepherd had Start of Care Worksheets that identified "Glenna Molyneux" as the person who referred them to Good Shepherd. (R. at 469). These worksheet entries, when combined with the timing of the patients' transfers to Good Shepherd, established that Ms. Molyneux contacted the patients after having accepting

employment with Good Shepherd in an effort to persuade them to transfer their care to Good Shepherd.

3. The District Court's Decision to Grant Defendants' Summary Judgment Motion Did Not Justify Its Decision to Impose Rule 11 Sanctions.

The district court ultimately rejected the foregoing evidence and granted the defendants' summary judgment motion. The court's ruling was based on its determination that much of the foregoing evidence constituted "speculation and assumptions." (R. at 665). However, the district court's decision to grant defendants' summary judgment motion based on a perceived lack of evidence does not mean that Heartwood also violated Rule 11. As will be explained more fully below, a party is not subject to Rule 11 sanctions for filing a complaint simply because it was later unable to produce facts sufficient to withstand a summary judgment motion. *See, e.g., Teamsters Local Union No. 430 v. Cement Express, Inc.*, 841 F.2d 66, 69 (3d Cir. 1988) ("Rule 11 may not be invoked because an attorney, after time for discovery, is unable to produce adequate evidence to withstand a motion for summary judgment."). This is because the standard for summary judgment is very different than the one used for Rule 11 purposes.

As stated more fully above, the standard for determining whether Rule 11 sanctions are appropriate is whether the party performed an "objectively reasonable" investigation of the relevant facts before it submitted the challenged pleading. *Barnard*, 846 P.2d at 1236. Under this standard, the Utah Supreme Court has explained that "the fact that a

complaint is dismissed for legal insufficiency or does not produce a triable issue does not necessarily mean that a sanction is appropriate.” *Packer*, 2000 UT 86 at ¶ 28.

In this case, the primary area of disagreement between Heartwood and the district court was whether the evidence presented by Heartwood constituted admissible circumstantial evidence or inadmissible speculation. The district court ultimately disagreed with Heartwood’s characterization of the evidence when it entered a summary judgment dismissing Heartwood’s claims. In doing so, the court felt that a jury could not reasonably infer any wrongdoing by the defendants from the facts presented and that Heartwood’s contrary arguments were based on mere speculation. However, the fact that Heartwood and the district court had differing opinions as to whether Heartwood’s arguments were based on reasonable inferences or speculation does not mean that Heartwood is subject to Rule 11 sanctions. In fact, Utah courts have recognized the difficulty in drawing a line between these two concepts. *See State v. Hester*, 2000 UT App 159, ¶ 16, 3 P.3d 725. (Recognizing that the difference between drawing a reasonable inference and merely speculating about possibilities is “sometimes subtle.”).

In sum, the fact that a complaint is dismissed for legal insufficiency or does not produce a triable issue does not mean that Rule 11 sanctions are appropriate. Rather, the relevant inquiry is whether the party submitting the complaint performed a reasonable investigation under the circumstances prior to filing the challenged pleading. In this case, Heartwood did perform a reasonable investigation prior to filing the complaint in this matter, especially in light of the limited time it had within which to act. Therefore, the

district court's decision to impose Rule 11 sanctions against Heartwood must be reversed.

II. THE DISTRICT COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT IN DEFENDANTS' FAVOR.

As discussed more fully above, the district court's decision to impose Rule 11 sanctions against Heartwood was based on its determination that Heartwood had failed to produce sufficient facts to support its claims. Based on this same determination, the district court also granted the defendants' summary judgment motion and dismissed Heartwood's claims against the defendants in their entirety. Specifically, the district court determined that (1) Heartwood failed to produce sufficient admissible evidence to support its claims (R. at 589); (2) Heartwood's contract claims are barred by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") (R. at 588); and (3) the relevant contract limits competition or restrains the right to engage in a common calling and is therefore not enforceable (R. at 588-89). However, as will be shown more fully below, the district court's ruling was made in error and must be reversed by this Court.

A. Standard for Summary Judgment

Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R.Civ. P. 56(c). In determining whether an issue of material fact exists, all facts and the reasonable inferences to be made therefrom should be construed in a light favorable to the non-moving party. *Mountain States Tel. & Tel. Co. v. Atkin, Wright*

& Miles, Chartered, 681 P.2d 1258, 1261 (Utah 1984).

In explaining the standard for summary judgment, the Utah Supreme Court has recognized that “[i]n some cases, the parties may agree on the objective statement of the facts, but may fundamentally disagree on the reasonable inferences to be made from those facts.” *USA Power, LLC v. Pacificorp*, 2010 UT 31, ¶ 33, 235 P.3d 749. In such instances, if courts “were to hold that the nonmoving party must present a specific fact to controvert a statement of fact by the moving party, [it] would diminish the important role reasonable inferences play in a district court's decision to grant summary judgment.” *Id.* “Even if the moving party's objective statement of the facts are agreed upon, reasonable inferences made from those undisputed facts can indeed create a genuine issue of material fact. That the objective facts are undisputed does not mean that no genuine issues remain as to those facts.” *Id.*

Based on the foregoing, the Utah Supreme Court has held that the “presentation of circumstantial evidence may create a genuine issue of material fact foreclosing summary judgment.” *USA Power, LLC*, 2010 UT 31 at ¶ 33 (citing *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 651 (10th Cir.2008) (“[W]e agree that circumstantial evidence can suffice to defeat summary judgment in appropriate circumstances; of course, a plaintiff is not required to prove his or her case by direct proof alone.”)). This is especially true in cases where the defendant is alleged to have misappropriated confidential material because “it may be difficult for a plaintiff to produce direct evidence that [the defendant] disclosed or misused confidential information.” 2010 UT 31 at ¶ 33; *see also CDC Restoration &*

Constr., LC v. Tradesmen Contractors, LLC, 2012 UT App 60, ¶ 30, 274 P.3d 317 (“A jury can infer misappropriation of a trade secret from circumstantial evidence.... Consequently, ‘presentation of circumstantial evidence may create a genuine issue of material fact foreclosing summary judgment.’”).

B. The District Court Erred When It Dismissed Heartwood’s Claims for Breach of Contract Based on a Lack of Evidence.

During the time they worked for Heartwood, both defendants signed a document entitled “Confidential/Non-Disclosure Agreement,” which stated as follows:

In order for HEARTWOOD HOME HEALTH AND HOSPICE to be successful in providing top quality care to people, we must have the confidence and trust of the people we work with. Confidentiality is essential if we are to be worthy of this trust....

* * *

Knowledge of employees and patients is specifically the privilege of your employment here. If your employment should end with HEARTWOOD HOME HEALTH AND HOSPICE, you are prohibited to contact any employee, patient, or other professional relationship that you have that was a result of being an employee of HEARTWOOD HOME HEALTH AND HOSPICE....

(R. at 474).

As discussed more fully above in the section disputing the court’s imposition of Rule 11 sanctions, Heartwood did produce sufficient evidence to show that both Ms. Huber and Ms. Molyneux violated the terms of this Agreement. For example, Heartwood presented evidence which, at a minimum, created a compelling inference that Ms. Huber had contacted two of her former co-workers, Ms. Molyneux and Mr. Nielson, in order to convince them to leave Heartwood and to begin working for Good Shepherd. This includes

evidence of meetings in which Ms. Huber would discuss employment opportunities at Good Shepherd and the employees' current dissatisfaction with Good Shepherd. (R. at 466-67). Within a few weeks of these meetings, both Ms. Molyneux and Mr. Nielson quit working for Heartwood and accepted employment positions with Good Shepherd. (*Id.*) The fact that two of Ms. Huber's former co-workers followed her to Good Shepherd within two months of Ms. Huber's departure from Heartwood, when coupled with Ms. Huber's admission that she discussed job openings at Good Shepherd with these same two employees, undoubtedly creates a strong inference that Ms. Huber contacted these former co-workers in violation of her contract and persuaded them to leave Heartwood and begin working for a competitor. *Mountain States Tel. & Tel. Co.*, 681 P.2d at 1261 (Utah 1984) (For purposes of summary judgment, court must construe all facts and the reasonable inferences to be made therefrom in a light favorable to the non-moving party).

Similarly, Heartwood produced sufficient evidence from which a jury could have concluded that Ms. Molyneux violated her employment contract by contacting Heartwood's patients and persuading them to transfer their care to Good Shepherd. Most significantly, and as discussed more fully above in the section addressing Rule 11 sanctions, Heartwood produced evidence showing that six of its patients who had been assigned to Ms. Molyneux transferred their care to Good Shepherd within days after Ms. Molyneux left Heartwood. (R. at 476). Moreover, four of these six patients had completed "Start of Care Worksheets" for Good Shepherd which identified "Glenna Molyneux" as the person who referred them to Good Shepherd. These worksheet entries, when combined

with the timing of the patients' transfers to Good Shepherd, create a compelling inference that Ms. Molyneux contacted the patients in an effort to persuade them to transfer their care to Good Shepherd.

Based on the foregoing, Heartwood has presented sufficient evidence to support its claims for breach of contract against Ms. Huber and Ms. Molyneux, especially when the evidence and all reasonable inferences to be drawn therefrom are viewed in the light most favorable to Heartwood. The relevant agreement clearly prohibited Mss. Huber and Molyneux from contacting any of the former patients or co-workers with whom they became acquainted as a result of their employment with Heartwood. Ms. Huber breached this agreement when she contacted Ms. Molyneux and Mr. Nielson to discuss job openings at Good Shepherd with them. Ms. Molyneux breached this agreement when she contacted Heartwood's patients to inform them that she had accepted employment with Good Shepherd. Therefore, since Heartwood presented sufficient evidence to support its claims for breach of contract, the district court erred when it granted the defendants' motion for summary judgment on these claims.

C. Heartwood's Breach of Contract Claims are Not Barred by HIPAA.

As part of its summary judgment ruling, the district court also determined that plaintiff's breach of contract claim is barred by HIPAA, a federal law which, among other things, establishes national standards to protect individuals' medical records and other personal health information (R. at 588). However, as will be shown more fully below,

Heartwood's claims are in no way based on HIPAA and therefore the law does not preempt such claims.

In enacting HIPAA, Congress required the Department of Health and Human Services ("HHS") to publicize standards for the exchange, privacy and security of health information. 42 U.S.C. § 1320d-2. HHS subsequently issued the "Privacy Rule," which addresses the use and disclosure of individuals' health information as well as standards for individuals' privacy rights. *See* 45 C.F.R. Parts 160, 164.

Under HIPAA and the Privacy Rule, an individual who wishes to voice a complaint concerning an alleged violation of HIPAA may file a complaint with either the Secretary of HHS or their state's attorney general, who are then tasked with enforcing the law. *See* 42 U.S.C § 1320d-5. However, the law does not establish a private right of action that allows individuals to enforce HIPAA's requirements in the courts. *See Espinoza v. Gold Cross Services, Inc.*, 2010 UT App 151, ¶ 8, 234 P.3d 156 ("HIPAA does not create a private right of action; '[u]nder HIPAA, individuals do not have a right to court action.'") (quoting Compliance and Enforcement, 65 Fed. Reg. 82,600, 82,601 (Dec. 28, 2000)) (citing *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1082 (9th Cir.2007)). Based on the foregoing, federal courts have dismissed claims that are based on or stem from the violation of a plaintiff's HIPAA rights. *See, e.g., Seaton v. Mayberg*, 610 F.3d 530, 533 (9th Cir. 2010)

In this case, Heartwood's claim for breach of contract was not based or dependent on any alleged violation of HIPAA. In fact, Heartwood never alleges that its HIPAA rights

were violated. Rather, the contract claim was based on defendants' decision to contact patients and employees of Heartwood in violation of defendants' employment agreements. *See* Complaint at ¶ 31 ("Defendants breached their confidentiality and non-disclosure agreements with Heartwood ... by contacting Heartwood's patients and current employees in the manner and for the purposes described above."). In fact, Heartwood only mentions HIPAA in its complaint to show that the patient information which the defendants accessed at Heartwood was considered private under federal law. (R. at 17-18).

Based on the foregoing, Heartwood's contract claims are not barred by HIPAA. In fact, the causes of action are not based on the disclosure of any medical records, which is the focus of HIPAA and the Privacy Rule. Rather, the claims are based entirely on the defendants' decisions to contact former co-workers and patients at Heartwood to persuade them to transfer their employment or care to Good Shepherd. Neither the defendants nor the district court ever cited any case law which shows that HIPAA preempts this type of claim, where no HIPAA statute or rule is directly implicated. Therefore, the district court erred when it determined that Heartwood's contract claims are barred by HIPAA.

D. The District Court Erred When It Determined that Defendants' Employment Contracts Are Unenforceable.

As part of its summary judgment ruling, the district court also dismissed Heartwood's breach of contract claim based on the court's determination that the defendants' employment contracts were enforceable. Specifically, the court ruled as follows:

Restrictive covenants are not favored in the law but are allowed if they are narrowly tailored to accomplish legitimate ends. Restricting competition is not a legitimate end. The restrictions Plaintiff seeks to enforce on the individual Defendants have no geographic or temporal bounds and are therefore grossly over broad. Because covenants which are primarily designed to limit competition or restrain the right to engage in a common calling are not enforceable, neither the “contracts” nor claims based on them may not be enforced against these Defendants. *digEcor, Inc. v. e.Digital Corp.*, 2009 U.S. Dist. LEXIS 28199, 4-5 (D. Utah Apr. 2, 2009); *Scenic Aviation, Inc. v. Blick*, 2003 U.S. Dist. LEXIS 28009 (D. Utah Aug. 4, 2003).

(R. at 588-89).

The district court’s ruling was made in error because it was based on case law and legal standards which have no application to the present dispute. This is because the district court’s analysis of the defendants’ employment agreements was focused on “geographical or temporal bounds,” which are factors which courts typically look at when examining non-competition agreements. *See, e.g., Robbins v. Findley*, 645 P.2d 623, 627 (Utah 1982) (When examining the reasonableness of “covenants not to compete,” courts look to several factors, including the agreement’s “geographical extent” and “the duration of limitation.”). In fact, all of the cases cited by defendants as support for this argument dealt exclusively with non-competition agreements. (R. at 309-312) (citing *Microbiological Research Corp. v. Muna*, 625 P.2d 690, 694 (Utah 1981) (discussing agreement in which defendant agreed not to engage “in any other commercial activity in any way competitive with the business of the Company, or its affiliated companies, and that, for a period of five (5) years after leaving the employ of the Company.”); *Electrical Distributions, Inc. v. SFR, Inc.*, 166 F.3d 1074, 1079 (10th Cir. 1999) (analyzing a purchase agreement containing a “covenant not to

compete.”); *digEcor, Inc. v. eDigital Corp.*, 2009 U.S. Dist. LEXIS 28199 (D. Utah Apr. 2, 2009) (discussing whether “it is a violation of Utah’s contractual duty of good faith and fair dealing for suppliers to compete with their buyers while delivery of goods is pending.”).

In this case, the defendants’ agreements do not contain a non-competition clause and Heartwood’s contract claim is not based on defendants’ decisions to go and work for one of Heartwood’s competitors. Rather, Heartwood is seeking to enforce a provision which precluded the defendants from soliciting Heartwood’s employees and/or patients after the defendants’ employment with Heartwood terminated. Neither the district court nor the defendants cited a single case in which a Utah court has invalidated a non-solicitation agreement for the reasons stated in the district court’s ruling. Therefore, the district court’s decision to invalidate the parties’ agreement based on geographic and temporal bounds was made in error and must be reversed.

E. The District Court Erred When It Dismissed Heartwood’s Tort Claims.

As an alternative to its claims for breach of contract, Heartwood also asserted tort claims against the defendants for breach of fiduciary duty and intentional interference with economic relations. These claims were based on the same set of facts as the contract claims, i.e., defendants’ decisions to contact Heartwood’s employees and patients in an effort to convince them to come to Good Shepherd. The district court ultimately dismissed these claims based on its determination that Heartwood failed to produce sufficient evidence to support the claims. However, as will be shown more fully below, the district

court's determination was made in error.

1. Duty of Confidentiality

With respect to Heartwood's claim that defendants breached their fiduciary duty of confidentiality, Utah courts have held that "[a] former employee may not use confidential information obtained during the course of his or her employment to compete after termination with his or her former employer." *Envirotech Corp. v. Callahan*, 872 P.2d 487, 496 (Utah App. 1994). "A written contract or formal employment contract is not required to create this duty." *Id.* Rather, the duty "is grounded on "basic principles of equity" ... and upon an implied contract, growing out of the nature of the employer-employee relation.'" *Id.* (quoting *Eastern Marble Products Corp. v. Roman Marble, Inc.*, 364 N.E.2d 799, 803 (1977)).

In this case, and as explained more fully above, Heartwood did present facts from which a jury could reasonably conclude that defendants breached the duty of confidentiality they owed to Heartwood when they used confidential information they obtained during their employment with Heartwood (the identity of Heartwood's patients and employees) to compete with Heartwood. Such competition occurred when the defendants used the confidential information to persuade many of Heartwood's patients to transfer their hospice care from Heartwood to the defendants' new employer, Good Shepherd. Therefore, the district court erred when it dismissed Heartwood's claim that defendants breach their duties of confidentiality.

2. Duty of Loyalty

In discussing the fiduciary duty of loyalty, Utah courts have held that “an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency.” *Prince, Yeates & Geldzahler v. Young*, 2004 UT 26, ¶ 20, 94 P.3d 179.

At the time Heartwood filed its complaint, it was unclear whether the defendants’ solicitation of Heartwood’ patients and employees occurred while the defendants were still employed by Heartwood or after they were hired by Good Shepherd. Discovery revealed that Ms. Huber solicited Heartwood’s employees after she left the company. As such, she was no longer an agent of Heartwood and therefore she owed no duty of loyalty to Heartwood.

However, Heartwood did present evidence that Ms. Molyneux was still employed by Heartwood when she referred a number of Heartwood’s patients to Good Shepherd. This is because Heartwood began receiving transfer notices from its patients on the same day that Ms. Molyneux accepted employment with Good Shepherd. (R. at 476-77). Ms. Molyneux’s decision to solicit Heartwood’s patients to transfer their care to Good Shepherd while she was still working for Heartwood was certainly a breach of her duty of loyalty to Heartwood. Therefore, the district court’s decision to dismiss this claim for a lack of evidence must be reversed.

3. Intentional Interference with Contract.

In order to recover for intentional interference with economic relations under Utah law, a plaintiff must prove (1) that the defendant intentionally interfered with the plaintiff’s

existing or potential economic relations, (2) using improper means, and (3) causing injury to the plaintiff.” *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982). To establish the second element, improper means, a plaintiff must show “that the defendant's means of interference were contrary to statutory, regulatory, or common law or violated an established standard of a trade or profession.” *Pratt v. Prodata, Inc.*, 885 P.2d 786, 787 (Utah 1994) (internal quotations omitted).

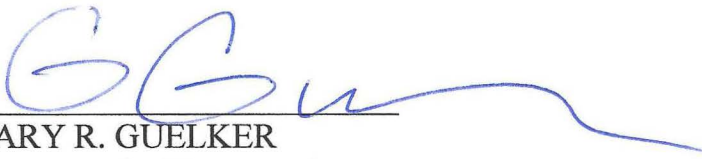
In this case, the district court dismissed Heartwood’s interference with contract claim based on its determination that Heartwood had failed to produce sufficient evidence which showed that defendants interfered with any of Heartwood’s contractual relations. However, as discussed more fully above, the defendants did interfere with Heartwood’s economic relationships with patients and employees through the use of confidential information they obtained during their employment with Heartwood, i.e., the identity of Heartwood’s patients and employees. However, defendants were precluded from using this information by virtue of the duty of confidentiality they owed to Heartwood. *Envirotech Corp*, 872 P.2d at 496 (“[a] former employee may not use confidential information obtained during the course of his or her employment to compete after termination with his or her former employer.”). Therefore, since the defendants used an improper means to successfully solicit Heartwood’s patients and employees, the district court’s decision to dismiss its claim for intentional interference with contract must be reversed.

CONCLUSION

Based on the foregoing, Heartwood respectfully requests this Court to reverse (1) the district court's decision to impose Rule 11 sanctions against Heartwood, and (2) the district court's dismissal of Heartwood's claims pursuant to defendants' motion for summary judgment.

DATED this 12th day of September, 2017.

RESNICK & LOUIS, PC

By: 

GARY R. GUELKER
Attorneys for Heartwood

Certificate of Compliance With Rule 24(f)(1)

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 13,835 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 13 point font size and in Times New Roman style.



GARY R. GUELKER

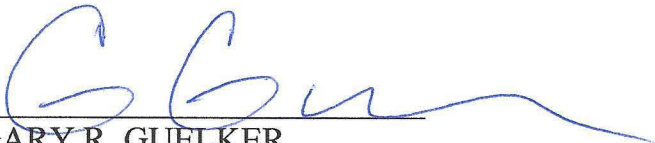
Dated: 9-12-17

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September, 2017, I caused the foregoing **OPENING BRIEF OF APPELLANT** to be served on the following via First Class Mail:

Robert Wilde
Blackburn & Stoll, LC
257 East 200 South, Ste. 800
Salt Lake City, Utah 84111

JENSON & GUELKER, PLLC

By: 
GARY R. GUELKER
Attorneys for Heartwood

ADDENDUM

Rule 11. Signing of Pleadings, Motions, Affidavits, and Other Papers; Representations to Court; Sanctions.

Utah Court Rules

Utah Rules of Civil Procedure

Part III. Pleadings, Motions, and Orders

As amended through July 31, 2017

Rule 11. Signing of Pleadings, Motions, Affidavits, and Other Papers; Representations to Court; Sanctions

(a) **Signature.**

(a)(Every pleading, written motion, and other paper must be signed by at least one
1) attorney of record, or, if the party is not represented, by the party.

(a)(A person may sign a paper using any form of signature recognized by law as
2) binding. Unless required by statute, a paper need not be accompanied by affidavit or have a notarized, verified or acknowledged signature. If a rule requires an affidavit or a notarized, verified or acknowledged signature, the person may submit a declaration pursuant to Utah Code Section 78B-5-705. If an affidavit or a paper with a notarized, verified or acknowledged signature is filed, the party must comply with Rule 5(f).

(a)(An unsigned paper will be stricken unless omission of the signature is corrected
3) promptly after being called to the attention of the attorney or party.

(b) **Representations to court.** By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(b)(it is not being presented for any improper purpose, such as to harass or to cause
1) unnecessary delay or needless increase in the cost of litigation;

(b)(the claims, defenses, and other legal contentions are warranted by existing law or
2) by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(b)(the allegations and other factual contentions have evidentiary support or, if
3) specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

- (b)(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
- (c) **Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that paragraph (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated paragraph (b) or are responsible for the violation.
 - (c)(**How initiated.**
 - 1) (c)(**By motion.** A motion for sanctions under this rule must be made separately
 - 1)(from other motions or requests and must describe the specific conduct
 - A) alleged to violate paragraph (b). It must be served as provided in Rule 5, but may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney fees incurred in presenting or opposing the motion. In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees.
 - (c)(**On court's initiative.** On its own initiative, the court may enter an order
 - 1)(describing the specific conduct that appears to violate paragraph (b) and
 - B) directing an attorney, law firm, or party to show cause why it has not violated paragraph (b) with respect thereto.
 - (c)(**Nature of sanction; limitations.** A sanction imposed for violation of this rule must
 - 2) be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in paragraphs (c)(2)(A) and (c)(2)(B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.
 - (c)(Monetary sanctions may not be awarded against a represented party for a
 - 2)(violation of paragraph (b)(2).
 - A)
 - (c)(Monetary sanctions may not be awarded on the court's initiative unless the
 - 2)(court issues its order to show cause before a voluntary dismissal or
 - B) settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

- (c) **Order.** When imposing sanctions, the court will describe the conduct determined to
- 3) constitute a violation of this rule and explain the basis for the sanction imposed.

Cite as Utah. R. Civ. P. 11

History. Amended effective May 1, 2016.

Note:

Advisory Committee Notes

The 1997 amendments conform state Rule 11 with federal Rule 11. One difference between the rules concerns holding a law firm jointly responsible for violations by a member of the firm. Federal Rule 11(c)(1)(A) states: "Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees." Under the federal rule, joint responsibility is presumed unless the judge determines not to impose joint responsibility. State Rule 11(c)(1)(A) provides: "In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees." Under the state rule, joint responsibility is not presumed, and the judge may impose joint responsibility in appropriate circumstances. What constitutes appropriate circumstances is left to the discretion of the judge, but might include: repeated violations, especially after earlier sanctions; firm-wide sanctionable practices; or a sanctionable practice approved by a supervising attorney and committed by a subordinate.

The Order of Court is stated below:

Dated: March 11, 2014 /s/ John Paul Kennedy
04:54:51 PM District Court Judge

ROBERT H. WILDE #3466
MICHAEL S. WILDE #14366
BLACKBURN & STOLL, LC
257 East 200 South Suite 800
Salt Lake City, Utah 84111
Telephone: 801-521-7900
rwilde@blackburn-stoll.com
mwilde@blackburn-stoll.com

Attorneys for Defendants Huber and Molyneux

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

HEARTWOOD HOME HEALTH &
HOSPICE, LLC.,

ORDER

Plaintiff,

vs.

Civil No.: 120907379
Judge: John Paul Kennedy

MERRILL B. NIELSON, RITA HUBER,
GLENN A. MOLYNEUX, GOOD SHEPHERD
HOME CARE & HOSPICE, INC.,

Defendant.

This matter came on regularly before the Court on the 25TH day of February, 2014 at the hour of 8:30 a.m. for consideration of Defendant Huber and Defendant Molyneux's Motion for Summary Judgment. The Plaintiff was represented by Gary Guelker. Defendants Huber and Molyneux were represented by Robert H. Wilde. The Court having reviewed the memoranda filed, listened to the argument of counsel and having reviewed the affidavits and evidence filed in support and opposition

thereof and having good cause appearing therefore the Court provides, pursuant to Rule 52(a) Utah R. Civ. P., a statement of the grounds upon which the Court has ruled.

Plaintiff sued Defendant Huber and Defendant Molyneux for, 1) breach of employment contract, 2) breach of duty of loyalty, 3) breach of duty of confidentiality, 4) intentional interference with contract, and 5) for injunctive relief. At oral argument Plaintiff's counsel advised the Court and counsel that Plaintiff's claims had been narrowed and that Defendant Huber was being sued only for having solicited Plaintiff's employees who then went to work for Defendant Good Shepherd and Defendant Molyneux was being sued only for having solicited Plaintiff's patients who then left Plaintiff to work for Defendant Good Shepherd. Each of the actions of which Plaintiff complains is alleged to have occurred after the Defendants' employment with Plaintiff ended.

The bases for the claims were two documents prepared by the Plaintiff, an Employee Handbook and a Confidentiality/Non-Disclosure Agreement. The Employee Handbook shows on its face, at page 24, that "it does not create a contract of employment" and thus cannot form the basis for any contract related claim. Plaintiff's president testified in the Plaintiff's deposition that the relief available for violation of the provisions of these documents was contained within the documents. Each of these documents shows on its face that violation of the terms could lead to revocation of access to Plaintiff's document, discipline, or termination. The documents describe no other relief. The Confidentiality/Non-Disclosure Agreement states that there exists a contract between the employee and the employee's supervisor but no supervisor has been made a party to this action. The Court has construed these documents according to their terms and, failing that, has construed them against the Plaintiff who drafted them or had them drafted. *Edwards & Daniels Architects v.*

Farmers' Properties, 865 P.2d 1382, 1386 (Utah Ct. App. 1993).

As to Defendant Molyneux, Plaintiff asserts that it produced evidence from which the Court could infer that she took Plaintiff's patients by soliciting them to go to Good Shepherd in violation of a contract, a duty of confidentiality, a duty of loyalty, or by interfering with their contracts with Plaintiff. The Court noted that notwithstanding Plaintiff's claim that there were between six and eight such patients the Plaintiff failed to depose any of these patients or their family members concerning the reasons they moved to Good Shepherd even though the Plaintiff had all the information it would have needed to locate and depose these patients. No testimony from any of these patients was offered to oppose the motion for summary judgment. The production of weak evidence when strong evidence is available can lead only to the conclusion that the strong would have been adverse. *Clifton v. United States*, 4 How. 242, 247. Silence then becomes evidence of the most convincing character. *Runkle v. Burnham*, 153 U.S. 216, 225; *Kirby v. Tallmadge*, 160 U.S. 379, 383; *Bilokumsky v. Tod*, 263 U.S. 149, 153, 154; *Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 111, 112; *Mammoth Oil Co. v. United States*, 275 U.S. 13, 52; *Local 167 v. United States*, 291 U.S. 293, 298; *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (U.S. 1939).

During the Rule 30(b)(6) Utah R. Civ. P. deposition of the Plaintiff given by Plaintiff's president Lee Vasic, the witness was asked, at page 80, lines 5-11, what evidence the Plaintiff had to support its allegations in paragraph 21 of the complaint that Defendant Molyneux had solicited patients at Good Shepherd's behest. He answered "there are no facts" and was asked "just the assumption?" to which he answered "just the assumption ...". Based on Plaintiff's uncorrected deposition testimony that the allegations were based on assumption the Court declines to infer or

conclude Defendant Molyneux solicited Plaintiff's patients as alleged in the complaint. Even if she had done so that solicitation, coming after her employment with Plaintiff was terminated, would not have been in violation of any enforceable agreement or principal of law.

As to Defendant Huber, the Plaintiff alleges that she solicited Plaintiff's employees to work for Good Shepherd in violation of her employment contract with Plaintiff. Again the Court notes that the Handbook specifically states that it is not a contract so it may not form the basis for this claim and the Confidentiality/Non-Disclosure Agreement limits its coverage to internal discipline or termination by the Plaintiff. The Plaintiff's evidence was that Defendant Huber and some of the Plaintiff's employees went to lunch after Defendant Huber began working for Good Shepherd and thereafter her friends sought employment with Good Shepherd. Defendant Huber denied soliciting employees to come to work for Good Shepherd and Defendants Molyneux and Nielson each testified that they did not seek work at Good Shepherd because they were solicited by Huber but because the terms and conditions of employment were better there.

In the Plaintiff's deposition Mr. Vasic was asked about the allegations of paragraph 15 of the complaint in which the Plaintiff alleged that Defendant Huber was employed by Good Shepherd to solicit Plaintiff's employees. At page 63, lines 5-12, he was asked "The allegation is that Good Shepherd hired Ms. Huber, the only reason that Good Shepherd hired her is because she agreed to contact Heartwood, so your employees, to persuade them to begin working for Good Shepherd. Do you have any facts that support that statement?" to which Mr. Vasic answered "Yeah, I'm--yeah, I'm not sure about that statement. I don't have any facts to support that statement." Based on Plaintiff's uncorrected deposition testimony that the allegations had no factual support the Court declines to

infer or conclude Defendant Huber solicited Plaintiff's employees as alleged in the complaint. Even if she had done so that would not have been in violation of any enforceable agreement or principal of law.

In the Plaintiff's deposition Mr. Vasic was asked if the basis for the claims against the Defendants was that they were covered by HIPAA, Plaintiff's deposition at 104:22-105:1. Mr. Vasic answered affirmatively. All reported cases on the issue indicate that there is no private right of action under HIPAA regardless of how the claim is alleged. *Bradley v. Pfizer, Inc.*, 440 Fed. Appx. 805, 809 (11th Cir. 2011) (invasion of privacy claim not supported by alleged HIPAA violation); *Seaton v. Mayberg*, 610 F.3d 530, 533 (9th Cir. 2010) (due process violation claim not supported by alleged HIPAA violation); *Huling v. City of Los Banos*, 2012 U.S. Dist. LEXIS 8765 (E.D. Cal. Jan. 24, 2012) (invasion of privacy, defamation, intentional infliction of emotional distress, interference with advantageous relationships, and negligence not supported by alleged HIPAA violation). Accordingly, to the extent Plaintiff's claims pertain to legal theories for which the underlying grounds are violations of HIPAA, they fail as a matter of law.

Plaintiff seeks to restrict the individual Defendants' ability to be employed and/or to interact with others. Restrictive covenants are not favored in the law but are allowed if they are narrowly tailored to accomplish legitimate ends. Restricting competition is not a legitimate end. The restrictions Plaintiff seeks to enforce on the individual Defendants have no geographic or temporal bounds and are therefore grossly over broad. Because covenants which are primarily designed to limit competition or restrain the right to engage in a common calling are not enforceable, neither the "contracts" nor claims based on them may not be enforced against these Defendants. *digEcor, Inc. v.*

e.Digital Corp., 2009 U.S. Dist. LEXIS 28199, 4-5 (D. Utah Apr. 2, 2009); *Scenic Aviation, Inc. v. Blick*, 2003 U.S. Dist. LEXIS 28009 (D. Utah Aug. 4, 2003) .

Plaintiff has not offered admissible evidence in response to Defendants' motion for summary judgment but has instead relied upon speculation, conjecture, inadmissible hearsay and statements without foundation. See Plaintiff's facts numbered 7, 13, 14, 15, 16, 17, 18, and Plaintiff's exhibits G, H, I, J, L, M, N, and O. Plaintiff further attempts to recast the answers given by Mr. Vasic in the deposition to infer that he testified that he had no direct evidence or first hand knowledge of the information sought in the deposition. Mr. Vasic in fact did not use the terms direct evidence or first hand knowledge in responding to most of the questions at issue though he was required by Rule 30(b)(6) to become familiar with the Plaintiff's case and facts prior to being deposed. The Court rejects Plaintiff's attempt to restate its deposition answers.

Once a motion for summary judgment is filed with proper support it becomes the opposing party's duty to respond with evidence, which would be admissible at trial, on each element of the challenged causes of action. The Court concludes that while the Plaintiff may have produced evidence on some of the elements of its claims it did not produce evidence establishing all of the elements of any of its claims and has accordingly not met its burden on summary judgment.

NOW THEREFORE IT IS HEREBY ORDERED that the motion for summary judgment filed by Defendants Huber and Molyneux is granted and Plaintiff's claims against them are dismissed with prejudice and on the merits.

END OF ORDER

Delivery Certificate

I hereby certify that a true and correct copy of the foregoing **Order** to be served by the method(s) indicated below and addressed to the following on February 28, 2014.

Gary Guelker
Janet Jenson
747 East South Temple #130
Salt Lake City, Utah 84102

David N. Kelly
FABIAN & CLENDENIN
215 South State St. #1200
Salt Lake City, Utah 84111

Merrill Nielson (U.S. Mail)
562 West 1300 North
West Bountiful, Utah 84087

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- E-mail
- Electronic Filing

/s/ Robert H Wilde _____

31. The individual defendants breached their confidentiality and non-disclosure agreements with Heartwood by copying, removing and using Heartwood's proprietary information and by contacting Heartwood's patients and current employees in [an improper manner].

...

34. The individual defendants violated their duties of loyalty owed to Heartwood in that, while still employed by Heartwood, defendants competed against Heartwood, defamed and disparaged Heartwood's business and employees, misappropriated confidential and proprietary information, improperly disclosed such information to third parties, including Good Shepherd, and solicited Heartwood's employees and customer contacts for Good Shepherd's business.

...

38. On information and belief, the individual defendants breached their duty of confidentiality by disclosing Heartwood's confidential information to third parties, including Good Shepherd, and by using and disclosing such confidential information for their own benefit, including to compete unfairly against Heartwood.

...

42. Heartwood has been harmed by the defendants Huber, Nielson and Molyneaux who have, for their own benefit, and for the benefit of Good Shepherd, intentionally and willfully interfered with the contracts that Heartwood has with its patients. Defendants Huber, Nielson and Molyneaux have knowingly and intentionally misinformed Heartwood's patients concerning the terms of their contracts to induce them to terminate their contracts with Heartwood. They have interfered with and induced Heartwood's patients to terminate their agreements with Heartwood on behalf of and for the benefit of Good Shepherd.

(Complaint ¶¶ 31, 34, 38, 42.)

After conducting discovery, including the deposition of Heartwood's owner, Lee Vasic, it became clear to these Defendants that Heartwood did not have any evidence to support its claims against them. Accordingly, these Defendants served Heartwood with their Rule 11 motion under the safe-harbor provision of that rule. Heartwood declined to withdraw its claims, so these

Defendants moved for summary judgment. Heartwood contested the motion for summary judgment but, at oral argument, informed the Court and opposing counsel that its claims against these Defendants had been narrowed. Heartwood explained that it was only pursuing claims against Huber for soliciting Heartwood's employees and against Molyneux for soliciting Heartwood's patients. The Court ultimately ruled in favor of these Defendants on summary judgment and dismissed all claims against them. These Defendants then filed their motion for sanctions with the Court.

Rule 11 of the Utah Rules of Civil Procedure requires that a party's "allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery[.]" Utah R. Civ. P. 11(b)(3). If an attorney or party violates Rule 11(b)(3), then the court may "impose an appropriate sanction." Utah R. Civ. P. 11(c). "The law requires that a trial court make a series of specific factual findings as a predicate for concluding that the rule has been violated, and then must determine the appropriate sanction." *Griffith v. Griffith*, 1999 UT 78, ¶ 10, 985 P.2d 255.

Rule 11 does not call for the imposition of sanctions whenever there are factual errors; the misstatements must be significant and sanctions will not be imposed when they are not critical and the surrounding circumstances indicate that counsel did conduct a reasonable inquiry.... [T]he fact that a complaint is dismissed for legal insufficiency or does not produce a triable issue does not necessarily mean that a sanction is appropriate.

Morse v. Packer, 2000 UT 86, ¶ 28, 15 P.3d 1021 (quoting 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil 2d* § 1335, at 67, 88 (1990)).

These Defendants contend that Heartwood's allegations against them lacked evidentiary support. They argue that the lack of evidentiary support should have been obvious after Mr. Vasic's deposition and that, by failing to withdraw its claims, Heartwood violated Rule 11. The Court agrees and makes the following specific factual findings in support of its conclusion:

1. Heartwood made allegations against these Defendants in its Complaint for, among other things, improper conduct in soliciting Heartwood's employees and patients.
2. Heartwood reaffirmed and later advocated based on these allegations in opposing these Defendants' motion for summary judgment.
3. Heartwood lacked evidentiary support and legal basis for its allegations against these Defendants.
4. Although Heartwood may have had reason to believe at the time it filed its Complaint that the allegations against these Defendants would materialize, Heartwood was unable, after conducting discovery, to produce any evidence in support of the allegations.
5. Mr. Vasic made clear in his deposition that Heartwood had no evidence to support its claims against these Defendants.
6. At the end of discovery, it should have been clear to Heartwood that it was unable to support its claims against these Defendants with evidence.
7. It was unreasonable for Heartwood to continue prosecuting its claims against these Defendants after it became clear that the claims lacked evidentiary support or legal basis.
8. Heartwood relied on speculation and assumptions in continuing to prosecute its claims against these Defendants and in opposing these Defendants' motion for summary judgment.
9. By refusing to withdraw its claims against these Defendants after Mr. Vasic's deposition, Heartwood acted in bad faith.

Based on the foregoing factual findings, the Court concludes that Heartwood violated Rule 11 by failing to withdraw its claims against these Defendants after being served under the

safe harbor provision and by continuing to advocate for a position that clearly lacked evidentiary support. In so concluding, the Court rejects Heartwood's argument that the only relevant inquiry under a Rule 11 analysis is on the reasonableness of counsel's investigation at the beginning of the case. As the Utah Supreme Court stated, "a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit." *Morse*, 2000 UT 86, ¶ 31 (quoting Fed. R. Civ. P. 11 advisory committee note).

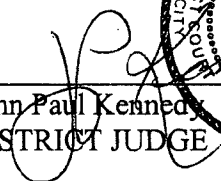
Having concluded that Heartwood violated Rule 11, the Court next determines the appropriate sanction. The Court has discretion to fashion an appropriate sanction based on the facts this case. *See Bailey-Allen Co., Inc. v. Kurzet*, 945 P.2d 180, 195 (noting that the trial court is given "great leeway to tailor the sanction to fit the requirements of the particular case"). Because Heartwood's conduct caused these Defendants to incur extra fees in continuing to defend against baseless claims, the Court determines that these Defendants are entitled to compensation for their reasonable attorney fees incurred litigating their motion for summary judgment and motion for sanctions.

Based on the foregoing, these Defendants' motion for sanctions is GRANTED. Heartwood shall pay these Defendants for their reasonable attorney fees in defending the claims after it became clear that the claims lacked evidentiary support and legal basis. These Defendants shall submit an attorney fee affidavit within 10 days and Heartwood may file an objection as


permitted by the rules. The Court will then determine the amount of sanction. No additional order is necessary.

DATED this 20 day of June, 2014.

BY THE COURT:



John Paul Kennedy
DISTRICT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 120907379 by the method and on the date specified.

MAIL: MERRILL B NIELSON 562 WEST 1300 NORTH WEST BOUNTIFUL, UT
84087
MAIL: GARY R GUELKER 747 E S TEMPLE ST STE 130 SALT LAKE CITY UT
84102
MAIL: JANET I JENSON 747 E S TEMPLE STE 130 SALT LAKE CITY UT
84102
MAIL: DAVID N KELLEY 215 S STATE ST STE 1200 SALT LAKE CITY UT
84111-2323
MAIL: MICHAEL S WILDE 257 E 200 S STE 800 SALT LAKE CITY UT 84111

Date: 06/20/2014

/s/ MICHELLE BANEY

Deputy Court Clerk