IN THE SUPREME COURT STATE OF SOUTH DAKOTA

APPELLANT'S BRIEF

DT-TRAK CONSULTING, INC., Plaintiff/Appellee,

VS.

REMA KOLDA, Defendant/Appellant.

DOCKET #29725

APPEAL FROM THE CIRCUIT COURT THIRD JUDICIAL CIRCUIT HAND COUNTY, SOUTH DAKOTA

HONORABLE KENT A. SHELTON Presiding Circuit Judge

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ORDER GRANTING PETITION FOR ALLOWANCE OF APPEAL FROM INTERMEDIATE ORDER FILED AUGUST 20, 2021

TABLE OF CONTENTS

	<u>Page</u>
Table of Cases and Authorities	ii
Preliminary Statement	1
Jurisdictional Statement	1
Statement of the Legal Issues	2
Statement of the Case	3
Statement of the Facts	4
Argument	11
A. Standard of Review	11
B. Standard for Summary Judgment	11
ISSUE 1: Did the trial court err by denying Rema's Motion for Summary Judgment?	12
A. Governing Law	13
1. Restraint of Trade	13
2. Geographical Limitations	18
B. Trade Secrets and Confidential and Proprietary Information	20
Conclusion	23
Request for Oral Argument	23
Certificate of Compliance	24
Certificate of Service	24
Appendix	26

-i-

TABLE OF CASES AND AUTHORITIES

SC	OUTH DAKOTA SUPREME COURT CASES:	<u>Page</u>
1.	Aqreva, LLC v. Eide Bailly, LLP, 2020 S.D. 59, 950 N.W.2d 774	13,14,15
2.	Central Monitoring Service, Inc. v. Zakinski, 1996 S.D. 116, 553 N.W.2d 513	18
3.	Communications Tech. Sys., Inc. v. Densmore, 1998 S.D. 87, 583 N.W.2d 125	19
4.	Daktronics, Inc. v. McAfee, 1999 S.D. 113, 599 N.W.2d 358	22
5.	Edgar v. Mills, 2017 S.D. 7, 892 N.W.2d 223	14
6.	Franklin v. Forever Venture, Inc., 2005 S.D. 53, 696 N.W.2d 545	19
7.	Keystone Plaza Cond. Assn. v. Eastep, 2004 S.D. 28, 676 N.W.2d 842	12
8.	Laska v. Barr, 2016 S.D. 13, 876 N.W.2d 50	14
9.	Lindskov v. Lindskov, 2011 S.D. 34, 800 N.W.2d 715	19
10	. Mckie Ford Lincoln, Inc. v. Scott Hanna & Gateway Auto., LLC, 2018 S.D. 14, 907 N.W.2d 795	11,14,20
11.	. Owners Ins. Co. v. Tibke Constr., Inc., 2017 S.D. 51, 901 N.W.2d 80	11
12	. Wyman v. Bruckner, 2018 S.D. 17, ¶9, 908 N.W. 2d 170	12
13.	. Wulf v. Senst, 2003 S.D. 105, 669 N.W.2d 135	11,12
14	. Zochert v. Protective Life Ins. Co., 2018 S.D. 84, 921 N.W.2d 479	11
O	THER STATE SUPREME COURT CASES:	
1.	Unlimited Opportunity, Inc. v. Waadah, 290 Neb. 629, 639, 861 N.W.2d	
	437, 444 (Neb. 2015)	. 19
ST	TATE STATUTES:	
1.	SDCL 15-6-56(c)	. 12
2.	SDCL 15-6-56(e)	. 12
3.	SDCL 15-26A-13	. 2
4.	SDCL 15-26A-17	. 2
5.	SDCL 37-29-1	21
6.	SDCL 37-29-1(4)	. 20,22
7.	SDCL 53-9-8	. 13
8.	SDCL 53-9-11	. 14,15,18

	<u>]</u>	Page
ОТ	THER SOURCES:	
1.	54A Am.Jur.2d Monopolies and Restraints of Trade §834	19

PRELIMINARY STATEMENT

The Appellant Rema Kolda shall be referred to herein as "Rema." The Appellee DT-Trak Consulting, Inc. shall be referred to herein as "DT-Trak." References to the Register of Actions shall be by "RA" followed by the title of the document, if applicable, and the page number thereof. References to the deposition exhibits shall be by "Depo. Exh." followed by the exhibit number or letter. Since there was no trial in this matter, references to the record to support factual matters shall be to the depositions, affidavits, other discovery, and pleadings. The deposition excerpts and other discovery supporting the record are found in the Affidavit of Timothy R. Whalen and the Second Affidavit of Timothy R. Whalen both of which are filed of record herein. RA, pp. 210, 392. Additional, deposition excerpts, if any, are contained in the Appendix. References to the depositions shall be by the identity of the party deposed followed by "Depo." and the page numbers of the deposition. References to DT-Trak's Complaint shall be by "Comp." followed by the paragraph number, references to Rema's Answer and Counterclaim shall be by "Ans." followed by the paragraph number, and References to DT-Trak's Reply to Counterclaim shall be by "Reply" followed by the paragraph number. References to the affidavits filed in the summary judgment proceeding shall be by "Affidavit" followed by the identity of the party making the affidavit, and the paragraph number of the affidavit.

JURISDICTIONAL STATEMENT

DT-Trak commenced this action in Hand County, South Dakota, against Rema, seeking relief on four separate counts. Rema denied DT-Trak's claims and counterclaimed for barratry. DT-Trak moved for partial summary judgment and Rema moved for summary judgment on all of DT-Trak's claims. A hearing on the aforesaid

motions was held on June 14, 2021, before the Honorable Kent A. Shelton, Circuit Court Judge, Third Judicial Circuit, State of South Dakota. Judge Shelton denied both parties' motions for summary judgment. The trial court entered its Order Denying Motions for Summary Judgment on June 30, 2021, and Notice of Entry of Order was filed and served on July 23, 2021. Subsequent to the trial court's denial of the parties' motions for summary judgment, Rema filed and served the Defendant's Petition for Intermediate Appeal on August 2, 2021, and DT-Trak filed and served Plaintiff's Petition for Permission to take Discretionary Appeal on August 2, 2021. The trial court entered its Order Certifying Order on Summary Judgments an Appealable Order on August 4, 2021, and Notice of Entry of Order was filed and served on August 4, 2021. This Court granted both petitions seeking an intermediate appeal and the Orders Granting Petition for Allowance of Appeal from Intermediate Order were both entered on August 20, 2021. This Court has jurisdiction pursuant to SDCL 15-26A-13 and 15-26A-17.

STATEMENT OF THE LEGAL ISSUES

ISSUE 1: DID THE TRIAL COURT ERR BY DENYING REMA'S MOTION FOR SUMMARY JUDGMENT?

Trial court holding: No.

Relevant court cases:

- 1. Agreva, LLC v. Eide Bailly, LLP, 2020 S.D. 59, 950 N.W.2d 774
- 2. Laska v. Barr, 2016 S.D. 13, 876 N.W.2d 50
- 3. Central Monitoring Service, Inc. v. Zakinski, 1996 S.D. 116, 553 N.W.2d 513
- 4. Mckie Ford Lincoln, Inc. v. Scott Hanna & Gateway Auto., LLC, 2018 S.D. 14, 907 N.W.2d 795.

Relevant statutes or authority:

- 1. SDCL 53-9-8
- 2. SDCL 53-9-11
- 3. SDCL 37-29-1

2 STATEMENT OF THE CASE

DT-Trak employed Rema for several years. RA, p. 4, Comp., ¶2. During her employment with DT-Trak, Rema executed a Non-Compete, Non-solicitation, Confidentiality, Non-Disclosure, and Non-Use Agreement (Agreement). *Id.*, at ¶3; Depo. Exh. A. Rema resigned her position with DT-Trak and shortly thereafter began employment with San Carlos Apache Healthcare Corporation (San Carlos) in Peridot, Arizona. RA, p. 7, Comp., ¶14. DT-Trak commenced this lawsuit against Rema by filing a Summons and Complaint seeking a preliminary and permanent injunction against Rema for allegedly using and disclosing confidential information and trade secrets and damages for an alleged breach of non-disclosure covenants (Count I); a preliminary and permanent injunction against Rema prohibiting her from working for San Carlos or any other "competing business" as defined by the Agreement, and damages for an alleged breach of non-compete covenants (Count II); a preliminary and permanent injunction against Rema prohibiting her from soliciting DT-Trak's employees to leave it and damages for an alleged breach of non-solicitation covenants (Count III); and a preliminary and permanent injunction against Rema for allegedly misappropriating trade secrets and actual and exemplary damages for such misappropriation (Count IV). RA, p. 4, Comp., ¶¶23, 29, 34, 35-42. Rema answered DT-Trak's Complaint and denied its claims, asserted affirmative defenses, and counterclaimed for barratry claiming actual and punitive damages. RA, p. 21, Ans. ¶¶7-10, 1-18. DT-Trak replied to Rema's counterclaim and denied all liability based upon the allegations in its Complaint. RA, p. 28, Reply.

DT-Trak moved for partial summary judgment on Count II of its complaint only, seeking a judicial determination that Rema was prohibited from working for San Carlos

or any other "competing business" as defined by the Agreement and for damages for the alleged breach of non-compete covenant. *RA*, *p*. 71. Rema resisted DT-Trak's partial motion for summary judgment, and moved for summary judgment on all of DT-Trak's claims. *RA*, *p*. 202. Both parties assert that the determination of the motions for summary judgment will fully adjudicate the claims herein, with the exception of the barratry claim which was not subject of any summary judgment proceedings. The trial court heard the motions for summary judgment and denied both parties' motions and entered its order accordingly. *RA*, *p*. 657. After cross petitions for intermediate appeal were made by the parties, this Court granted same and entered its Order Granting Petition for Allowance of Appeal from Intermediate Order on both petitions on August 20, 2021. *RA*, *pp*. 669, 671. Rema appeals the trial court order denying summary judgment on all of DT-Trak's claims.

STATEMENT OF THE FACTS

The material facts in this case are undisputed. There are certain factual matters disputed by the parties, but those facts are insignificant and not material to the resolution of this case by summary judgment.

DT-Trak is a South Dakota corporation and an independent contractor located in Miller, South Dakota. *Natalie Bertsch Depo.*, pp. 15-17; RA, p. 100, Affidavit of Natalie Bertsch, ¶2; RA, p. 4, Comp., ¶1.; RA, p. 21, Ans., ¶3. DT-Trak provides a variety of services to institutions and providers in the health field, but not to specific patients. RA, p. 204, Defendant's Statement of Undisputed Material Facts, ¶¶11 and 12. The services DT-Trak provides on a contract basis include medical coding, billing services, accounts receivable, compliance auditing, revenue cycle analysis, workflow analysis, medical staffing, staffing positions, and PPE supplies. *Id.*; Natalie Bertsch Depo., pp. 15-17;

Jewel Kopfman Depo., pp. 50-52; RA, p. 100, Affidavit of Natalie Bertsch, ¶3. Natalie Bertsch (Bertsch) is the Vice President over operations and business development for DT-Trak. RA, p. 204, Defendant's Statement of Undisputed Material Facts, ¶¶11 and 12; RA, p. 100, Affidavit of Natalie Bertsch, ¶1.

Rema was initially employed by DT-Trak in 2004. RA, p. 204, Defendant's Statement of Undisputed Material Facts, ¶1. Prior to becoming employed with DT-Trak, Rema had attended approximately two years of formal education to become a registered nurse at Presentation College and worked at the Hand County Memorial Hospital in the Courtyard Villa. Id., at ¶6. Shortly after Rema became employed with DT-Trak, and in accordance with its policy for medical coders, DT-Trak paid for training in the ICD-10 medical coding system for Rema so that she could become a certified medical coder. *Id.*, at ¶2. Although DT-Trak paid for Rema's ICD-10 medical coding training, Rema was required to continue her employment with DT-Trak for at least five years thereafter. *Id.*, at ¶¶2-4. If Rema were to have terminated her employment without having completed five years of employment with DT-Trak, she would have been required to repay DT-Trak for the medical coder training and certification. *Id.*, at ¶4. Rema became a certified medical coder in January of 2006 and fully complied with the five-year work period regarding the ICD-10 training and certification. Natalie Bertsch Depo., pp. 85-86; Rema Kolda Depo., p. 58; Depo. Exh. #16. In the latter years when Rema worked for DT-Trak as a medical coder she worked remotely from her home in St. Lawrence, South Dakota, but reported to the office for DT-Trak occasionally when requested to do so by management. Rema Kolda Depo., pp. 4, 71-74.

Rema resigned her position with DT-Trak in July of 2016. RA, p. 204;

Defendant's Statement of Undisputed Material Facts, ¶5. At the time Rema resigned her

position with DT-Trak she was a certified medical coder. *Rema. Kolda Depo., p. 58.*Rema returned to her employment with DT-Trak in September of 2016 as a medical coder and continued to work in that capacity until she terminated her employment with DT-Trak in February of 2019. *RA, p. 204, Defendant's Statement of Undisputed Material Facts,* ¶7. When Rema re-hired with DT-Trak in September of 2016, she signed the above referenced Agreement. *Id., at* ¶8; *Depo. Exhs. A and* #23. Rema signed several agreements with DT-Trak during her tenure there, but the only agreement relevant to this lawsuit is the agreement signed on September 12, 2016. *Id.* All agreements signed by Rema while she was employed by DT-Trak were drafted by DT-Trak, were a condition of employment, and were offered on a "take-it-or-leave-it" basis. *Rema Kolda Depo., pp. 35-37; Depo. Exh. A and* #23. The Agreement contains the following provisions at issue herein:

WHEREAS, Employer ...[DT-Trak] ...would not, absent Employee's ... [Rema] ... acceptance of this Agreement, employ Employee or continue to employ Employee; and

WHEREAS, Employee acknowledges and agrees that acceptance of this Agreement by Employee is a condition precedent to employment or continued employment by Employer.

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- 1.1 "Business" or "Business of Employer" shall mean professional medical coding, data entry, third-party billing and accounts receivable services and related activities for healthcare service providers including, but not limited to, the following services: Professional medical coding ...
- 1.2 "Business Area" shall mean and include each state within the United States of America, including Alaska and Hawaii. The Business Area is so defined because, and Employee so agrees, that the market for the Business is highly specialized and that Employer engages in the Business with and for numerous entities that are located within and throughout the United States.
- 1.3 "Competing Business" shall mean any individual, corporation,

- partnership, limited partnership, limited liability company, association, trust (business or otherwise), institution, foundation, pool, plan or other entity or organization (other than Employer) that engages or proposes to engage in the Business of Employer. ...
- 2. Non-Competition. At all times during which Employee is employed by Employer and during the period commencing on the date of the termination of Employee's employment with Employer and ending two years after such date, Employee agrees that Employee will not, anywhere in the Business Area, engage, directly or indirectly, in any capacity whatsoever, whether as officer, director, stockholder, owner, proprietor, partner, member, co-owner, investor, employee, trustee manage, consultant, independent contractor, co-venturer, lender, financier, agent, representative or otherwise, in a Competing Business, or otherwise hold any interest in a Competing Business.

Depo. Exhs. A and #23. The Agreement also contained provisions regarding non-solicitation of DT-Trak's employees, consultants, customers, and other persons and entities; provisions regarding claimed confidential information, proprietary information, and trade secrets, and nondisclosure and non-use provisions relative thereto. *Id.* DT-Trak is an independent contractor that provides the services described in the Agreement to medical institutions and health-care providers. RA, p. 204, Defendant's Statement of Undisputed Material Facts, ¶12; Jewel Kopfmann Depo., pp. 50-52; RA, p. 100, Affidavit of Natalie Bertsch, ¶3. At all times while Rema was employed with DT-Trak she was an employee and did not serve in any management or supervisory capacity. RA, p. 204, Defendant's Statement of Undisputed Material Facts, ¶13; Jewel Kopfmann Depo., pp. 50-52. At no time either before, during, or after her employment with DT-Trak did Rema operate or own an independent business, or did she operate as a contractor in any respect. Id., at ¶¶13, 15; Jewel Kopfmann Depo. pp. 50-52; RA, p. 376, Affidavit of Katherine Andersen, ¶5; In fact, Rema has always been an employee of an employer at all relevant times hereto. *Id.*; *Rema Kolda Depo.*, pp. 94-105, 139-153.

Rema was dissatisfied with her employment with DT-Trak and in approximately

January of 2019 she began actively looking for other employment. *RA*, *p.* 204, *Defendant's Statement of Undisputed Material Facts*, ¶16. Rema eventually found and accepted employment with San Carlos as a medical coder and gave notice of the termination of her employment to DT-Trak on or about January 31, 2019. *Id.*, at ¶¶17 and 18. Rema works remotely from her home in St. Lawrence for San Carlos, the same as she did for DT-Trak. *Rema Kolda Depo.*, pp. 4, 71-74.

San Carlos is a medical health provider that operates a hospital and clinic and is not an independent contractor that engages in or proposes to engage in the same business as DT-Trak. RA, p. 204, Defendant's Statement of Undisputed Material Facts, ¶¶19 and 20; Jewel Kopfmann Depo., pp. 50-52. San Carlos had a contract for services with DT-Trak, but that contract expired on December 31, 2018, was not renewed, and San Carlos had no intentions of renewing its contract with DT-Trak. RA, p. 204, Defendant's Statement of Undisputed Material Facts, ¶21; RA, p. 376, Affidavit of Katherine Andersen ¶¶6, 7, and 8. Before Rema accepted the job with San Carlos, she questioned the representatives with San Carlos as to whether or not they had an existing contract with DT-Trak and she was advised by said representatives that there was no contractual relationship between San Carlos and DT-Trak. RA, p. 204, Defendant's Statement of Undisputed Material Facts, ¶23; Rema Kolda Depo., pp. 141-148; RA, p. 376, Affidavit of Katherine Andersen ¶¶6, 7, and 8. It is common practice in the medical health industry to utilize private contractors on a temporary basis, but once the work from the contractor is complete and moving along satisfactorily, the medical health facilities no longer use the private contractors. RA, p. 376, Affidavit of Katherine Andersen ¶¶8 and 14. San Carlos discontinued the need for all outside contracts because the need for quality and timeliness was best served with the hiring of direct employees for the work in coding, billing, and credentialing. *Id.*, at ¶8. Use of contractors like DT-Trak is a short-term solution to problems that flare up within the medical services industry and said contractors are very rarely kept on for long periods of time. *Id.*, at ¶14.

Rema is a medical coder for San Carlos, but her work with San Carlos is not the same type of work that she did while employed by DT-Trak. *RA*, *p. 204*, *Defendant's Statement of Undisputed Material Facts*, ¶22. When Rema was hired by San Carlos, she was trained in the specific processes and procedures used by San Carlos to perform medical coding work for it. *RA*, *p. 376*, *Affidavit of Katherine Andersen* ¶¶11 and 12. While Rema was employed by DT-Trak and working in its Quality Assurance division, she worked on a San Carlos account, but Rema had not worked on any San Carlos projects while a medical coder. *RA*, *p. 204*, *Defendant's Statement of Undisputed Material Facts*, ¶24.

The ICD-10 medical coding system and process is a universal coding system. *RA*, *p. 204*, *Defendant's Statement of Undisputed Material Facts*, ¶¶25-28. The ICD-10 is in the public domain and is accessible by any person who wants to train as a medical coder. *Id.*, *at* ¶26. DT-Trak did not develop the ICD-10 medical coding system and does not claim the ICD-10 coding system as a trade secret, confidential information, or proprietary in nature in any respect. *Id.*, *at* ¶¶27 and 28. Katherine Andersen was previously employed by DT-Trak and is familiar with their processes and procedures for medical coding. *RA*, *p. 376*, *Affidavit of Katherine Andersen*, ¶4. Nothing Rema uses for her work as a medical coder at San Carlos is a trade secret or confidential information in the industry, nor is it specific or confidential to DT-Trak. *RA*, *p. 376*, *Affidavit of Katherine Andersen* ¶¶11, 12, and 13.

DT-Trak claims Rema misappropriated trade secrets from it, but DT-Trak has never identified for Rema, or any other employee, what constitutes trade secrets, confidential information, or proprietary information. *Jewel Kopfmann Depo.*, pp. 16-17, 29-37; Natalie Bertsch Depo., pp. 24-27, 36, 64-70. The Agreement generally defines what services DT-Trak provides and gives a vague and ambiguous definition of confidential information, but no employee or officer of DT-Trak ever specifically identified the trade secret, confidential or proprietary information. *Id*; Depo. Exhs. A and #23. DT-Trak claims that the experience and knowledge Rema gained while working for it and utilizing the ICD-10 medical coding system is a trade secret, confidential information, and proprietary. RA, p. 204, Defendant's Statement of Undisputed Material Facts, ¶29.

DT-Trak further claims that Rema violated every term of the Agreement regarding trade secrets, confidential information, and proprietary information by accepting employment with San Carlos as a medical coder. *Id.*, at ¶¶29 and 31.

DT-Trak, however, has no evidence that it has produced by way of discovery, deposition, or in response to Rema's motion for summary judgment that supports this claim and merely relies upon suspicions of its representatives Bertsch, Jewel Kopfmann, and Renae Aalbers. *Id.*, at ¶¶29 and 31. Moreover, DT-Trak claims that the Agreement prohibits Rema from working for any of DT-Trak's current customers, any past customers, any customer that it submitted a bid for work to, or prospective customers, regardless of whether or not they are known. *Id.*, at ¶31. Finally, the Agreement identifies the geographical limitation of its application as the entire continental United States and Alaska and Hawaii. *Id.*, at ¶32; Exh. A.

ARGUMENT

A. Standard of Review.

The Supreme Court reviews a trial court's denial of a motion for summary judgment under the de novo standard of review. *Owners Ins. Co. v. Tibke Constr., Inc.*, 2017 S.D. 51, ¶8, 901 N.W.2d 80. Further, "... [q]uestions of statutory interpretation and application are reviewed under the de novo standard of review with no deference to the circuit court's decision." *Mckie Ford Lincoln, Inc. v. Scott Hanna & Gateway Auto.*, *LLC*, 2018 S.D. 14, ¶10, 907 N.W.2d 795.

B. Standard for Summary Judgment.

The standard for summary judgment is well known and settled in South Dakota.

The Supreme Court

... must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper. ... Moreover, '[u]nsupported conclusions and speculative statements do not raise a genuine issue of fact.'

Zochert v. Protective Life Ins. Co., 2018 S.D. 84, ¶19, 921 N.W.2d 479. Furthermore, "... summary judgment is not a substitute for trial ..." nor is it appropriate simply because the trial court believes the "... non-moving party will not prevail at trial." (citations omitted). Wulf v. Senst, 2003 S.D. 105, ¶17, 669 N.W.2d 135. Summary judgment is considered an "... extreme remedy and should be awarded only on a clear showing of the necessary elements ..." Id., at ¶17. However, where there are "... no

genuine issues of material fact, summary judgment is looked upon with favor as particularly adaptable to expose sham claims and defenses." (citations omitted). Id., at ¶17. The burden of proof on a motion for summary judgment is placed on the moving party, and the movant must show that there are no genuine issues of material fact and that the movant is entitled to a judgment as a matter of law. SDCL 15¶-6-56(c); Wulf, 2003 S.D. at 105, ¶17. The nonmoving party, however, "... cannot merely rest on the pleading, but must present specific facts by way of 'affidavits or as otherwise provided in SDCL 15-6-56(e)'... setting forth specific facts showing the existence of genuine issues of material fact." Wulf, 2003 S.D. at 105, ¶18. Moreover, "... mere general allegations or denials will not prevent the issuance of summary judgment." Id., at ¶18. A party opposing "... summary judgment must establish the specific facts which show that a genuine and material issue for trial exists." *Id.*, at ¶18. Finally, "... [s]ummary judgment is not the proper method to dispose of factual questions ..."; however, when "... fact questions are undisputed ..." they then become questions of law for the court to decide and are appropriately disposed of on summary judgment. Keystone Plaza Cond. Assn. v. Eastep, 2004 S.D. 28, ¶8, 676 N.W.2d 842. Finally, cases which involve "... the interpretation of written documents are particularly appropriate for disposition by summary judgment, such interpretation being a legal issue rather than a factual one." (Citations omitted). Wyman v. Bruckner, 2018 S.D. 17, ¶9, 908 N.W. 2d 170.

ISSUE 1: DID THE TRIAL COURT ERR BY DENYING REMA'S MOTION FOR SUMMARY JUDGMENT?

The undisputed facts and the law supported granting Rema's motion for summary judgment in this matter on all of DT-Trak's, claims and the trial court erred as a matter of law by denying Rema's motion.

A. Governing Law.

In this lawsuit, DT-Trak seeks to stop Rema from working as an employee doing medical coding work for any employer that DT-Trak has had any relationship with regardless of whether that relationship has ended or is ongoing or a possibility in the future. In this particular instance, the employer Rema is working with is San Carlos. DT-Trak's claims and arguments in this lawsuit constitute an unlawful restraint on Rema's trade and are prohibited under the law.

1. Restraint of Trade.

SDCL 53-9-8 provides that any contract restraining the exercise of a "... lawful profession, trade, or business is void to that extent, except as provided by §§ 53-9-9 to 53-9-12, inclusive." *SDCL 53-9-8*. A covenant not to compete is a restraint on trade. *Mckie*, 2018 S.D. at 14, ¶12. In addition, the law is well settled

... that 'SDCL 53-9-8 is generally denoted as a prohibition against agreements in 'restraint of trade.' However, its provisions are much broader as the statute actually prohibits any agreements which restrain a **lawful profession**, trade or business.' ... (Emphasis added)

Aqreva, LLC v. Eide Bailly, LLP, 2020 S.D. 59, ¶25. 950 N.W.2d 774. Moreover, the analysis as to whether "... a contract is an unlawful restraint on trade ..." involves a "... three-part test." Aqreva, 2020 S.D. at 59, ¶25. First, the court must determine "... whether 'the conduct of the parties concern[s] a lawful profession, trade or business.'" Id., at ¶25. Second, the court reviews whether "... 'there has been a material restraint upon exercising that lawful profession, trade or business.'" Id., at ¶25. Finally, the court must determine "... whether any of the statutory exceptions apply." Id., at ¶25. The only statutory exception that could apply in this case is set forth at SDCL 53-9-11. SDCL 53-9-11 provides that

... [a]n employee may agree with an employer at the time of employment or at any time during his employment not to engage directly or indirectly in the same business or profession as that of his employer for any period not exceeding two years from the date of termination of the agreement and not to solicit existing customers of the employer within a specified county, first or second class municipality, or other specified area for any period not exceeding two years from the date of termination of the agreement, if the employer continues to carry on a like business therein.

SDCL 53-9-11. Agreements pursuant to SDCL 53-9-11, however, are narrowly construed so as to prohibit a violation of the general rule of law set forth in SDCL 53-9-8. *Mckie*, 2018 S.D. 14, ¶12.

Additionally, the rules of contract construction apply to the issue on appeal herein. The law governing contract construction is well settled and provides that

... [w]hen the meaning of contractual language is plain and unambiguous, construction is not necessary. If a contract is found to be ambiguous the rules of construction apply. ... A contract is ambiguous when application of rules of interpretation leaves a genuine uncertainty as to which of two or more meanings is correct. ... [A] contract is ambiguous only when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement. (Citations omitted).

Laska v. Barr, 2016 S.D. 13, ¶5, 876 N.W.2d 50. If the contractual language is plain and unambiguous, then it is the court's duty to interpret and enforce the contract as written. Edgar v. Mills, 2017 S.D. 7, ¶28, 892 N.W.2d 223. Further, "...[u]nder the rules of contract interpretation ..." the court is to look "... to the language that the parties used in the contract to determine their intention ..." and the court must "... examine the language of an agreement as a whole to determine the terms and conditions ..." thereof. Id., at 7, ¶26.

There is no question that the first two *Aqreva* tests have been met herein. Rema is a professional, certified medical coder. DT-Trak paid for Rema's training and certification, but Rema, in return, was obligated to and did work as an employee for

DT-Trak for at least five years. A person must be properly trained and educated to be a professional, certified medical coder. Deposition Exhibit C shows that training regiment for certification as a medical coder and is available to the general public on the internet and elsewhere. *Depo. Exh. C.* Clearly, one must attain something more than mere experience and desire to become a professional, certified medical coder. Rema attained her professional status by becoming a certified medical coder and acquiring the work experience as well. *Depo. Exh. #16*.

Unquestionably, Rema's profession or trade has been materially restrained. As interpreted by DT-Trak, the Agreement prohibits Rema from working for any hospital, clinic, or Indian Health Services facility in the contiguous United States and Alaska and Hawaii. DT-Trak's interpretation of the Agreement is that since Rema is a professional medical coder and was trained by it, and DT-Trak is an independent contractor that provides medical coding services, among other services, Rema cannot work in the field of medical coding at all. Moreover, DT-Trak interprets the Agreement in such a fashion that Rema as an employee falls within the definition of a "Competing Business." As a result, Rema cannot pursue the profession she has gained substantial experience in for over 14 years in any respect. Consequently, the conduct of the parties herein clearly involves a profession or trade and Rema's profession and trade has been severely restrained.

The final *Aqreva* test involves whether or not the actions of DT-Trak are covered by the exception found at SDCL 53-9-11. SDCL 53-9-11 specifically indicates that the basis for the covenant not to compete must be that the employee not "... engage directly or indirectly in the same business or profession as that of his employer ..." *SDCL 53-9-11*. The rules of contract construction apply to this portion of the *Agervat* test. DT-Trak

created the language in the Agreement and made the acceptance of the agreement a condition of employment. The clear intention of DT-Trak by the language in the Agreement was to prohibit Rema from engaging in the business, either as a sole proprietor or as an entity, of providing the same services as DT-Trak does to customers in the health-care field on a contract basis. Likewise, the clear intent of the Agreement was to prohibit Rema from working as an employee with a competitor of DT-Trak, i.e., an independent contractor who provides services to third-parties pursuant to a contractual relationship with said third parties. There clearly was no intention conveyed or set forth in the Agreement that prohibited Rema from continued employment in the field of medical coding as an employee for a hospital that did not engage in the same business as DT-Trak. If DT-Trak were to argue otherwise, then the Agreement would not be narrowly construed as required by the law, but would be subject to an overly broad construction which would effectively deny Rema of her chosen profession. The law does not permit this conclusion.

Moreover, the Agreement at issue herein identifies DT-Trak, the employer, as a South Dakota corporation. It is undisputed that DT-Trak is an independent contractor that provides a particular service to a variety of health-care providers in various locations in the United States. DT-Trak does not own or operate any Indian Health Services facilities, hospitals or clinics. The business of DT-Trak is defined in the Agreement and includes, but is not limited to, providing professional medical coding services to its customers. DT-Trak pursues its business pursuant to individually negotiated contracts with each of its customers. DT-Trak has numerous customers under contract with it. The plain language of the Agreement defines "Competing Business" as

... any individual, corporation, partnership, limited partnership, limited liability company, association, trust (business or otherwise), institution, foundation, pool, plan or other entity or organization (other than Employer) that engages or proposes to engage in the Business of Employer. (Emphasis added).

Depo. Exh. A. A competing business does not include medical coding employees working for a hospital. A competing business does include any entity that "... engages or proposes to engage in the Business of Employer ...", i.e., providing medical coding services as an independent contractor and not as an employee of a hospital. Depo. Exh. A. It is undisputed that San Carlos operates only a hospital and clinic. San Carlos does not provide contract services for medical coding, nor any of the other services identified in the Agreement, by contract with third parties or for other facilities or customers. San Carlos does all of its medical coding in-house and not through DT-Trak or any other third-party contractor. Clearly, San Carlos is not a competing business as to DT-Trak.

Furthermore, Rema is an hourly paid employee at San Carlos and works exclusively for San Carlos. Rema does not provide medical coding services to third parties pursuant to a contract or otherwise. Rema has never been in the business of providing medical coding services on an independent contractor basis to any health-care provider. Rema has never had a contractual relationship to provide medical coding services to San Carlos or any other facility. San Carlos had a contract with DT-Trak, but said contract terminated effective December 31, 2018, and was not renewed.

Consequently, Rema did not seek nor accept employment with San Carlos while it had a contract for services with DT-Trak. Moreover, Rema took reasonable, prudent, and proper steps to determine whether or not San Carlos had an existing contract with DT-Trak before she accepted employment with San Carlos. Nothing Rema is doing at

San Carlos constitutes a violation of any of the terms of the Agreement.

Under the governing statutes and rules of contract construction and the *Aqerva* test, it is clear that a narrow construction of the Agreement supported granting Rema's motion for summary judgment as to all counts of DT-Trak's Complaint.

2. Geographical Limitations.

Generally, an employee cannot challenge a covenant not to compete on the basis of "reasonableness" if the employee voluntarily terminates employment. *Central Monitoring Service, Inc. v. Zakinski*, 1996 S.D. 116, ¶47, 553 N.W.2d 513. However, in order for the *Zakinski* prohibition to apply, the covenant not to compete must comply in all respects with SDCL 53-9-11. *Id.*, at 116, ¶47. The Agreement in this case does not comply with SDCL 53-9-11 as argued *supra* and due to the overly broad geographical limitations in the Agreement.

In order to comply with SDCL 53-9-11, the geographical restrictions of the Agreement must be a "... specified county, first or second class municipality, or other specified area." SDCL 53-9-11. The "business" of DT-Trak is defined in the Agreement as a variety of matters, but specifically includes medical coding. If, under the terms of the Agreement, Rema is engaging in the "business" of DT-Trak, the non-competition geographical restrictions prohibit her from working in the continental United States and Alaska and Hawaii for any health-care provider. Depo. Exh. A. Moreover, if Rema is subject to the terms of the Agreement, she is prohibited from working as an employee for any of DT-Trak's current, past, or future employers, even if unknown. Effectively, Rema will be completely prohibited from working in her chosen profession anywhere in the United States. This clearly violates SDCL 53-9-8 and the public policy behind said statute, part of which is to encourage and promote the continued employment of

employees in South Dakota. Lindskov v. Lindskov, 2011 S.D. 34, ¶12, 800 N.W.2d 715; Communications Tech. Sys., Inc. v. Densmore, 1998 S.D. 87, ¶18, 583 N.W.2d 125. The intent of SDCL 53-9-11 is not to allow employers to render an employee unemployable in the entire country, but, rather, to allow an employer some protections, while affording an employee the opportunity to work in their chosen profession. The "specified area" language cannot be taken any other way. Moreover, a geographical limitation covering the entire continental United States and Alaska and Hawaii does not constitute a specified area, as it covers the entire country. It is black letter law that when a "... business operates on a multistate or international basis, a prohibition on competing in any territory in which the business operates is similar to having no territorial restriction at all, and thus, any such prohibition is not reasonable." 54A Am.Jur.2d Monopolies and Restraints of Trade §834; see also Unlimited Opportunity, Inc. v. Waadah, 290 Neb. 629, 639, 861 N.W.2d 437, 444 (Neb. 2015). Additionally, allowing such a broad geographical limitation violates the legal requirement that covenants not to compete be narrowly construed as argued supra.

Rema's argument on the geographical limitation is applicable even though Rema works remotely for San Carlos from her home. The expansion of the Internet and electronic media to such a degree as we experience now, does not change the analysis in this case, but renders certain legal principals as to contract interpretation impractical. Remote working has become the standard in many communities in the country, and South Dakota has not escaped this advancement in employment. Most medical coders work remotely for their employers from home. Here, the Agreement contains a saving clause which allows for reformation of the Agreement so as to comply with the dictates of SDCL 53-9-11 in the event a court determines that any provision of the Agreement is

unenforceable. Depo. Exh. A, §8.3. In addition, this Court has held that under certain circumstances an overly broad geographical limitation can be saved and modified based upon the rule of "partial enforcement" and a savings clause. Franklin v. Forever Venture, Inc., 2005 S.D. 53, ¶15, 696 N.W.2d 545. Typically, if the court applies the "partial enforcement" rule in conjunction with a savings clause, the geographical limitation is modified so as to comply with the statutory mandates. Franklin, 2005 S.D. at 53, ¶15. This modification usually results in the geographical limitation being restricted to a county. The law does not permit an employer to render an employee unemployable in their chosen profession simply because they are able to work from their home for an employer thousands of miles away. If the Agreement applies to Rema in these circumstances, the application of the partial enforcement rule will work an extreme hardship on her and will effectively render her unemployable in the field of medical coding. A decision affirming this concept is categorically contrary to the above authority and goes directly against the dictates of SDCL 53-9-8, as it discourages, rather than promotes, employment in South Dakota.

To enforce this geographical limitation on Rema's employment is an unlawful restraint on her chosen profession and clearly violates SDCL 53-9-8 and the case law applying said statutory restriction. See, *Mckie*, 2018 S.D. 14, ¶12. In light of the above and foregoing, it was reversible error to deny Rema's motion for summary judgment and same should be granted as to all of DT-Trak's claims.

C. Trade Secrets and Confidential and Proprietary Information.

The Uniform Trade Secrets Act (UTSA) is found at SDCL Chapter 37-29. SDCL 37-29-1(4) defines a trade secret as

- ... information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
- (I) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- (ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

SDCL 37-29-1(4). Clearly, a trade secret must be "... information, including a formula, pattern, compilation, program, device, method, technique, or process" SDCL 37-29-1. DT-Trak claims that certain protocols were protected as trade secrets, but the deposition testimony clearly establishes that the protocols changed daily if not hourly, were not always customer specific, and are not used by Rema at San Carlos. Rema Kolda Depo., pp. 160-161; Jewel Kopfmann Depo. pp. 31-33; Renae Aalbers Depo., pp. 12-14. Consequently, assuming the protocols were trade secrets, same would have changed shortly after Rema terminated her employment and she would not have known what the new protocols entailed, so she could not have possibly divulged same in any regard. Further, DT-Trak has produced no evidence whatsoever that Rema did anything to try to take the protocols, or any other of DT-Trak's property, with her when she left her employment.

In addition, DT-Trak identified Rema's experience and knowledge as a medical coder as a trade secret because she became adept at medical coding while employed with it. Personal experience, knowledge, or the polishing of an employee's talent, however, do not constitute information, a formula, pattern, compilation, program, device, method, technique, or process so as to be afforded protection under the UTSA. Moreover, DT-Trak clearly does not claim the ICD-10 medical coding process and system is a trade secret, confidential or proprietary in any respect. In addition, Rema did not work at the

management level, she was not a supervisor of a department, she did not negotiate contracts for DT-Trak, she did not work with other staff to develop processes or methods for operating DT-Trak's business, and she had little, if any, contact with DT-Trak's customers. The record is also clear that no one with DT-Trak made any attempt to identify trade secrets to Rema or any other medical coder. Rema simply was not exposed to anything when she worked with DT-Trak that constituted a trade secret or, for that matter, confidential or proprietary information. In short, Rema was a medical coder who used the ICD-10 medical coding system to do her work and that is it. In addition, Rema's experience and knowledge as a medical coder cannot under any circumstances be the "... subject of efforts that are reasonable under the circumstances to maintain its secrecy." SDCL 37-29-1(4). Rema's experience and aptitude as a medical coder is not "property" possessed by DT-Trak and cannot be claimed as a trade secret, confidential or proprietary in any regard as the use of information in the public domain is not subject to protection as a trade secret. Daktronics, Inc. v. McAfee, 1999 S.D. 113, 599 N.W.2d 358. Clearly, since DT-Trak has no trade secrets or confidential or proprietary information that Rema was privy to, she could not be held liable under a claim of misappropriation of trade secrets nor under a claim that she divulged or disclosed confidential or proprietary information.

DT-Trak does claim to have a certain amount of confidential or proprietary information that it has developed over the years, but that information, like the claimed trade secrets, is largely well known in the health-care field. Moreover, Rema did not work in the area of DT-Trak's business that exposed her to anything other than medical coding. Consequently, Rema could not have taken any confidential or proprietary information from DT-Trak and DT-Trak, again, cannot produce any evidence that Rema

22

stole such information. The only supporting assertion DT-Trak has in this regard is rank

suspicion, speculation and conjecture. Moreover, Rema adamantly denies taking any of

DT-Trak's confidential or proprietary information when she terminated her employment.

Finally, Rema is an employee with San Carlos doing medical coding. She is not engaged

in a competitive field with DT-Trak and neither is San Carlos. Consequently, DT-Trak's

suspicions are wholly unfounded, unsupported by the evidence, and meritless in all

respects.

In light of the above and foregoing, Rema's motion for summary judgment should

have been granted and judgment should be entered in favor of Rema on all of DT-Trak's

claims relative to trade secrets, confidential and proprietary information and the

misappropriation or wrongful disclosure thereof.

CONCLUSION

The decision of the trial court should be reversed and summary judgment in favor

of Rema should be entered and all counts as plead in DT-Trak's Complaint should be

dismissed.

REQUEST FOR ORAL ARGUMENT: Rema hereby requests oral argument.

Dated this 11th day of January, 2022.

/S/TIMOTHY R. WHALEN

Whalen Law Office, P.C.

P.O. Box 127

Lake Andes, SD 57356

Telephone: 605-487-7645

whalawtim@cme.coop

Attorney for the Appellee

23 CERTIFICATE OF COMPLIANCE

Timothy R. Whalen, the attorney for the Appellee, hereby certifies that the Appellee's Brief complies with the type volume limitations provided for in SDCL 15-26A-66(b)(4). The Appellee's Brief contains 36,457 characters and 6917 words. Further, the undersigned relied upon the word count of the word processing system used to prepare the Appellee's Brief.

Dated this 11th day of January, 2022.

/S/ TIMOTHY R. WHALEN Whalen Law Office, P.C. P.O. Box 127 Lake Andes, SD 57356 Telephone: 605-487-7645 whalawtim@cme.coop Attorney for the Appellee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served two true and correct copies of the Appellee's Brief on the attorneys for the Appellee at their address as follows: Sander J. Morehead and Jordan J. Feist, Woods, Fuller, Shultz & Smith, PC, 300 S. Phillips Avenue, Suite 300, P.O. Box 5027, Sioux Falls, SD 57117-5027 jordan.feist@woodsfuller.com and sander.morehead@woodsfuller.com by e-mail and by depositing same in the United States first class mail, postage prepaid, on the 11th day of January, 2022, at Lake Andes, South Dakota. Further, the undersigned hereby certifies that the original and two copies of the above and foregoing Appellee's Brief were mailed to Shirley Jameson-Fergel, Clerk of the Supreme Court, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070 by depositing same in the United States first

class mail, postage prepaid, on the 11th day of January, 2022. Further, one copy of the Appellee's Brief was e-mailed to the aforesaid Clerk of the Supreme Court on the 11th day of January, 2022, at her e-mail address as follows: SCClerkBriefs@ujs.state.sd.us.

/S/TIMOTHY R. WHALEN Whalen Law Office, P.C. P.O. Box 127 Lake Andes, SD 57356 Telephone: 605-487-7645 whalawtim@cme.coop

APPENDIX

26 APPENDIX TABLE CONTENTS

		Page
1.	Order Denying Motions for Summary Judgment	1
2.	Notice of Entry of Order	2
3.	Deposition Exhibit #16	5
4.	Deposition Exhibit A and #23	11
5.	Deposition Exhibit C	18
6.	Renae Aalbers excerpt from deposition transcript	26
7.	Natalie Bertsch except from deposition transcript	30
8.	Rema Kolda excerpt from deposition transcript	34

APPENDIX

APPENDIX TABLE CONTENTS

	•	<u>Page</u>
1.	Order Denying Motions for Summary Judgment	1
2.	Notice of Entry of Order	2
3.	Deposition Exhibit #16	5
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7.	Natalie Bertsch except from deposition transcript	30
8.	Rema Kolda excerpt from deposition transcript	34

The above entitled matter having come on before the Honorable Kent A. Shelton, Circuit Court Judge, Third Judicial Circuit, State of South Dakota, on the 14th day of June, 2021, pursuant to the partial motion for summary judgment filed by the Plaintiff and the motion for summary judgment filed by the Defendant; and the Plaintiff appearing in the person of its corporate representative and with counsel of record, Sander J. Morehead of Woods, Fuller, Shultz & Smith, P.C.; and the Defendant appearing in person and with her attorney of record Timothy R. Whalen of Whalen Law Office, P.C., and the Court having read and considered the motions, briefs, affidavits, and other filings made by the parties in support of and in resistance to the motions for summary judgment; and the court having heard and considered the arguments of the parties; and the Court having been fully advised in the premises and good cause appearing therefore, it is hereby

ORDERED that the Plaintiff's motion for partial summary judgment and the Defendant's motion for summarygiendgment boardandwhe same are both hereby denied in their entirety.

Attest: Bertsch, Maria Clerk/Deputy



1

SHELTON - CIRCUIT COURT JUDGE

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
: SS	-
COUNTY OF HAND)	THIRD JUDICIAL CIRCUIT
******	******
DT-TRAK CONSULTING, INC., a South) FILE NO. 29CIV19-30
Dakota Corporation,	(
Plaintiff,)
vs.) NOTICE OF ENTRY OF ORDER
)
REMA KOLDA, an Individual,)
Defendant.)
*********	************
TO: Sander J. Morehead/Jordan F. Fe	ist, Woods, Fuller, Shultz & Smith,
P.C., P.O. Box 5027, Sioux Falls, S	D 57117-5027,
Sander.Morehead@woodsfuller.com/Jon	

NOTICE IS HEREBY GIVEN that an Order Denying Motions for Summary Judgment in the above entitled action has been entered by the Court on the 30th day of June, 2021, and filed with the Clerk of Courts of Hand County, South Dakota, on the 30th day of June, 2021, a copy of which is attached hereto.

Dated this 23rd day of July, 2021

TIMOTHY R. WHALEN Whalen Law Office, P.C.

P.O. Box 127

Lake Andes, SD 57356
Telephone: 605-487-7645
Attorney for the Defendant
whalawtim@cme.coop

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the NOTICE OF ENTRY OF ORDER was served upon the attorneys for the Plaintiff at their last known e-mail addresses as follows:

Sander J. Morehead
Jordan F. Feist
Sander.Morehead@woodsfuller.com
Jordan.Feist@woodsfuller.com

Notice of Entry of Order - 29CIV19-30

by the UJS Odyssey System on the 23rd day of July, 2021.

TIMOTHY R. WHALEN

Whalen Law Office P.C.

P.O. Box 127

Lake Andes, SD 57356

Telephone: 605-487-7645

Attorney for the Defendant

whalawtim@cme.coop

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ORDERED that the Plaintiff's motion for partial summary judgment and the Defendant's motion for summaryggiardgment beared. The same are both hereby denied in their entirety.

Attest:

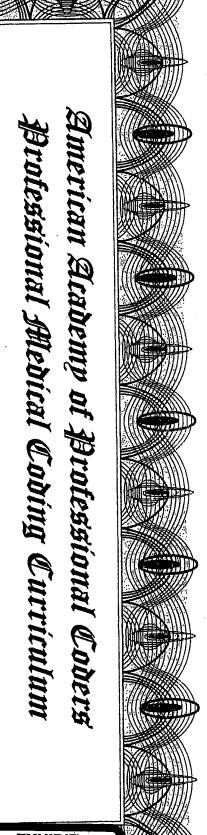
Bertsch, Maria Clerk/Deputy



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SHELTON - CIRCUIT COURT JUDGE



Certificate of Attendance
CEU Credits

Rema Kolda

PMCC Instructor: Genevieve Daley, CPC, CCS-P

Meeting Date/Topic: Miller, South Dakota-January 9, 2006 through January 20, 2006

This Program meets the American Academy of Professional Coders'
Guidelines for <u>63</u> Max Continuing Education Units



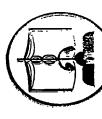
Certificate # CC00-31004

Date: 01/20/06

EXHIBIT

Service Document

Diversican A cademp of Professional Coder.



Hereby confers upon

Kema I Kolda

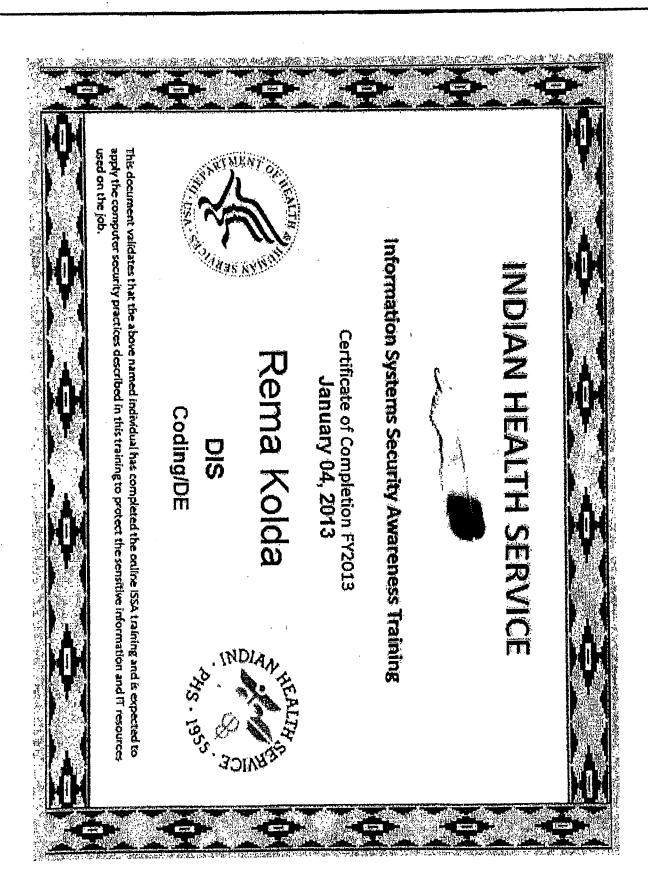
the title of

Certified Professional Coder

In witness whereof, this certificate is granted by authority successfully passed the examination given by the Academy. For having satisfied all the requirements and having this month of January, in the year two thousand six. of the American Academy of Professional Coders

Plesident, National Addisory Board guile OPe-Ens, OPC-4, OPC-D. OPCS-D

CEO and President, American Academy of Professional Coders



Certificate of ICD-10-CM Proficiency

This certifies that

Rema J Kolda, CPC

has successfully passed AAPC's ICD-10-CM Proficiency Assessment.



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12/1/2013

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TOP-IS-CIVIPOS TRAINER CERTIFICATE

Rema J. Kolda

CPC

has successfully completed Training and Assessment for the AHIMA Academy for ICD-10

June 30, 2013

Valid through

Lynne Thomas Gordon, MBA, RHIA, FACHE
Chief Executive Officer

ICD-10

American Health Information Management Association®

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printed Printed THE CAN TO THE NEW CERTIFICATE

Rema Kolda

has successfully completed Training and Assessment for the AHIMA Academy for ICD-10

Valid through: June 30, 2016

Lynne Thomas Gordon, MBA, RHIA, FACHE
Chief Executive Officer

ICD-10

American Health Information Management Association⁵

MX5986

NON-COMPETE, NON-SOLICITATION, CONFIDENTIALITY, NON-DISCLOSURE, AND NON-USE AGREEMENT

This Non-Compete, Non-Solicitation, Confidentiality, Non-Disclosure, and Non-Use
Agreement (this "Agreement") is made and entered into this 12 day of September,
20, by and between DT-Trak Consulting, Inc., a South Dakota corporation, with an
address of 210 North Broadway, Miller, South Dakota 57362 ("Employer"), and
Kema J. Kolda , an individual ("Employee").

RECITALS

WHEREAS, the business of Employer is of a highly specialized nature and its work for its customers requires it to divulge to Employee certain of Employer's trade secrets, confidential information, and processes; and

WHEREAS, Employee acknowledges and agrees that Employer will provide and make available to Employee specialized training and skills; and

WHEREAS, Employee will have access to Employer's trade secrets, confidential information, processes, and customers; and

WHEREAS, Employee acknowledges and agrees that Employer has a legitimate and vital interest in protection of its trade secrets, confidential information, processes, and customers; and

WHEREAS, Employer would not, absent Employee's acceptance of this Agreement, employ Employee or continue to employ Employee; and

WHEREAS, Employee acknowledges and agrees that acceptance of this Agreement by Employee is a condition precedent to employment or continued employment by Employer.

NOW, THEREFORE, in consideration of Employee being employed by Employer and other good and valuable consideration, the receipt and sufficiency of which is acknowledged by Employer and Employee, the parties agree as follows:

- 1. <u>Definitions</u>. As used in this Agreement, the following terms shall have the meanings set forth in this Section 1.
 - 1.1. "Business" or "Business of Employer" shall mean professional medical coding, data entry, third-party billing and accounts receivable services and related activities for healthcare service providers including, but not limited to, the following services:

Non-Compete, Non-Solicitation, Confidentiality, Non-Disclosure, and Non-tise Agreement
Page 1 of 7

EXHIBIT 23

Professional medical coding; Electronic Health Record Services (EHR); Electronic Data Entry (any database or software); Error Report Management and Completion; Third Party Billing, all payer sources; Accounts Receivable; Posting; Collections (120+ days, etc.); Quality Assurance of Revenue Generation Cycle; Comprehensive Revenue Generation Services; Compliance Auditing HIPAA, etc.; Data Integrity Audits, entire revenue generation cycle; Provider and Staff Education; Patient Registration; Staff & Program Development/Evaluation Criteria Development; Comprehensive Consultative Services for Healthcare Administrative, Financial, HIM and BO Functions; Revenue Enhancement Auditing; Development and Implementation of Work Flow Processes Relating to Revenue Generation Cycle; Planning, Implementing and Facilitation of Training/Workshops; Feasibility Studies for or Development of Revenue Generation Cycle or Development; Internal Controls Policy Evaluation, Implementation and Management; "Special Projects"- Analysis and Development of Various Health an Revenue Generation Studies; Financial Projections for Healthcare Facilities; Cost Analysis Studies for Healthcare Facilities; Chargemaster Audit, Implementation and Utilization.

- 1.2. "Business Area" shall mean and include each state within the United States of America, including Alaska and Hawaii. The Business Area is so defined because, and Employee so agrees, that the market for the Business is highly specialized and that Employer engages in the Business with and for numerous entities that are located within and throughout the United States.
- 1.3. "Competing Business" shall mean any individual, corporation, partnership, limited partnership, limited liability company, association, trust (business or otherwise), institution, foundation, pool, plan or other entity or organization (other than Employer) that engages or proposes to engage in the Business of Employer.
- 1.4. "Confidential Information" shall mean any information or data concerning the Business of Employer that is not generally known and that is proprietary to Employer or that any party is obligated to treat as proprietary, including without limitation: information or material of Employer relating to trade secrets, inventions, improvements, discoveries, "know-how," technological developments, or unpublished writings or works of authorship, or to the materials, apparatus, processes, formulae, plans or methods used in the development, provision, or marketing of Employer's products or services; and information that when received is marked as "proprietary," "private," or "confidential." Any information that Employer reasonably considers as confidential or proprietary, or that Employer treats as confidential or proprietary, will be presumed to be Confidential Information without regard as to whether Employer originally produced or created such information and regardless of how Employer obtained such information.

- 2. <u>Non-Competition</u>. At all times during which Employee is employed by Employer and during the period commencing on the date of the termination of Employee's employment with Employer and ending two years after such date, Employee agrees that Employee will not, anywhere in the Business Area, engage, directly or indirectly, in any capacity whatsoever, whether as an officer, director, stockholder, owner, proprietor, partner, member, co-owner, investor, employee, trustee, manager, consultant, independent contractor, co-venturer, lender, financier, agent, representative or otherwise, in a Competing Business, or otherwise hold any interest in a Competing Business.
- 3. <u>Non-Solicitation of Employer's Employees and Consultants</u>. At all times during which Employee is employed by Employer and during the period commencing on the date of the termination of Employee's employment with Employer and ending five years after such date, Employee may not directly or indirectly solicit, request, cause or induce any person who, at any time during the foregoing time period, is an employee, agent, or representative of or a consultant to Employer to leave the employ of or otherwise terminate that person's relationship with Employer.
- 4. <u>Non-Solicitation of Customers and Other Persons and Entities</u>. At all times during which Employee is employed by Employer and during the period commencing on the date of the termination of Employee's employment with Employer and ending five years after such date, Employee may not, directly or indirectly:
 - 4.1. solicit, induce or knowingly attempt to induce any current or prospective customer, partner, reseller, distributor, client or supplier of Employer to cease doing business in whole or in part with Employer; or
 - 4.2. knowingly attempt to limit, undermine, disrupt or interfere with any business engagement or relationship relating to the Business existing between Employer on the one hand, and any third party on the other hand.

As used in this Section 4, "current" customers, partners, clients, and suppliers includes persons or entities doing business with Employer during all times which Employee is employed by Employer and during the period commencing on the date of the termination of Employee's employment with Employer and ending five years after such date. "Prospective" customers, partners, clients, and suppliers include any and all persons or entities that engage the services of an outside person or entity for the performance of services similar to the Business of Employer.

5. <u>Confidential Information: Non-Disclosure and Non-Use of Confidential</u>

<u>Information.</u> Employee agrees that due to the nature of Employee's association with Employer, Employee will possess trade secrets and other confidential and proprietary information (including the identity of customers, partners, resellers, distributors, clients and suppliers) relating to the Business of Employer. Employee acknowledges that such information is of extreme importance to the Business and the goodwill of Employer and that disclosure of such confidential information to others or the unauthorized use of such information by others would cause

Non-Compete, Non-Solicitation, Confidentiality, Non-Disclosure, and Non-Use Agreement Page 3 of 7 substantial loss and harm to Employer, including, but not limited to, significant financial loss and the loss of goodwill and other intangible assets.

- 5.1. Protection of Confidential Information. Employee may not, directly or indirectly, at all times during which Employee is employed by Employer and during the period commencing on the date of the termination of Employee's employment with Employer and ending five years after such date, use Confidential Information in any fashion or manner or disclose Confidential Information to any person not authorized by Employer to receive it, except that Employee may disclose Confidential Information to any governmental or regulatory authority to which he is subject, but only pursuant to subpoena or court order. However, in such instance, Employee shall provide notice to Employer of any such disclosure, within three days of Employee's receipt of such subpoena or court order, and Employee shall allow Employer to defend against, and take such defense to final judgment or determination, prior to any disclosure of Confidential Information by Employee.
- 5.2. Return of Confidential Information. On the date of termination of Employee's employment with Employer, or sooner if requested by Employer, Employee will promptly turn over to the Employer all documents, records, electronically stored information, and any compositions, articles, devices, apparatus, computers, hand held devices, cellular phones, hard drives, flash drives, and other items that disclose, describe, contain, store, or embody Confidential Information, including all copies, reproductions, and specimens of the Confidential Information in Employee's possession or control, regardless of who prepared them.
- 6. Restrictions Reasonable and Product of Negotiation. Employee represents and agrees that Employee has had the opportunity to be fully advised by legal counsel of Employee's own choosing in connection with this Agreement, and Employee agrees to be fully bound by the restrictive covenants and the other agreements contained in this Agreement. Accordingly, Employee agrees that it is the intent and spirit of the parties that the restrictive covenants and the other agreements contained herein shall be valid and enforceable in all respects.
- 7. Remedies. Employee acknowledges and agrees that compliance with the covenants and restrictions set forth in this Agreement is necessary to protect Employer's Business, goodwill, contacts, trade secrets, and Confidential Information and that a breach shall irreparably and continually damage Employer for which money damages might be inadequate. Consequently, if Employee breaches or threatens to breach any of the covenants or promises set forth in this Agreement, Employer shall be entitled, without the necessity of posting a bond or other similar security or without an actual showing of irreparable harm, to preliminary and permanent injunction to prevent the continuation of Employee's breach or threatened breach of the covenants and promises set forth in this Agreement. In addition to injunctive relief, Employer is entitled to recover liquidated damages from Employee for breaches of the covenants and promises set forth in this Agreement in the amount of \$5,000.00 per incident of breach or the actual damages proven by Employer, whichever amount is greater. Regardless of the remedy or

damages being pursued, Employer is also entitled to recover from Employee all attorneys' fees and costs incurred in enforcing this Agreement and pursuit of any and all remedies and/or damages hereunder. Nothing in this Agreement shall be construed to prohibit Employer from pursuing any other remedy, whether at law, in equity, or otherwise.

8. Miscellaneous.

- 8.1. <u>Survival</u>. All of the provisions of this Agreement, including, but not limited to Section 1 through and including Section 7, as well as any other provisions related to and/or necessary to enforce the provisions of Section 1 through and including Section 7 shall survive the termination of this Agreement and the termination of Employee's employment by Employer.
- 8.2. At-Will Employment: Termination. Nothing in this Agreement is intended to provide nor shall this Agreement provide Employee with any contractual rights to employment for any period of time. Employee and Employer acknowledge and agree that the employment relationship between Employer and Employee is strictly "at-will." This means that either Employee or Employer may, at any time, for any or no reason, with or without notice, terminate the employment relationship between Employee and Employer, except that Section 1 through and including Section 7 and any other provisions of this Agreement necessary to enforce such post-termination rights and obligations shall survive termination of Employee's employment by Employer and shall survive the termination of this Agreement.
- 8.3. <u>Reformation</u>. In entering into this Agreement, the parties intend that it fully comply with the requirements of SDCL § 53-9-11 in all respects including, but not limited to, geographic and temporal restrictions. To the extent that this Agreement is found to not comply with SDCL § 53-9-11 by a court of competent jurisdiction, then the parties agree that this Agreement shall be enforced to the fullest extent possible within the bounds of SDCL § 53-9-11.
- 8.4. Governing Law. This Agreement, including its validity, interpretation and enforcement, and the rights and obligations of the parties hereunder, shall be governed by the laws of the State of South Dakota (without giving effect to the conflicts of laws provisions thereof). Employee consents to the exclusive jurisdiction and venue of, and expressly consents to be sued in, the appropriate state and federal courts sitting in South Dakota, regardless of the Employee's existing or future residences, with respect to any action, suit, or proceeding arising out of or in connection with this Agreement.
- 8.5. <u>Costs and Fees</u>. Employee shall reimburse and pay to Employer all of Employer's actual costs and fees (including, but not limited to, attorneys' fees) incurred by Employer in any suit arising out of, in connection with, or to enforce any terms of this Agreement.

- 8.6. Severability. In the event that any one or more of the provisions contained herein is held invalid, illegal or unenforceable in any respect for any reason in any jurisdiction, the validity, legality and enforceability of any such provision in every other respect and of the remaining provisions hereof shall not be in any way impaired or affected, it being intended that each of the parties' rights and privileges shall be enforceable to the fullest extent permitted by all applicable laws, and any such invalidity, illegality and unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.
- 8.7. <u>Successors and Assigns</u>. This Agreement and all covenants and agreements set forth herein shall inure to the benefit of the successors and assigns of Employer.
- 8.8. <u>Descriptive Headings</u>. The headings of the sections and paragraphs of this Agreement have been inserted for convenience of reference only and shall not be deemed to be part of this Agreement.
- 8.9. <u>Amendment: Assignment.</u> This Agreement may not be amended except by an instrument in writing signed by the parties hereto. This Agreement and any rights hereunder, may be assigned by Employer.
- 8.10. Entire Agreement. Except as to any later amendment hereto that complies with Section 8.9, this Agreement is complete, and all promises, representations, understandings, warranties and agreements with reference to the subject matter hereof, and all inducements to the making of this Agreement relied upon by the parties hereto, have been expressed herein. This Agreement supersedes any prior discussion, negotiations, and agreements, whether oral or written, between the parties with respect to the subject matter hereof.
- 8.11. Counterparts. This Agreement may be executed in any number of counterparts and by the parties hereto on separate counterparts, each of which when so executed and delivered shall be an original, but all of which together shall constitute one and the same instrument.

(signature page follows)

Employer

DT-Trak Consulting, Inc.

Téo

Employee

Rema J. Kolda (Print Namo)

Remo (Signature)

Apni

(Signature)



EVERYTHING YOU NEED TO GET STARTED IN MEDICAL BILLING & CODING

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What is Morlical Effling & Coding

What is windical Coding?

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Advice

2.05:100-10-CM

ICD-10-CM is a vastly expanded set of diagnosis codes that a set to replace ICD-9-CM in 2015. While these code sets share a number of simulatities, ICD-10-CM is different in its format and organization. The course will reach you what ICD-10-CM is and will give you a foundation for using it at exceptly coding.

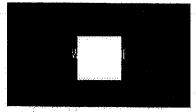
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•October 1, 2014 is t.

idline for the upgrade

Coders should be able to move freely between sets



Section 2.01
Learn More About Medical Coding

Land Control of Contro

Section 2.02
Medical Coding Vocabulary & Ke...

THE CHANGE OVER FROM ICD-9-CM TO ICD TOCM

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Section 2.05 ICD-10-CM

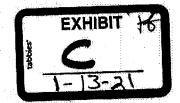
STUDY TOOLS:

Review and keep track of what you've learned by downloading the slides for this lesson.

2.05: ICD-10-CM

LAYOUT AND ORGANIZATION

ICD-10-CM is a seven-character, alphanumeric code. Each code begins with a let e that letter is followed by two numbers. The first three characters of ICD-10-CM a



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"category." The category describes the general type of the injury or disease. The category is followed by a decimal point and the subcategory. This is followed by up to two subclassifications, which further explain the cause, manifestation, location, severity, and type of injury or disease. The last character is the extension.

The extension describes the type of encounter this is. That is, if this is the first time a healthcare provider has seen the patient for this condition/injury/disease, it's listed as the "initial encounter." Every encounter after the first is listed as a "subsequent encounter." Patient visits related to the effects of a previous injury or disease are listed with the term "sequela."

To review: the first digit of an ICD-10-CM code is always an alpha, the second digit is always numeric, and digits three through seven may be alpha or numeric. Here's a simplified look at ICD-10-CM's format.

"Ao1 - {Disease}"

- · A01.0 [Disease] of the lungs
 - A01.01 ... simple
 - · A01.02 ... complex
 - A01.020 ... affecting the trachea
 - A01.021 ... affecting the cardiopulmonary system
 - · A01.021A ... initial encounter
 - A01.021D ... subsequent encounter
 - * A01.021S ... sequela

The ICD-10-CM code manual is divided into three volumes. Volume I is the tabular index. Volume II is, again, the alphabetic index. Volume III lists procedure codes that are only used by hospitals. (We won't be covering ICD-10-CM Volume III codes in these courses).

ICD-10-CM is divided into ranges based on the type of injury or disease they document. For a breakdown of the ICD-10-CM coding manual download our ebook.

Range	Topic	
A00- B99	Certain infections and parasitic diseases	((111) 100 100 400 1
C00- D49	Neoplasms	
D50- D89	Diseases of the blood and blood-forming organs and certain disorders involving the immune mechanism	
E00- E89	Endocrine, nutritional and metabolic diseases	
F01- F99	Mental, Behavioral and Neurodevelopmental disorders	
G00- G99	Diseases of the nervous system	
Hoo-	Diseases of the eye and adnexa	7

H59	The state of the s
л59 	
H60- H95	Diseases of the ear and mastoid process
100- 199	Diseases of the circulatory system
J00- J99	Diseases of the respiratory system
K00- K95	Diseases of the digestive system
L00- L99	Diseases of the skin and subcutaneous tissue
Moo- M99	Diseases of the musculoskeletal system and connective tissue
N00- N99	Diseases of the genitourinary system
000- 09A	Pregnancy, childbirth, and puerperium
P00- P96	Certain conditions originating in the perinatal period
Q00- Q99	Congenital malformations, deformations and chromosomal abnormalities
R00- R99	Symptoms, signs, and abnormal clinical laboratory findings, not elsewhere classified
S00- T88	Injury, poisoning, and certain other consequences of external causes
V00- Y99	External causes of morbidity
Z00- Z99	Factors influencing health status and contact with health services

Below, we've provided an example to show the levels of detail to which ICD-10 codes can go.

ICD-10-CM

Injury: Closed fracture of distal phalanx of right index finger

 ${\bf Soo-T88-Injury, poisoning\ and\ certain\ other\ consequences\ of\ external\ causes {\bf S60-Injury, poisoning\ and\ certain\ other\ consequences\ of\ external\ causes {\bf S60-Injury, poisoning\ and\ certain\ other\ consequences\ of\ external\ causes {\bf S60-Injury, poisoning\ and\ certain\ other\ consequences\ of\ external\ causes {\bf S60-Injury, poisoning\ and\ certain\ other\ consequences\ of\ external\ causes {\bf S60-Injury, poisoning\ and\ certain\ other\ consequences\ of\ external\ causes {\bf S60-Injury, poisoning\ and\ certain\ other\ consequences\ of\ external\ causes {\bf S60-Injury, poisoning\ and\ certain\ other\ consequences\ of\ external\ causes {\bf S60-Injury, poisoning\ and\ certain\ other\ consequences\ of\ external\ causes {\bf S60-Injury, poisoning\ and\ certain\ other\ consequences\ of\ external\ causes {\bf S60-Injury, poisoning\ and\ certain\ other\ consequences\ of\ external\ causes {\bf S60-Injury, poisoning\ and\ certain\ other\ consequences\ of\ external\ causes {\bf S60-Injury, poisoning\ and\ certain\ other\ consequences\ of\ external\ causes {\bf S60-Injury, poisoning\ and\ certain\ other\ consequences\ of\ external\ causes {\bf S60-Injury, poisoning\ and\ certain\ other\ consequences\ of\ external\ causes {\bf S60-Injury, poisoning\ and\ certain\ other\ certain$

S69 - Injuries to the wrist, hand and fingers

- S62 Fracture at wrist and hand level
 - S62.0 fracture at navicular [scaphoid] bone of wrist
 - o ...
 - S62.5 fracture of thumb
 - \$62.6 fracture of other and unspecified finger(s)



- S62.60 fracture of unspecified phalanx of finger
- S62.61 displaced fracture of proximal phalanx of finger
- .
- S62.63 displaced fracture of distal phalanx of finger
 - S62.630 Displaced fracture of distal phalanx of right index finger
 - S62.630A ... initial encounter for closed fracture
 - \$62.6308 ... Initial encounter for open fracture
 - S62.630D ... initial encounter for fracture with routine healing
 - Etc.

As you can clearly see, ICD-10-CM allows coders to code to a high level of specificity. ICD-10-CM also documents laterality—which side the injury or infection is on—and substantially increases the amount of information about the diagnosis.

CONVENTIONS

Aside from its format and organization, ICD-10-CM makes use of a number of conventions that help guide the coder to correct diagnosis codes. Some of these conventions include:

- Brackets []
- Parentheses ()
- · "Includes"
- · "Excludes"
 - There is a slight variation here: ICD-10-CM includes two types of "Excludes" conventions
 - Excludes: lists codes that should never be coded with the code listed above. You can think of this as a "hard excludes."
 - Excludes2: lists other codes for conditions/injuries that may be a part
 of the condition, but are not included here. This is more of a "soft
 excludes." An Excludes2 note functions similarly to a "See Also" note
- "Code first"
- "Use Additional Code"
- "In Disease Elsewhere Classified"
- "See"
- "See Also"
- "Not Elsewhere Classified"
- · "Not Otherwise Specified"

ICD-10-CM's Excludes notes have been divided into two 'levels.' Excludes informs coders that the codes listed in the note may not, in any circumstance, be listed with the code that contains the Excludes note. For example, you might find something that looks like this:

- A12 {Disease} A
 - Excludes1
 - {disease} B, {disease} C



The conditions listed in an Excludes1 note are mutually exclusive with the main condition the coder is looking up. An Excludes1 note informs the coder that if the code they are looking up is in the Excludes1 note, the coder cannot, under any circumstances, use the code that houses the note. That is, if a medical coder is looking for {disease} B, but thinks the code for {disease} A would be appropriate, the Excludes1 note would direct her to look elsewhere besides {disease} A.

Excludes 2 is the other Excludes note. An Excludes 2 note indicates that the code above the note does not include the other conditions listed below the note. Let's take another look at our simplified example.

- A12 {Disease} D
 - Excludes2
 - {disease} E, {disease} F

This Excludes2 note means that while Diseases E and F might be pertinent to or related to Disease D, they're not found in the same code as Disease D. Unlike Excludes1, you can code conditions found in an Excludes2 note with the condition above the note. You can think of Excludes2 as sort of like "See Also," while an Excludes1 note is more like a "See" note.

ICD-10-CM has another important convention that has to do with the code's extensions. Remember, extensions typically provide information what encounter this is for the healthcare provider with the patient. These are not always included, but in the case that they are, they cannot simply be appended to the end of whatever code is attached. Extensions are only found in the seventh character of an ICD-10-CM code.

If a coder has to include an extension for an initial encounter on a code that does not have six characters, they must add placeholder characters. Coders use an 'X' for the placeholder digit.

If, for example, a coder needs to code an instance of poisoning by unintentional underdosing of antibiotic penicillin, the coder would use T36.0X1A. In this case, the fifth digit is empty, and so we'd use the placeholder character 'X.' Remember that placeholder characters are only used when an extension is necessary. Most ICD-10 codes do not include an extension for the encounter.

HOW TO USE ICD-10-CM

The coding process begins with the analysis and abstraction of a medical report. Using their notes from the report, the coder may go straight to the tabular section or may refer to the alphabetic section to find the correct code, and then confirm it in the tabular.

Let's take a look at an example.

Patient is 44-year-old Caucasian male. Self reported height and weight 1,8m and 80 kg. No notable medical history.

Patient presents with a red rash around the nose and labial folds. Some yellowish-reddish pimples. Patient complains of itching and flaking skin. Patient says rash emerged two months



ago but then subsided. Diagnosed patient with seborrheic dermatitis and prescribed a topical antifungal medication.

In order to code this relatively straightforward visit, the coder would first abstract the information in the doctor's report. The patient shows one very specific symptom (a rash on the face), and the doctor is able to make a positive diagnosis: seborrheic dermatitis.

The coder could look this up in the alphabetic index, or turn to the section in the tabular index for diseases of the skin or subcutaneous tissue: Loo-Loo. From there the coder would look for dermatitis and eczema and find L21: "seborrheic dermatitis."

Underneath that category we'd find four subcategories. We'd select the one that best describes the condition diagnosed by the physician, which in this case would be L21.9, "Seborrheic dermatitis, unspecified." We use "unspecified" here because the other codes for seborrheic dermatitis pertain either to infants or describe an "other" seborrheic dermatitis. In this case, "unspecified" is our best option.

Let's look at the tree of codes for this diagnosis code.

LOO-L99 - DIBEASES OF THE SKIN AND SUBCUTANEOUS TISSUE

- L21 Seborrheic Dermatitis
 - L21.0 Seborrhea capitis
 - L21.1 Seborrheic infantile dermatitis
 - L21.8 Other seborrheic dermatitis
 - o L21.9 Seborrheic dermatitis, unspecified

You'll note that this ICD-10-CM code doesn't have any subclassifications or extensions. Remember, not all codes need to go to the level of specificity that ICD-10-CM provides. In this case, the fourth digit is all that's needed to describe the diagnosis.

FURTHER EXPLORATIONS

Let's look at another example, this time an injury. Injuries often have extensions that document the encounter because the stage of treatment (whether it has not been treated, as in an initial encounter, or has already received treatment, as in a subsequent encounter) can greatly impact the medical necessity on a claim.

"Patient presents with bruising and a swollen nose and cheek after contact in a rugby match. Patient has not lost consciousness. Examination shows no rupture of the skin on the face. X-rays confirm a type II Le Fort fracture [a Le Fort fracture is one of three fractures of the bones in the face, including fractures the lower and mid maxillary bones and the zygomatic arch/cheek bone]."

We know right off the bat that this is an injury code, so we can start searching in the ICD-10-CM injury codes, found in Soo-T88: "Injury, poisoning and certain other consequences of external causes." From there we'd winnow our search to Soo-Soo, "Injuries to the head."

Within that subfield of codes, we'd find So2, "fracture of the skull and facial bones." We could also go about this by looking up a Le Fort fracture in the alphabetic index. As



mentioned in the note above, a Le Fort fracture can be one of three fractures to the facial bones and skull. According to the medical report, we're looking for a Type II Le Fort fracture.

Below So2, we'd find a number of subcategories, including codes for fractures of the vault and base of the skull, fractures of the nasal bones, and fractures of the orbital floor. We're looking for a very specific type of fracture, however, one that involves the maxillary and zygoma bones of the face. Thankfully, there's a specific subcategory for this: So2.4, "fracture of the malar, maxillary and zygoma bones."

Once in this subcategory, we'd find a subclassification for Le Fort fractures (So2.4), and then three more subclassifications for each type of Le Fort fracture (So2.41). We'd select the code for our Type II Le Fort fracture: So2.412. Since this is the doctor's first encounter with this injury, we'd use the initial encounter extension 'A,' and would end up with: So2.412A, "Le Fort type II fracture, closed, initial encounter."

Now let's look at the code tree to see how we got there.

SOD-TBB – INJURIES, POISONINGS AND CERTAIN OTHER CONSEQUENCES OF EXTERNAL CAUSES

- S02 Fracture of skull and facial bones
- S02.0 Fracture of vault of skull
- So2.1 Fracture of base of skull
- S02.2 Fracture of nasal bones.
- •
- · So2.4 Fracture of malar, maxillary and zygoma bones
- So2.40 Fracture of malar, maxillary and zygoma bones, unspecified
- So2.41 Le Fort fracture
 - S02.411 Le Fort I fracture
 - So2.412 Le Fort II fracture
 - S02.412A ... initial encounter for closed fracture
 - S02.412B ... initial encounter for open fracture
 - S02.412D ... subsequent encounter for fracture with routine healing
 - · Etc.

In the next few courses, we'll introduce you to CPT codes, HCPCS codes, and their modifiers. These codes, along with the ICD codes you've just learned about, make up the heart of the medical coding profession.

Prev Section - 2.03

Next Section - 2.06

JUMP TO A DIFFERENT SECTION:

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In The Matter Of:

DT-Trak Consulting, Inc., a South Dakota Corporation v. Defendant Kolda, an individual

> Renae Aalbers January 14, 2021 Confidential

Frantzen Reporting

Original File 011421Aalbers.txt
Min-U-Script® with Word Index

- protocol that would be specific to that specific site.
 - O Specific what?

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- A Site. Sorry. Contract.
- Q So if we have customer A, B, and C, most -- we would have a separate and specific protocol for customer A that would not be like customer B, and C's would not be like A or B. It would be independent and distinctive. Is that a fair conclusion?
- 10 A Roughly correct.
- 11 Q There would be some overlapping?
- 12 A That was my point. Of course. Some -- two sites may
 13 do something exactly alike or two sites may always do
 14 something exactly different.
 - Q Okay. And is the protocol a living thing? Is it something that changes regularly?
- 17 A Correct.
- 18 Q It can change daily, can't it?
- 19 A Absolutely.
- Q In fact, you've had some that have changed not only daily, but weekly and monthly?
- 22 A Correct.
- Q Are you aware, are there any -- what I've categorized
 as cheat sheets, but what -- basically they're
 abbreviated notes that a coder can use instead of

Paige K. Frantzen Paige.Frantzen@gmail.com



having to look at the exact full protocol so that they can properly do the work for a particular customer?

A No.

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- 5 Q You ever heard of anything called a cheat sheet?
- 6 A For coding?
- 7 Q For coding.
- 8 A Correct. Not for a facility-specific item, no.
- 9 Q Have you ever heard of that phrase, "cheat sheet,"
 10 for anything else at DT-Trak?
- 11 A For coding.
- Q For coding. What's that, then? Explain what that is.
 - As a certified coder, you have three different books that you live and breathe out of. And ICD-10 now, CPT, and HCPCS. So as you become a coder, you learn things. So you might find out that this specific type of diagnosis, it's really hard to find, links to this specific diagnosis code, so you would make a cheat sheet so that you wouldn't have -- because you're not going to remember that probably three months later when you're finding that again. So you would take and make a cheat sheet as far as coding goes.

Same with CPT. Same way with HCPCS. Yes,

- absolutely a cheat sheet in those avenues.
- Q So the cheat sheet doesn't relate to the protocol, it relates to the coding?
 - A In my -- in what I understand of what you're asking, correct.
 - Q I'm just trying to figure it out because I don't know. I just know that there's things called cheat sheets. As I understand it, it's -- okay, if I got customer A and we have a protocol and customer A does a lot of emergency room type stuff, my cheat sheet is to help me code appropriately without having to do a lot of research to figure out what code to use?
 - A That's coding. That's what I explained.
- 14 Q That's what you just said and that's what it's for?
- 15 A In what I understand you're asking, correct.
- Q Okay. Is there anything else that you might use something called a cheat sheet for?
- A Not to my knowledge. From -- for me, to my knowledge.
- Q Cheat sheet is probably not a very good slang to use for it. It's really just an abbreviated guide of the codes, isn't it?
- 23 A I --

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Q What's your best explanation? I mean, other than what you just told me, is there some verbiage I

Confidential

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1	STATE OF SOUTH DAKOTA) IN CIRCUIT COURT:	
2	COUNTY OF HAND) THIRD JUDICIAL CIRCUIT	
3	DT-TRAK CONSULTING, INC., a South 29CIV19-000030	
4	Dakota Corporation,	
5	Plaintiff,	
6	-vs-	
7	REMA KOLDA, an individual,	
8	Defendant.	
9	Hand County Courthouse Miller, South Dakota	
10	January 14, 2021 9:30 a.m.	
11		
12	* * * * * * * * * * * * * * * * * * * *	
13	DEPOSITION OF	
14	NATALIE BERTSCH	
15	* * * * * * * * * * * * * * * * * * * *	
16	APPEARANCES: Mr. Sander J. Morehead	
17	Woods, Fuller, Shultz & Smith 300 South Phillips Avenue	
18	Suite 300 Sioux Falls, South Dakota 57104	
19	Attorney for the Plaintiff;	
20 21	Mr. Timothy R. Whalen Whalen Law Office, P.C.	
22	P.O. Box 127 Lake Andes, South Dakota 57356	
23	Attorney for the Defendant.	
24	nocorney for one berondance.	
25		

happen to find it.

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- Q It's basically by happenstance, isn't it?
 - A Well, it's basically we trust our people. Even when people leave, most people are up front with us.
 - We've been doing this almost 19 years. We don't have a lot of people that lie and are deceitful to what their intentions are. And the ones that did want to be allowed, they asked us.
 - Q So the primary business of DT-Trak is -- correct me if I'm wrong -- medical coding, billing services; correct? Those two?
- 12 A So far so good.
- 13 Q And then I believe in your pleadings there were
 14 identification -- or it was stated as other services
 15 that DT-Trak may perform. That's the phrase I took
 16 from the pleadings, your complaint. What are the
 17 other services?
 - A Accounts receivable, compliance auditing, revenue cycle analysis, workflow analysis. We also do medical staffing, staffing positions, and we do PPE supplies.
- 22 | Q What?
- 23 A PPE supplies for COVID.
- Q Is that a recent thing or is that something that you've done before?

- A That is fairly recent.
- Q Okay. How many customers or clients does DT-Trak

 have? I don't need to know their names, just a
- 4 number.

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- 5 A I would say 40 to 50.
 - Q And those are all Indian Health Service facilities,

 private hospitals, or other medical service

 providers. Is that a fair statement?
- 9 A Indian Health Service, tribal, and private healthcare 10 facility.
- 11 Q You don't provide any services to, for instance, a

 12 real estate outfit? They don't fall within the

 13 purview of DT-Trak's services; correct?
- 14 A Correct.
- Q When did you start -- did you -- were you one of the original incorporators of DT-Trak?
- 17 A I was.
- 18 Q Who else was an original incorporator?
- 19 A Jewel Kopfmann.
- 20 Q Just the two of you?
- A We started a company by the name of Priority One
 Coding Services and then later we made Datatrak
 Consulting.
- Q And you said that Datatrak has been in business for about 19 years?

A About 18 and a half.

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- Q Okay. So exactly what is the medical coding?
 What -- explain that.
 - A It's assigning alpha numeric identifiers that drive reimbursement, statistic analysis, and revenue generation, continuity of patient care.
 - Q So when I get my explanation of benefits and my insurance company says this service isn't covered and I call my insurance company and complain and they say, Well, it's coded wrong. Is that what they're talking about? This code, when they tell me it's coded wrong from the medical supplier, is that what they're referring to, that medical coding?
- 14 A It can be.
- Okay. And sometimes they'll send it back and say,
 We'll talk to the medical provider, and then they
 say, Well, we'll recode it because there was a
 mistake made in the coding, and then I might get my
 bill paid by my insurance company. Is that -- am I
 on the right track when I explain that?
 - A Yeah, that's how it can work.
- Q What exactly do you do by way of billing services?

 Is it affiliated with coding or is it something

 completely separate from the coding?
- 25 A It depends on the facility contract. Some facilities

1	STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2	COUNTY OF HAND) THIRD JUDICIAL CIRCUIT * * * * * * * * * * * * * * * * * * *
3	THE TRAIT GOVERNMENTS THE THE COURT 200TV10 000020
4	DT-TRAK CONSULTING, INC., a South 29CIV19-000030 Dakota Corporation,
5	Plaintiff,
6	-vs-
7	REMA KOLDA, an individual,
8	Defendant.
9	Hand County Courthouse
	Miller, South Dakota January 13, 2021
10	10:00 a.m.
11	LO. OO C. III.
12	* * * * * * * * * * * * * * * * * * * *
13	DEPOSITION OF
14	REMA KOLDA
15	* * * * * * * * * * * * * * * * * * * *
16	APPEARANCES:
17	Mr. Sander J. Morehead Woods, Fuller, Shultz & Smith 300 South Phillips Avenue
18	Suite 300
19	Sioux Falls, South Dakota 57104
20	Attorney for the Plaintiff;
	Mr. Timothy R. Whalen
21	Whalen Law Office, P.C. P.O. Box 127
22	Lake Andes, South Dakota 57356
23	Attorney for the Defendant.
24	ALSO PRESENT: Natalie Bertsch
2 5	

- 1 A Not exactly Exhibit 7. Like I said, there was
- 2 more than one of these non-compete confidentiality
- 3 agreements, and I know that during one of them
- 4 Natalie Bertsch had them and went around and just
- 5 had everybody sign one. And I asked if I could take
- 6 it overnight and read it and review it, and she
- 7 said, "No. You don't need to. Just sign it."
- 8 Q You don't remember whether that was Exhibit 7
- 9 that we're talking about, though?
- 10 A It could have been Exhibit 7 or it could have
- 11 been the other non-compete confidentiality
- 12 agreements.
- 13 Q So sitting here today, you just don't remember
- 14 which agreement it was that you were talking about
- 15 that Natalie brought it?
- 16 A Yes. It was one of them.
- 17 Q So is that a yes, you don't remember which one?
- 18 A I do not recall which one, but I remember it
- 19 being said.
- 20 Q No. I'm talking about which document was being
- 21 talked about.
- 22 A Like I said, I do not remember which document.
- 23 Q Okay.
- 24 A I just know that it was one of the non-compete
- 25 confidentiality agreements.

- 1 Q You said one of the non-compete and
- 2 confidentiality agreements, so it sounds like this
- 3 was a type of document you were familiar with while
- 4 you were at DT-Trak.
- 5 A I was not ever able to review them.
- 6 Q Okay. At the time you signed Exhibit 7 --
- 7 well, let's back up. Exhibit 2, remember we talked
- 8 about that, the "Employee Confidentiality and Unfair
- 9 Competition Agreement"?
- 10 A Yes.
- 11 Q Okay. When it was presented to you, do you
- believe you would have at least seen that it was
- 13 called a "Confidentiality and Unfair Competition
- 14 Agreement"?
- 15 A I probably would have been able to read the
- 16 top.
- 17 O Okay. Are you saying that you didn't know what
- any of the terms of Exhibit 2 were when you signed
- 19 it?
- 20 A I was not able to read it.
- 21 | Q Okay.
- 22 A I was not allowed to read it.
- 23 Q Sorry. Go ahead and finish your answer.
- 24 A I was not allowed to read it.
- 25 Q Do you independently remember signing



Exhibit 2? 1 I remember signing documents that we were not 2 A 3 allowed to read. Okay. And you've said that multiple times. 4 I'm just talking about Exhibit 2 specifically right 5 now. Okay? 6 And I believe I've answered that. 7 So you don't remember signing Exhibit 2; 8 9 correct? I believe I've answered that by saying I was 10 never -- I was not allowed to read the documents. Ι 11 was told to sign or you do not have a job. 12 I understand that, but my question is a little 13 different. My question is: Exhibit 2, do you 14 remember signing it, this specific document? 15 I have already -- I have already stated that. 16 Α Is it fair to say your answer is no, sitting 17 here today, you do not remember signing Exhibit 2? 18 19 I have already stated my comment. MR. MOREHEAD: Can we go off the record for a 20 21 moment? 22 MR. WHALEN: Let me talk to her. (A brief recess was taken.) 23 MR. WHALEN: We're ready to go back on the 24 25

record.

- A -- and passed it.
- Q Do you remember roughly when that was?
- 3 A It had to have been in January of 2006.
- Q Okay. So it was about 2006 you became a
- 5 certified professional coder?
- 6 A Yes.

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- Q Okay. Moving to the next one, it says "Indian Health Service." Do you see that certificate?
- 9 A Yes.
- 10 Q Can you explain to me what this is?
- 11 A This is a security awareness training that each
- 12 employee, if working for -- in the Indian Health
- 13 Service, needs to take. It's a yearly training.
- 14 It's on a computer. You go on and you listen to a
- 15 webinar, like, little training that you have to --
- 16 that you will keep your access/verify codes secure,
- 17 that you will not share them, you will keep them so
- 18 nobody else sees them, nobody else can use them.
- 19 It's basically the HIPAA compliance.
- 20 Q So if somebody's going to be a coder and they
- 21 | want to do work for Indian Health Service, this
- 22 certificate relates to the training they have to do
- 23 if they want to do that?
- 24 A Yeah. It's about an hour, hour and a half each
- 25

year.

- 1 was.
- Q But you were the one, in any event, who for
- 3 some of the employees was checking their work and
- 4 letting them know how they were doing?
- 5 A I was one of them. Sorry.
- 6 Q That's okay. Letting them know how they were
- 7 doing?
- 8 A Yes. I was one of the auditors for a period of
- 9 time. But during this, I was not.
- 10 Q Okay. So at this time in August of 2015 you
- 11 must have been in quality assurance by then?
- 12 A I was no longer in quality assurance in 2015.
- 13 Q Okay. I missed something. Why would you have
- 14 been working on audits, then?
- 15 A I was not working on audits. The QA staff at
- 16 that time was doing audits. And then because of
- 17 this mass hiring --
- 18 O Got it.
- 19 A -- of 40 to 50 coders during that time, I was
- 20 directed to help do this, but I was still being paid
- 21 as a coder and working as a coder.
- 22 Q Got it. So these e-mails back and forth
- 23 between you and Jewel Kopfmann and Natalie Bertsch,
- Renae Aalbers and others, was this a common way of
- 25 communicating with management at DT-Trak?

- 1 A Yes.
- Q By this point were you working --
- 3 A During this period.
- Q Okay. By this point were you working pretty
- 5 much remotely by 2015?
- A I was working remotely, but I needed to come
- 7 into the office during this summer -- spring and
- 8 summer to help this out, and then I had to do my
- g coding at the same time.
- 10 Q Okay. Leaving aside the special training, how
- 11 frequently -- once you went remote, how frequently
- would you have to come into the office of DT-Trak?
- 13 A Not with this training?
- 14 O Not with this training.
- 15 A During this time, I was able to stay at home.
- 16 Q You didn't have to come in at all?
- 17 A No.
- 18 O And how often would you speak with management
- 19 on the telephone?
- 20 A When they called me to chew my butt --
- 21 Q Okay.
- 22 A -- and to degrade me.
- 23 O And how often was that?
- 24 A There were so many times that it was -- it's
- 25 hard to say.

- Q Once a week?
- 2 A Oh, two or three.
- Q Okay. So you would have communicated with
- 4 management in some form or fashion by telephone a
- 5 couple times a week?
- 6 A They would call me.
- 7 Q Okay.

- A And they would call other coders, too, to tell
- 9 them how bad they were coding and couldn't believe
- that we would be -- that we wouldn't be able to get
- 11 jobs anywhere else and we better be happy that we're
- 12 here.
 - 13 Q Okay.
 - 14 A And then they would turn around and in front
 - of -- like an example -- in front of my husband
 - 16 Natalie would say, "Oh, Rema is such a great coder.
 - We wouldn't know what to do without her," but then
 - 18 turn around and call me later and tell me what a bad
 - 19 coder I am.
 - 20 O Okay. So that's a yes, two or three calls a
 - 21 week with management?
 - 22 A Yes.
 - 23 Q Okay. Turning to Exhibit 18, it looks like
 - it's Bates numbered DT60 -- wait a minute, I need my
 - 25 glasses -- 160 to 161. It looks like Kathy Andersen

- sent you an updated employee handbook and asked you to sign it; is that fair?
- A Yes.

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- Is that pretty common how you would receive documents from management as of 2015? 5
 - I asked a bad question. Was it pretty common or the usual practice that you would receive the new version of the employee handbook by e-mail?
- 9 Α Yes.
- And you typically had to complete and 10 Q sign a form, it looks like; correct? 11
- Similar to, yes, the electronic signatures. 12 Α
- Like they did with the 2012 one; right? 13 Q
- 14 A Yes.
- Now, back in 2012 I saw that that was 15 electronic signatures. Do you think you were 16
- getting things by e-mail then? 17
- Yes. 18
- When did you start working primarily remotely 19 for DT-Trak? 20
- I would have to say it was about the fall of 21 2013. 22
- And then Exhibit 19, just to follow up, 23 Okay.
- this is dated March 17 of 2016. It looks like 24
- 25 you're acknowledging receipt of an employee

1 call --

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- Q Can I just ask one thing here?
- 3 A Yes.
- 4 Q I'm not trying to interrupt. I want you to go
- 5 ahead. We've been talking about a call between you
- 6 and Natalie Bertsch --
- 7 A Yes.
- 8 Q -- that your husband witnessed.
- 9 A And I'm going to explain that.
- 10 Q That's the one you're talking about now?
- 11 A Yes.

afternoon.

- 12 Q Just wanted to make sure.
- A She called me telling me -- it was in the
- until 2:30, so it had to have been after 2:30. He

My husband was home from work.

- was sitting in the living room. Natalie Bertsch
- 17 called me, started telling me about how bad I was
- 18 coding on a facility and that they were going to
- 19 lose a contract because of me.
- I explained I don't recall working on that
- 21 facility at that time. And she goes, "Well, you had
- 22 to have, and then started yelling at me. And I
- 23 said, "Somebody has to be using my access because
- 24 I'm not -- that's not the facility I'm working," and
- 25 just going on. I was calm through the whole thing.



My husband can witness to that.

I put -- because of the yelling and screaming of Natalie, I put her on speaker. My husband heard all of it. I looked at him and I asked him if I could please resign, quit at DataTrak. I can't do it anymore. I can't take the degrading. And he said, "Yes."

And so in a break of when Natalie was yelling at me, I calmly told her that I would -- I resign effective immediately and if she would -- I would not hang up on her, and that if she -- when she was done saying what she needed to, that I would go in and package up all of the computers, all of my books, everything -- I wanted nothing -- and I would bring them in.

Q Okay.

A After that time, finally I was able to get off the phone. It took me a very short time. I grabbed every single paper -- papers, books, computers, everything. It was all in good condition. You know, nothing was wrong with it. I took it over -- and prior to me leaving the house, Renae Aalbers called me on the phone asking me if I really wanted to do this. My husband again was witness to it. I said, "Yes, I do. I can't do this anymore."

And she informed me that it was law that I had to do an exit interview. It is not law. I said I would not be doing an exit interview. And she hounded me and hounded me and said that I had to and there was no choice and I wasn't going to get my check, my last paystub if I didn't do it. And I said, "Well, so be it."

When I got there, I got kind of hounded again and I said, "Fine. Let's go do the exit interview." In the exit interview was Renae Aalbers and Kathy Andersen.

During that interview, as the questions were asked, I declined all of the answers. I did not have to answer those questions. And from there then -- after that, I left the building.

- Q Okay. What questions did they ask you?
- 17 A I do not recall.

- Q Okay. So there was a lot there, but I could tell that you had a lot that you wanted to say.
- A And we could sit here all day and all week as long as you want and I can come up with a lot more.
- Q So you made a comment about you should have had two weeks of sick leave and that you had a doctor's note. Who was your doctor?
- A Pauline Bevers at that time.



- 1 Q What was the phone number that you received all
- of these telephone calls -- or what I've been
- 3 calling, and I don't mean it sarcastically, mean
- 4 calls from management?
- 5 A It would be their personal -- it would be
- 6 Renae's personal phone.
- 7 Q Your telephone number that they called. What
- was your telephone number that they called?
- 9 A My personal cell phone number.
- 10 O Which is?
- 11 A (605) 870-3282...
- 12 Q So you said this started in 2006. I think that
- 13 was the first event that you talked about. 2006,
- there was a hospitalization, and it was July of 2016
- 15 that you quit; right?
- 16 A Yes.
- 17 Q So during those ten years did you look at
- 18 employment anywhere else, think about working
- 19 somewhere else?
- 20 A Yes, I did.
- 21 Q Did you apply anywhere else?
- 22 A Yes, I did.
- 23 Q Who did you apply with?
- 24 A Several places. You just have to Google.
- 25 | There was several places. I can't name all of them.

- 1 Throughout the United States.
- 2 Q What category -- what category of work would it
- 3 have been, I guess?
- 4 A Medical coder.
- 5 Q You said you did apply?
- 6 A Yes, I applied for jobs.
- 7 Q Okay. Did you ever get any offers?
- 8 A Yes, I did.
- 9 Q Okay. Do you remember how many offers you got?
- 10 A I don't know. I cannot recall how many.
- 11 Q Why did you turn them down?
- 12 A Because I would have to be -- they were either
- short-term, like, you'd work for three months, then
- 14 you may not work for another three months, or I'd
- have to be on-site for a month at a time. It wasn't
- 16 conducive -- I didn't want to be away from my family
- and I wanted to be able to work from home.
- 18 Q Okay. So this conversation happens on July 22.
- 19 Did you at any point during that conversation or
- 20 before that ask DT-Trak or anybody in management,
- 21 "Why don't you just fire me?"
- 22 A No, because I needed to have a paycheck to pay
- 23 my bills and to help support my family. And it was
- 24 July 20. It was not July 22.
- 25 Q July 20th. Sorry about that. Did you consider

- 1 employment other than the medical coding business?
- 2 A Yes, but I couldn't make what I was making at that point.
- 4 Q How much were you making at that time?
- 5 A Nineteen dollars.
- 6 Q So you started working for DT-Trak again after 7 that, in September; right?
- A Only after Jewel Kopfmann called me and asked me to come speak with her.
- 10 Q That was going to be my next question. What
 11 made you start working for DT-Trak again?
- 12 A That was a very hard decision to make to come
 13 back.
- 14 Q Why?

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- A Because I was afraid that nothing had changed in the work environment. And my husband and I -- I didn't want it to come between my husband and I again. And my husband and I talked at length about me going back and that I would continue to look for more work, different, somewhere else.
 - Q Was your husband wanting you to keep working there or wanted you to stop working there when you quit?
- 24 A He did not want me to work there.
- 25 Q Okay.

- 1 A He was very upset about the way that I was
- 2 treated.
- Q Okay. So you said you had a conversation with
- 4 Jewel Kopfmann?
- 5 A She called me.
- 6 Q Okay. And do you remember when she called you?
- 7 A It had to have been -- I would say end of
- 8 August, beginning of September --
- 9 Q Okay.
- 10 A -- of 2016.
- 11 Q Okay. And what did the two of you talk about?
- 12 A She wanted -- she -- as far as I can recall,
- she asked if I really wanted to not work at DT-Trak.
- 14 That -- you know, "Do you need a job? Would you
- 15 come in and talk to me?"
- 16 Q What was your relationship like with Jewel
- 17 Kopfmann before that?
- 18 A I respect Jewel as a coder, as a person. I
- 19 have witnessed Natalie and Jewel in arguments and
- 20 how Jewel would back down.
- 21 Q Okay. Did you have a good relationship with
- 22 Jewel?
- 23 MR. WHALEN: Did you ask if she did or if
- 24 Natalie did?
- MR. MOREHEAD: If she did.

1 MR. WHALEN: I'm sorry.

THE WITNESS: It's okay.

- Q (By Mr. Morehead) So why did you come back? I mean, I realize you had a conversation with Jewel and she asked you, but what was the reason you came back to DT-Trak?
- A It had only probably been a short time, a month or two, and I hadn't found work yet. I had interviews but did not get a new job yet. And my husband and I talked, and we just needed to be paid. We had to support our children, and so knowing that the environment was still not going to be the greatest, but hoping for the best, I went back.
- Q Okay. Did you attach any conditions to you coming back when you were talking to DT-Trak about it, about coming back?
- A I just asked if I could still have the same pay. They were not going to give me anything more to come back. I would have to be a new employee. I would still get my vacation time that I had previously, but that was -- there was no other -- there was no other amount of money given to me, no other stipulations, just that I could get -- work from home, have the same pay, and have my vacation.
- Q Did you ask them for anything more than that?



- 1 A I did not ask for any more because I was not 2 expecting that they would give it to me.
 - Q Okay. Would it be -- you started working for them again, then, in September; correct?
 - A Yes.

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- Q If you look at Exhibit 23, please. Exhibit 23 are -- and Exhibit 24, actually. I'll start with Exhibit 24. Exhibit 24 is DT154 to -158. These all look like forms dated September 12, 2016. Are those all your signatures on the signature lines for all of these forms?
- MR. WHALEN: Are you referring to Exhibit 24?
- MR. MOREHEAD: Only Exhibit 24.
 - MR. WHALEN: You said 24; right? Not Exhibit 23.
- MR. MOREHEAD: Only 24.
- THE WITNESS: Yes, those look like my signatures.
- Q (By Mr. Morehead) Okay. And in the date line 20 it says 9-12-16. Is that your handwriting?
- 21 A It looks like it.
- Q Okay. So would it be your recollection that's probably either at or near when you started working
- 24 for DT-Trak again?
- 25 A Yes.



- Q Okay. Now look at Exhibit 23. And I'll go
 first, again, to the last page of the seven-page
 document. Do you recognize that as your signature
 - A I recognize that as my signature, and I will acknowledge that I did not sign anything in front of April VanDerWerff or Natalie Bertsch. There was no discussion of this document with them.
 - Q Okay. You did sign it, though; correct?
- 10 A . That is my signature.

on that document?

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- Okay. You're not claiming somebody else put the signature on there, are you?
- 13 A I'm saying that is my signature.
- MR. WHALEN: He wants to know if you signed it or not, yes or no.
- 16 THE WITNESS: Yes.
 - Q (By Mr. Morehead) Okay. But you are saying that the witness, April VanDerWerff, wasn't actually there?
- 20 A No.
- Q I think I already know the answer to the
 question based on your answers, but do you actually
 remember signing this document?
- A I remember a group of papers given to me and
 April handed them to me, and I had -- she said,



- 1 "Sign all of these." And I said, "I would like to
- 2 read them. " And she says, "Well, if you don't sign
- 3 them, you don't have a job."
- 4 Q Okay.
- 5 A I had no discussion with anybody about anything
- 6 that I signed.
- 7 Q Okay. If I look at the first page of the
- 8 Exhibit 23, it says that it's dated the 12th day of
- 9 September and then the two thousand is blank. Do
- 10 you see that?
- 11 A Yes, I do.
- 12 Q September 12 is the same date as the date of
- the other documents that we looked at in Exhibit 24;
- 14 correct?
- 15 A Yes.
- 16 Q So that's probably the same September 12 that
- 17 we're talking about?
- 18 A It may be. I cannot verify that.
- 19 Q Okay. You don't know either way?
- 20 A Right.
- 21 Q So if somebody else were to testify that it's
- 22 the same September 12th and it's 2016, you have no
- 23 basis to deny it?
- 24 A Yes.
- 25 Q Have you had a chance to look at Exhibit 23

- 1 before today?
- 2 A Since being pursued by DT-Trak, yes.
- Q Okay. Before the lawsuit started, you received
- 4 a letter; right?
- 5 A No, I did not. Oh, I received a letter that
- 6 they were going to pursue me.
- 7 Q Okay. A letter from my office?
- 8 A Yes.
- 9 Q Okay. That's the letter I'm talking about.
- 10 Sorry.
- 11 A Okay.
- 12 Q Informing you about Exhibit 23; correct?
- 13 A Well, there was -- the first letter you sent me
- 14 was -- there was no exhibit to it.
- 15 Q Okay. Did you know which document was being
- 16 referred to?
- 17 A I just knew that it was a non-compete,
- 18 non-solicitation.
- 19 MR. MOREHEAD: Okay. Now is a good time. It's
- 20 12:30.
- 21 MR. WHALEN: You call it.
- 22 MR. MOREHEAD: This is a good time.
- MR. WHALEN: Okay.
- 24 (Recess taken from 12:31 p.m. to 1:01 p.m.)
- 25 Q (By Mr. Morehead) When we left off, we were



- 1 A Yes.
- 2 Q It would be accurate to say this is your notice
- 3 to DT-Trak that you're leaving employment?
- 4 A Yes.
- 5 MR. MOREHEAD: Okay. Let's take a break.
- 6 (Recess taken from 1:54 p.m. to 2:01 p.m.)
- 7 MR. MOREHEAD: We'll go back on the record.
- 8 Q (By Mr. Morehead) We were talking about
- 9 Exhibit 63 and your e-mail dated January 31, 2019,
- 10 resigning from DT-Trak; correct?
- 11 A Yes.
- 12 Q So you work at San Carlos now?
- 13 A Yes.
- 14 Q Okay. At the time you sent that e-mail, had
- 15 you applied anywhere other than San Carlos?
- 16 A I had other applications in other places, yes.
- 17 Q Okay. Such as?
- 18 A I don't remember the names.
- 19 Q How did you find out about a position being
- 20 available at San Carlos?
- 21 A Through Google, looking for jobs. Also,
- 22 Jennifer Card told me that DT-Trak no longer had a
- 23 contract with San Carlos.
- Q Okay. Now, by this time Kathy Andersen was
- 25 working for San Carlos; correct?

- 1 A Yes. Yes.
- Q Okay. And she had previously worked with you
- 3 at DT-Trak; correct?
- 4 A Yes.
- 5 Q Okay. Did she contact you about the position
- 6 at San Carlos?
- 7 A No.
- 8 Q Okay. So you never had any conversation
- 9 with her before the time you started working for
- 10 San Carlos about working there?
- 11 A No.
- 12 Q Okay. Your sole source of information that
- there was a position available at San Carlos was
- 14 Google and Ms. Card?
- 15 A Yes.
- 16 Q Nothing else?
- 17 A No.
- 18 Q Okay. So when did you apply for the position
- 19 at San Carlos?
- 20 A Towards the end of January.
- 21 0 Of 2019?
- 22 A Yes.
- 23 Q Okay. When did you start looking at working at
- 24 San Carlos? Do you know what I mean? When did you
- 25 start looking and obtaining information that a



- 1 position was available?
- 2 A Towards the end of January 2019.
- Q Okay. And who was the person who you dealt
- 4 with at San Carlos, like, for your job interview?
- 5 A There was three people in on that meeting.
- 6 Q Who were they?
- 7 A I don't remember their names. There was a
- gentleman, another lady, and Kathy Andersen was in
- 9 that interview.
- 10 Q So Kathy Andersen was in the interview?
- 11 A Yes, because she runs -- she is the supervisor
- 12 for the HIM Department.
- 13 Q Just to clarify, what is San Carlos?
- 14 A It is a hospital.
- 15 Q Okay. And you do coding there; correct?
- 16 A Yes.
- 17 Q Would it be fair to say you do a number of the
- 18 same things there as an employee that you were doing
- 19 on a contract basis for DT-Trak?
- 20 A I am a medical coder. That is my career, my
- job. It didn't matter where I would be working, I
- do coding.
- 23 Q Okay. So just wanted to make sure. Kathy
- 24 Andersen was in on the interview. I assume she
- 25 recognized you?

1 A Yes.

- Q Okay. Did Kathy Andersen express any concerns that you were applying after working for DT-Trak?
- A No, because I asked in my interview if there
 was a current contract with DT-Trak, and I made sure
 that there was no contract.
 - Q Although you had a contract with DT-Trak; right?
 - A I had -- I was an employee.
 - Q That you wouldn't compete or work for someone in that field for two years after you left employment; correct?

MR. WHALEN: Hold on. I'm going to object to that because that calls for a legal conclusion, and that's clearly the basis for our defense -- one of the bases for our defense. So absent rendering any sort of legal conclusion, you can answer the question to the best of your ability.

THE WITNESS: San Carlos is not a contractor. It does not do the same as what DT-Trak Consulting does. DT-Trak Consulting is a contractor. They contract with hospitals.

I am a direct employee of a hospital just as other coders that have worked at DT-Trak have gone to hospitals such as Avera. There's also been



- coders that have gone to IHS facilities that DT-Trak
 still had a contract with and they were not sued.
 - Q (By Mr. Morehead) Who?

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- A I do not have the name of that person, but that can be brought.
- 6 Q Who knows? Who will you have to talk to to find out?
- 8 A Kathy Andersen, Becky Beenken, Jennifer Gienau, 9 Terri Waltari.
- Q Who were the people who went to work for
 somebody other than a tribal facility? I think you
 mentioned --
- 13 A DeLonne Yeaton.
- 14 Q Do you know the circumstances?
 - A She said that she was getting laid off from DT-Trak and that Natalie approached her and said that there was a job at Avera and that she would help her get that job, and that's how that was.
 - Q Okay. If somebody from DT-Trak testified that, in fact, people who were given some leeway on the non-compete were people who came to them, who were honest with them and had special circumstances, would you have any basis to dispute that?
- A There is no special circumstances. They were just allowed to go.

1 Q So --

- A Because like --
- Q They should have just --
 - A -- an example.

MR. WHALEN: Hold on. She needs to finish her answer so you're not talking over each other.

MR. MOREHEAD: Well, for the record -- and I've been real polite about it -- for the record, I'm getting a lot of speeches that aren't answers, but she can finish her answer.

THE WITNESS: For example, one of the ladies that -- she was a Native, I don't know her name -- but Kathy Andersen can witness to that, that she is -- she was Native American, and she wanted to go back to work at her -- that facility and be back with her people. And at that current time DT-Trak had a contract with that facility, and when she said that she wanted to go back, Natalie says, "Well, you can't. We'll sue you. You signed a non-compete."

Come to find out, she did not sign a non-compete, and then at a later date a non-compete with her signature showed up.

- Q (By Mr. Morehead) And you heard this from who?
- 24 A Kathy Andersen.
 - You don't know any of this personally; right?

- 1 A No. But she said she has the documentation to
- 2 prove it.
- 3 Q Okay. Where is Kathy Andersen located now?
- 4 A She's in Arizona.
- 5 Q Okay. Is it your thought that you're going to
- 6 ask her to come testify?
- 7 A Yes.
- 8 Q So Kathy Andersen's in on your interview at
- 9 San Carlos, and we went through the question. You
- 10 said you're doing the same thing for San Carlos that
- 11 you were doing at DT-Trak; correct?
- 12 A I am a medical coder. I do not do the same
- 13 processes. I do medical coding.
- 14 Q Okay. So when did you find out that you'd been
- 15 hired?
- 16 A Shortly before my resignation, they offered me
- 17 the job.
- 18 Q So just before January 31?
- 19 A Yeah. Maybe like the day before.
- 20 Q Did you tell them that you had signed a
- 21 non-compete?

- 22 A Yes. I asked them in my interview to make sure
- 23 that there was no contract with DT-Trak because I
- 24 signed a non-compete.
 - Q You said two different things there.



- 1 A No, I did not.
- 2 Q No. That's fine. I think I understand you're
- 3 saying there was no contract at that time between
- 4 DT-Trak and San Carlos; right? That's what you're
- 5 saying?
- 6 A Right.
- 7 O My question was: Did you tell San Carlos that
- you had signed a non-compete with DT-Trak? And I
- 9 think your answer is yes. Is it?
- 10 A I told them that I had signed a non-compete
- 11 with DT-Trak, and that if there was a contract with
- 12 San Carlos and DT-Trak, that I would not work for
- 13 you. There was no contract is what they said to me.
- 14 Q Did you --
- 15 A And the contract --
- 16 MR. WHALEN: Hold on.
- 17 | Q (By Mr. Morehead) Go ahead.
- MR. WHALEN: Go ahead and ask your next
- 19 question.
- 20 Q (By Mr. Morehead) Did you provide them with a
- 21 copy --
- 22 A No.
- 23 Q -- of the non-compete?
- 24 A No.
- 25 Q Did they ask you for one?

- 1 A No. Because they said there was no contract 2 with DT-Trak.
- Q Did you look into the contract -- did you look at the non-compete to see whether it said, "As long as there's no contract, this doesn't apply"?
 - A I did not have a copy of it. I was not given a copy of that from when I was rehired at DT-Trak.
- 8 Q How did you provide the copy you provided in 9 discovery?
- 10 A You sent it to me in the second --
- 11 Q I just wanted to make sure.
- 12 A When I had to come up to the sheriff's office,
 13 you sent it. That was when I saw it.
- Q During the interview, did anybody say what they perceived to be the value you could bring to San Carlos?
- 17 A No.

- Q During the interview, did you need to tell them
 what you thought the value would be that you would
 bring to San Carlos?
- 21 A No.
- 22 Q So what did you talk about in your job
- 23 interview?
- 24 A They asked me what I knew, how did I know
- 25 coding, my work experience. Normal interview

- 1 questions.
- Q Okay. While you were with DT-Trak, you had
- 3 worked on the San Carlos contract; correct?
- 4 A Prior to -- I believe when I was in QA.
- 5 Q Okay. So that's a yes, you did work with
- 6 San Carlos?
- 7 A Yeah. But that was many years ago.
- 8 Q Okay. And Kathy Andersen would have known
- 9 that; correct?
- 10 A I don't know if Kathy was there at the time I
- 11 was working there -- or when I -- no, Kathy was
- 12 not -- Kathy was not working when I was in QA. She
- was not at DT-Trak, so I did not work on San Carlos
- when Kathy was employed at DT-Trak.
- 15 Q After you sent the resignation e-mail,
- 16 Exhibit 63, we're still looking at that.
- 17 A Okay.
- 18 Q Did you ever have a conversation with anybody
- 19 from DT-Trak after that?
- 20 A Yes. Ten minutes after I sent the e-mail,
- 21 April VanDerWerff called me and asked me what was
- 22 going on, and I just explained to her that I was
- 23 resigning and that was it.
- 24 Q Is that the extent of the conversations you
- 25 ever had with anybody from DT-Trak?

- A That I recall.
- 2 Q So if Jewel, who we've been talking about,
- 3 would testify that she had a face-to-face
- 4 conversation with you after that, you would say that
- 5 that's not true?

- 6 A I think -- as I recall, when I came in at a
- 7 later date to have my 401(k) signed, I told Jewel,
- 8 "Thank you" and "Good-bye."
- 9 Q Okay. If they testified that you told them you
- weren't going to be working in the coding business,
- 11 that you were just quitting because you needed the
- 12 time, you would say that's not true?
- 13 A I don't recall saying it that way. I recall
- 14 saying that I don't know where for sure I am going
- 15 or what I am going to do, that I needed to -- you
- 16 know, as it says here provide for my family and take
- 17 a different direction.
- 18 Q Did she remind you about the non-compete during
- 19 that meeting?

- 20 A April VanDerWerff said something about -- she
- 21 said there is a non-compete, that you cannot go to
- 22 work for a contractor. You cannot go to work for
- anybody that we have a contract with or a facility
- 24 that we are looking at doing a contract with.
 - Q Okay. Who is it that said that?



- 1 A April VanDerWerff.
- 2 Q And you told them you weren't going to do that;
- 3 right?
- 4 A I said I didn't know what I was going to do for
- 5 sure.
- 6 Q Do you have an employment contract with
- 7 San Carlos?
- 8 A No. What do you mean by an "employment
- 9 contract"?
- 10 Q Do you have -- well, we looked today, you had
- 11 to sign certain documents while you were with
- 12 DT-Trak. Have you had to sign certain
- acknowledgments or agreements in the time you've
- 14 been working for San Carlos?
- 15 A No.
- 16 Q Have you had to sign a confidentiality
- 17 agreement?
- 18 A I signed documents stating that I worked there
- 19 and for, like, my paychecks, how to do my paychecks,
- 20 but, no, I do not have a non-compete,
- 21 confidentiality.
- 22 Q Okay. Do you have any type of employee
- 23 handbook?
- 24 A No.
- 25 Q Okay. Do you have any document that provides

- 1 you with guidance on what your job description is?
- 2 A Just that I've been told, to code.
- 3 Q Nothing in writing?
- 4 A No. Oh, I have something that says my job
- 5 descriptions. Yes, I do.
- 6 Q Okay. How much do you get paid an hour?
- 7 A \$33.50.
- 8 Q Any benefits beyond that?
- 9 A Insurance.
- 10 Q Do you have to pay for part of that or is it
- 11 all --
- 12 A There's a portion that comes out.
- 13 Q Did you apply at Avera by any chance?
- 14 A Yes, I did.
- 15 Q Okay. Did they hire you?
- 16 A I had an interview.
- 17 O I should have said: Did they offer to hire
- 18 you?
- 19 A Yes. It was for a desk position.
- 20 Q So they did offer to hire you?
- 21 A I went in for an interview.
- 22 Q Okay.
- 23 A That was prior -- that was in 2016, and that
- 24 was prior to Jewel Kopfmann calling me.
- 25 Q Oh, I'm sorry. I'm talking about at the time

- that you started working for San Carlos. I'm
- 2 talking in 2019 or even late 2018.
- 3 A Okay.
- 4 Q Had you been offered a position by anyone else
- 5 other than San Carlos?
- 6 A Yes.
- 7 | Q Who?
- 8 A A place in -- it was either Wyoming or Montana.
- 9 Q Was that also an IHS or tribal facility?
- 10 A No.
- 11 | Q Do you remember what the name of the entity
- 12 was?
- 13 A I don't recall the name, but it wasn't suitable
- 14 for --
- 15 MR. WHALEN: It wasn't what?
- 16 THE WITNESS: I don't recall the name. It just
- 17 | wasn't suitable for what I wanted to do.
- 18 Q (By Mr. Morehead) Okay. Was there anybody
- 19 working at that facility who you knew personally
- 20 before that?
- 21 A No.
- Q Okay. Turning to Exhibit 64. Do you recognize
- 23 Exhibit 64?
- 24 A Yes, I do.
- 25 Q Did you write Exhibit 64?



- A Yes, I did.
- Q When you wrote -- again, don't provide any
- 3 prompting you have from your attorney or anything
- 4 like that, but what was your purpose when you wrote
- 5 Exhibit 64?

- 6 A To acknowledge why I did not want to be
- 7 employed at DT-Trak anymore, and to show that the
- 8 demands, the bullying, the picking and choosing,
- 9 that I just wanted to walk away from DataTrak and
- 10 | just be left alone --
- 11 Q Okay.
- 12 A -- and to be able to be with my family. I lost
- a lot of years of spending time with my family
- 14 because of DT-Trak.
- 15 Q You have asserted a counterclaim against
- 16 DT-Trak in this case. You know that; right?
- 17 A Yes, I have.
- 18 Q What damages are you seeking?
- 19 MR. WHALEN: I'm going to object to the extent
- 20 that that's been provided in Answers to
- 21 Interrogatories. To that extent, it's cumulative.
- 22 So subject to that objection, you can go ahead and
- 23 answer that.
- 24 THE WITNESS: I want to be able to live my life
- and be with my family.

- on the front. It's my understanding that that
- either is or has been a DT-Trak client. Do you
- 3 recognize that name, by chance?
- 4 A Yes.
- 5 O Okay. And it says, "protocol notes"?
- 6 A Yes.
- 7 Q Do you see that?
- 8 A Yes.
- 9 Q What are "protocol notes"?
- 10 A Protocol notes are notes that are -- that are
- set up for each individual contract that DT-Trak has
- on clinics that they have, how they want things
- 13 coded.
- 14 Q Okay. Have you seen protocol notes for other
- 15 facilities?
- 16 A Yeah. All of the facilities that DT-Trak has
- 17 normally had a protocol note to it.
- 18 Q Are protocol notes created through the process
- 19 of fixing the problems. You talked about when
- 20 DT-Trak would get a contract --
- 21 A Yes.
- 22 Q -- they have to fix the problems?
- 23 A Yes.
- 24 Q The protocol notes will be basically the
- 25 written result of that investigation and whatever

- they do about the problems; right?
- 2 A Yeah. I don't know how they are all set up,
- but I assume that someone in management sits with
- 4 the facility to go over these.
- 5 Q Okay.

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- A I was never part of that process.
- 7 O Okay. Let's look at --
- 8 A But on the other note, protocol notes, this is
- 9 for DT-Trak's use. Working for the hospital itself,
- 10 I don't use any of these protocols.
- 11 Q Fair enough. Exhibit 5. We talked about
- 12 Exhibit 5 earlier, but just to recap, this is the
- interrogatory answers you provided. You said that
- 14 your signature was on the last page.
- I just wanted to visit with you about a
- 16 few of these because, as Mr. Whalen noted, you have
- 17 provided these answers. Exhibit -- or excuse me, if
- 18 you would turn to page 3, number 8.
- In your answer you say, "DT-Trak and its
- 20 supervisory staff have violated numerous contracts
- and provisions of contracts it had with customers
- 22 while I was working there." Which customers?
- 23 A All of them.

- 24 Q Okay. And what provisions?
 - A What does that mean?

THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

Consolidated Appeal Nos. 29725 and 29726

DT-TRAK CONSULTING, INC., a South Dakota Corporation

Plaintiff/Appellant,

v.

REMA KOLDA, an individual,

Defendant/Cross-Appellant.

Cross-Appeals from the Circuit Court Third Judicial Circuit Hand County, South Dakota

HONORABLE KENT SHELTON

DT-TRAK CONSULTING, INC.'S RESPONSIVE BRIEF IN APPEAL #29725

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TABLE OF CONTENTS

TABLE OF	AUTH	HORITIESiii		
JURISDICT	ΓΙΟΝΑ	L STATEMENT1		
STATEME	NT OF	LEGAL ISSUES PRESENTED BY APPELLANT1		
1.	Did the Trial Court Err by Denying Rema's Motion for Summary Judgment			
STATEME	NT OF	THE FACTS1		
STATEME	NT OF	THE CASE4		
ARGUMEN	NT	4		
I.		Kolda breached and continued to breach her Employment Agreement by engaging in the same business as DT-Trak4		
	A.	SDCL 53-9-11 permits employees to agree they will not engage directly or indirectly "in the same business or profession as that of the employer."		
	В.	The Employment Agreement defines "Competing Business" to include performing services that are the same business or profession as DT-Trak		
	C.	The Geographical limitation is enforceable and irrelevant here		
II.	oblig infor	Kolda is violating or will violate her contractual and statutory obligations to preserve and protect DT-Trak's confidential information and trade secrets if she continues to work for San Carlos.		
	A.	Kolda must protect and preserve DT-Trak's confidential information and trade secrets.		
	B.	Kolda possesses DT-Trak's confidential information that DT-Trak used to earn business from San Carlos		
	C.	DT-Trak is entitled to relief for actual or potential disclosure of confidential information or trade secrets11		

CONCLUSION	13
CERTIFICATE OF COMPLIANCE	14
CERTIFICATE OF SERVICE	15
APPENDIX TABLE OF CONTENTS	I

TABLE OF AUTHORITIES

	Page(s)
Cases	
1st Am. Sys., Inc. v. Rezatto, 311 N.W.2d 51 (S.D. 1981)	1
American Express Financial Advisors, Inc. V. Yantis, 358 F.Supp.2d 818 (N.D. Ia. 2005)	12
Cardinal Freight Carriers, Inc. v. J.B. Hunt Transport Services, Inc., 987 S.W.2d 642 (Ark. 1999)	12
Carstensen Contracting, Inc. v. Mid-Dakota Rural Water Systems, Inc., 2002 S.D. 136, 653 N.W.2d 875	6
Central Monitoring Serv., Inc. v. Zakinski, 1996 S.D. 116, 553 N.W.2d 513	1
Crowley v. Texaco, Inc., 306 N.W.2d 871 (S.D. 1981)	6
Dakotronics, Inc. v. McAfee, 1999 S.D. 113, 599 N.W.2d 358	8
Dexxon Digital Storage, Inc. v. Haenszel, 832 N.E.2d 62 (Ohio App. 2005)	12
Johns-Manville Corp. v. Guardian Indus. Corp., 586 F.Supp. 1034 (E.D. Mich. 1983)	9
Malcolm v. Malcolm, 365 N.W.2d 863 (S.D. 1985)	6
National Starch & Chemical Corp. v. Parker Chemical Corp., 530 A.2d 31 (N.J. 1987)	12
Nelson v. Schellpfeffer, 2003 S.D. 7, 656 N.W.2d 740	6
PepsiCo, Inc. v. Richmond, 54 F.3d 1262 (7 th Cir. 1995)	
Procter & Gamble Co. v. Stoneham, 747 N.E.2d 268 (Ohio 2000)	

Scotland Vet Supply v. ABA Recovery Svc., Inc., 1998 S.D. 103, 583 N.W.2d 834	1
Weins v. Sporleder, 1997 S.D. 111, 569 N.W.2d 16	
Statutes	
SDCL 53-9-11	1, 5
SDCL § 15-26A-66(b)(4)	14
SDCL § 37-29-2	8, 11
SDCL § 37-29-1(4)	8
SDCL §§ 37-29-1 to 37-29-11	8

JURISDICTIONAL STATEMENT

On August 20, 2021, this Court entered an Order Granting Petition for Allowance of Appeal from Intermediate Order in each of the referenced appeals upon separate petitions filed by DT-Trak Consulting, Inc. ("DT-Trak") and Rema Kolda ("Kolda"). This Court has jurisdiction over these appeals under SDCL § 15-26A-17.

STATEMENT OF LEGAL ISSUES PRESENTED BY APPELLANT

1. Did the Trial Court Err by Denying Rema's Motion for Summary Judgment

No. The Circuit Court properly denied Rema's motion for summary judgment because it should have instead granted DT-Trak's motion for summary judgment.

SDCL § 53-9-11.

Central Monitoring Serv., Inc. v. Zakinski, 1996 S.D. 116, 553 N.W.2d 513

1st Am. Sys., Inc. v. Rezatto, 311 N.W.2d 51 (S.D. 1981)

Scotland Vet Supply v. ABA Recovery Svc., Inc. 1998 S.D. 103, 583 N.W.2d 834.

STATEMENT OF THE FACTS

DT-Trak has already discussed the facts related to the Non-Compete provisions of its Employment Agreement with Kolda in its opening brief in its consolidated appeal No. 29726. However, a few additional facts are relevant to Kolda's cross-appeal related to her breach of the agreement's confidentiality provisions. The Employment Agreement provides Kolda may not use or disclose DT-Trak's trade secrets or other confidential and proprietary information for five years after termination with "Confidential Information" defined as:

Any information or data concerning the Business of Employer that is not generally known and that is proprietary, including without limitation: information or material of Employer relating to trade secrets, inventions, improvements, discoveries, "know-how," technological developments, or unpublished writings or works of authorship, or to the materials,

apparatus, processes, formulae, plans or methods used in the development, provision, or marketing of Employer's products or services; and information that when received is marked as "proprietary," "private," or "confidential." Any information that Employer reasonably considers as confidential or proprietary, or that Employer treats as confidential or proprietary, will be presumed to be Confidential Information without regard as to whether Employer originally produced or created such information and regardless of how Employer obtained such information.

(APP. 00004, S.R. 0095, Stmt. Facts ¶ 15; APP. 00063-00069, S.R. 0103-0104, Bertsch Aff. Ex. A at ¶¶ 1.5 and 7.)

Healthcare facilities hire DT-Trak to help them improve efficiency, training, record-keeping, and collections. (S.R. 0443-0444, Morehead Aff. Ex. D—Bertsch Dep at 35-36.) Because DT-Trak has worked with so many facilities over the years, it is familiar with provider standards, clinic visit types and locations, data entry and coding details. These are the backbone of DT-Trak's proprietary workflow and processing protocols. (S.R. 0465-0468, Morehead Aff. Ex. F—Answers to Interrogatories at Answer to Interrogatory Nos. 9 and 10, APP. 000140-000145, S.R. 0629-0633, Plaintiff's Responses to Defendant's Statement of Undisputed Material Facts, Response to Statement No. 29.) By working for and rehabilitating so many facilities' coding, billing, collections, and other functions, DT-Trak has developed tried and true protocols and processes that are not generally known in the industry. DT-Trak installs these at IHS facilities to help them optimize their administrative departments. (*Id.*)

DT-Trak has also developed and incorporated its proprietary protocols for each specific clinic visit type for each specific client. (*Id.*) DT-Trak's identification, gathering, compilation and construction of these details, which DT-Trak calls its "proprietary protocol notes," is guided by its variety of work experience with multiple clients and developed from work experience specifically with each client, including San

Carlos. (*Id.*) DT-Trak has created an enormous volume of information about how to do things right and, just as crucial, avoid wasting time by doing the wrong thing (including the wrong things its clients have been doing). (S.R. 000489-0499--Morehead Aff. Ex. G-Aalbers Dep. at 22-32.)

As with DT-Trak's other clients, DT-Trak developed DT-Trak's proprietary coding protocols for San Carlos. Some details include specific coding and data entry details regarding pharmacy, labs, immunizations, clinic types and location details, regional payer-specific requirements, specific notification details, and provider entry details. (S.R. 0468, Morehead Aff. Ex. E—Answers to Interrogatories at Answer to Interrogatory No. 10 at p. 11.) DT-Trak's knowledge, design, and method of identifying and compiling these details is DT-Trak's proprietary trade secret and confidential information, which Defendant would have learned from her training at DT-Trak. (*Id.*) These requirements are sufficiently detailed that it often takes a year or more for a coder to get fully up to speed on each facility the coder works for/on, which results in a tremendous cost to DT-Trak in training coders. (*Id.*)

DT-Trak has compiled its confidential information and workflows in general into a set of "Master DT Guidelines" (S.R. 0500-0512--Morehead Aff. Ex. H). It organized its San Carlos information and workflows into a "San Carlos Apache Healthcare (SCAH) Coding Protocol Notes v1.1" document for reference (S.R. 0512-0524--Morehead Aff. Ex. I), as it has for other facilities. (S.R. 0525-0568--Morehead Aff. Ex. J.)

While employed at DT-Trak, Kolda had access to DT-Trak's confidential information. DT-Trak regularly informed its employees that it had confidential and trade secret information through its employee handbooks, which Kolda received. (S.R. 0569-

0580--Morehead Aff. Ex. K; S.R. 0450, 0455--Morehead Aff. Ex. E--Kolda Dep. 62:11-21 and 132:18-25; S.R. 0581-0593--Morehead Aff. Ex. L; Exs. 56-57.) DT-Trak was also very persistent about obtaining acknowledgments of receipt from its employees that they had received the employee handbooks, and obtained them from Kolda. (S.R. 0453-0454--Morehead Aff. Ex. E—Kolda Dep. 122-123.)

STATEMENT OF THE CASE

DT-Trak incorporates the Statement of the Case from its opening brief in its consolidated appeal.

ARGUMENT

Kolda agrees there are no disputed material facts and that the Circuit Court should have entered summary judgment. However, her legal position, if accepted, would grant her a *post hoc* amendment of the Employment Agreement. She is arguing what it "must have meant" as opposed to what it actually means. Kolda's opening brief also does not assert the Employment Agreement is unconscionable or otherwise unenforceable, unlike her position below, so Kolda has effectively waived this argument. Kolda is also incorrect that DT-Trak's other claims should have been dismissed. Other than her one-note argument that coding standards are not trade secrets or confidential information, she has offered to argument to support her position regarding DT-Trak's breach of confidentiality and trade secret claims.

I. Kolda breached and continued to breach her Employment Agreement by engaging in the same business as DT-Trak.

Kolda asserts that the Employment Agreement's "clear intention" was to stop her from "working as an employee with a competitor of the Plaintiff." (Kolda Brief at 10-11). Neither the relevant statute nor the Employment Agreement is concerned with who

Kolda's employer is. The only thing that matters is the work Kolda is doing. Because Kolda is doing the same thing for San Carlos that she did for DT-Trak, she is violating the Employment Agreement.

A. SDCL 53-9-11 permits employees to agree they will not engage directly or indirectly "in the same business or profession as that of the employer."

Kolda's brief is peppered with arguments and allegations that San Carlos is not DT-Trak's "competitor." SDCL § 53-9-11 does not address the identity or business model of an employee's new employer, and the phrase "competing business" does not appear in the statute. The statute addresses whether a departed employee is engaged "directly or indirectly in the same business or profession" as her former employer. SDCL § 53-9-11. While employed by DT-Trak, Kolda enabled DT-Trak to perform coding and other services for medical providers. She is providing the same services to San Carlos, a medical provider. (APP. 00006, S.R. 0097, Stmt. Facts ¶ 24; APP. 00025 and 00037, S.R. 0113 and 0148, Kolda Dep. 4:22-23 and 141:13-22.) So Kolda is engaged directly "in the same business or profession" as DT-Trak.

B. The Employment Agreement defines "Competing Business" to include performing services that are the same business or profession as DT-Trak.

The Employment Agreement's scope reaches the full extent of the limits imposed by SDCL § 53-9-11. Kolda agreed she would not "engage, directly or indirectly, in any capacity whatsoever" in a "Competing Business." (APP. 00004, S.R. 0095, Stmt. Facts ¶ 15; APP. 00063-00069, S.R. 0103-0104, Bertsch Aff. Ex. A at ¶ 2.) The Employment Agreement defines "Competing Business" to include any "individual" that "engages or

proposes to engage in the "Business of Employer." (*Id.*--Employment Agreement, ¶ 1.3.)

A "Competing Business" includes an individual, like Kolda. (*Id.*)

"Business of Employer" means "professional *medical coding*, data entry, third-party billing and accounts receivable services *and related activities for healthcare service providers* including, but not limited to, [p]rofessional medical coding." (*Id.*-- Employment Agreement, ¶¶ 1.1, 1.3) (emphasis added). The non-competition portion of the Agreement provides that Kolda will not "engage, *directly or indirectly*, in any capacity whatsoever, whether as an officer, director, stockholder, owner, proprietor, partner, member, co-owner, investor, employee, trustee, manager, consultant, independent contractor, co-venturer, lender, financier, *agent, representative or otherwise*, in a Competing Business, or otherwise hold any interest in a Competing Business." (*Id.* ¶ 2) (emphasis added).

"It is a fundamental rule of contract interpretation that the entire contract and all its provisions must be given meaning if that can be accomplished consistently and reasonable." *Carstensen Contracting, Inc. v. Mid-Dakota Rural Water Systems, Inc.*, 2002 S.D. 136, ¶ 8, 653 N.W.2d 875, 877 (citing *Malcolm v. Malcolm*, 365 N.W.2d 863, 865 (S.D. 1985)). "The contract is to be read as a whole, making every effort to give effect to all provisions." *Nelson v. Schellpfeffer*, 2003 S.D. 7, ¶ 8, 656 N.W.2d 740, 743 (citing *Crowley v. Texaco, Inc.*, 306 N.W.2d 871 (S.D. 1981)).

Under the full scope of the unambiguous provisions of the Employment Agreement, Kolda is violating the Employment Agreement. She cannot engage, directly or indirectly in any capacity whatsoever in a "Competing Business." (Employment Agreement ¶ 2.) "Competing Business" refers to any work, including work by

individuals that falls within the "Business of Employer". (APP. 00004, S.R. 0095, Stmt. Facts ¶ 15; APP. 00063-00069, S.R. 0103-0104, Bertsch Aff. Ex. A at ¶ 1.3.) Finally "Business of Employer" includes "professional medical coding . . . for healthcare service providers" Kolda agreed she would not work for any entity in DT-Trak's business; but she agreed that as an individual, she also would not engage in DT-Trak's business. (Id. ¶¶ 1.1, 1.3.) It is undisputed Kolda provides professional medical coding services to San Carlos, a healthcare provider, just as she provided those services to DT-Trak's – healthcare-provider clients while working for DT-Trak. (S.R. 0449, 0457-58--Morehead Aff. Ex. E--Kolda Depo. at 4:22-23; 141:13-22; 148:2-7.)

C. The Geographical limitation is enforceable and irrelevant here.

Kolda argues that the geographic limitation of the Employment Agreement is unenforceable because it effectively prevents her from working as a coder in the United States. (Kolda Brief at 13-14.) DT-Trak has fully addressed these arguments in its opening brief in this consolidated appeal and incorporates its arguments from that brief here. (See DT-Trak Opening Brief in Appeal No. 29726 at page 10 through 12.)

II. Kolda is violating or will violate her contractual and statutory obligations to preserve and protect DT-Trak's confidential information and trade secrets if she continues to work for San Carlos.

DT-Trak agreed that DT-Trak's Complaints counts I and IV, related to Kolda's breach of confidentiality and misappropriation of trade secrets, would be moot if the circuit court granted DT-Trak's motion for summary judgment on Count II, because DT-Trak sought the same relief regarding all counts of its Complaint, i.e., a two-year injunction from Kolda's further breach of the Employment Agreement liquidated damages, and attorneys' fees. DT-Trak maintains that position on appeal, i.e., that if it prevails on the noncompete issue, those other counts are moot. However, Kolda still

asserts those claims should have been dismissed. Her position ignores the undisputed facts and the law.

A. Kolda must protect and preserve DT-Trak's confidential information and trade secrets.

The Employment Agreement prohibits Kolda from disclosing confidential information learned while working for DT-Trak. (APP. 00004, S.R. 0095, Stmt. Facts ¶ 15; APP. 00063-00069, S.R. 0103-0104, Bertsch Aff. Ex. A at ¶ 1.4.) South Dakota law also requires her to protect DT-Trak's trade secrets under its version of the Uniform Trade Secrets Act (UTSA"), SDCL §§37-29-1 to 37-29-11. The UTSA defines a trade secret as:

Information, including a formula, pattern, compilation, program, device, method, technique, or process, that: derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

SDCL § 37-29-1(4). The trade secret owner may petition the court for injunctive relief for actual or *threatened* misappropriation. SDCL § 37-29-2 (emphasis added).

B. Kolda possesses DT-Trak's confidential information that DT-Trak used to earn business from San Carlos.

Whether certain information is a trade secret is a mixed question of fact and law. *Dakotronics, Inc. v. McAfee*, 1999 S.D. 113, ¶ 13, 599 N.W.2d 358, 361. Whether particular information can be a trade secret is the legal part of the inquiry. *Id.* The factual inquiry relates to whether the information has independent economic value from not being generally known, and whether the holder of the information has protected its confidentiality. *Weins v. Sporleder*, 1997 S.D. 111, ¶ 17, 569 N.W.2d 16, 20. Kolda does not assert that DT-Trak failed to protect the confidentiality of the information at

issue. Kolda's only argument has been that DT-Trak has no confidential information or trade secrets because it isn't the right kind of information. However, this is not true.

1. DT-Trak offered uncontested testimony about its confidential information.

As noted above, Kolda didn't just learn "coding" at DT-Trak. DT-Trak is hired by healthcare facilities, such as San Carlos, typically because those facilities are experiencing inefficiencies, insufficient training, and other issues interfering with the proper record-keeping for medical services and collecting revenues for those services. Because DT-Trak has worked with so many facilities over the years, it is familiar with provider standards, clinic visit types and locations, data entry and coding details. These are the backbone of DT-Trak's proprietary workflow and processing protocols, i.e., DT-Trak's confidential information and trade secrets for meeting all these duty requirements. (S.R. 0464-68--Morehead Aff. Ex. F—Answers to Interrogatories at Answer to Interrogatory Nos. 9 and 10.)

DT-Trak's identification, gathering, compilation and construction of these details, which DT-Trak calls its "proprietary protocol notes," is guided by its variety of work experience with multiple clients and developed from work experience specifically with DT-Trak's clients such as San Carlos. (*Id.*) Essentially, DT-Trak has created an enormous volume of information about how to do things right and, just as crucial, how to avoiding wasting time by doing the wrong thing (including the wrong things its clients have been doing). (S.R. 0489-0499, Morehead Aff. Ex. G--Aalbers Dep at 22-32.) *See*, *e.g., Johns-Manville Corp. v. Guardian Indus. Corp.*, 586 F.Supp. 1034, 1974 (E.D. Mich. 1983) (referencing "the competitive edge" a company gains by avoiding "blind alleys" in development).

This proprietary information is not some amorphous mass of experience. DT-Trak has compiled its confidential information and workflows in general into a set of "Master DT Guidelines" (S.R. 0500-0512--Morehead Aff. Ex. H). It organized its San Carlos information and workflows into a "San Carlos Apache Healthcare (SCAH) Coding Protocol Notes v1.1" document for reference (S.R. 0512-0524--Morehead Aff. Ex. I), as it has for other facilities. (S.R. 0525-0568--Morehead Aff. Ex. J.) Kolda would have had access to and essentially learned all of the contents of these documents.

Moreover, DT-Trak regularly informed its employees that it had confidential and trade secret information through its employee handbooks, which Kolda received. (S.R. 0569-0580--Morehead Aff. Ex. K; S.R. 0450, 0455--Morehead Aff. Ex. E--Kolda Dep. 62:11-21 and 132:18-25; S.R. 0581-0593--Morehead Aff. Ex. L; Exs. 56-57.) DT-Trak was also very persistent about obtaining acknowledgments of receipt from its employees that they had received the employee handbooks, and obtained them from Kolda. (S.R. 0453-0454--Morehead Aff. Ex. E—Kolda Dep. 122-123.)

2. Kolda refused to produce San Carlos-related information because it was "confidential" even with a protective order in place.

During discovery, DT-Trak asked for a variety of information related to Kolda's employment with San Carlos. Kolda objected the requests sought "confidential information." (S.R. 0594-0611-Morehead Aff. Ex. M.) This included requests for Kolda's employment contract and job descriptions with San Carlos (*Id.* at RFP #2); all correspondence Kolda had with San Carlos before she worked there (*Id.* at RFP #4); all correspondence and things San Carlos provided to Kolda before she was employed there (*Id.* at RFP #5); all correspondence and other documents Kolda received from San Carlos

since being employed there (*Id.* at RFP #7-9); and all of Kolda's employment evaluations from San Carlos (*Id.* at RFP #12). Kolda asserted this was all "confidential information" and did not produce it, despite the circuit court's entering a protective order under which Kolda could have produced the documents while preserving their confidentiality. (S.R. 0035-0045.) Kolda could not refuse to produce documents because they were so confidential even a confidentiality order was insufficient to protect them while simultaneously claiming the same kinds of confidential information possessed by DT-Trak were not valuable.

C. DT-Trak is entitled to relief for actual or potential disclosure of confidential information or trade secrets.

Kolda protests there is no direct evidence she is using DT-Trak's confidential information for San Carlos's benefit. But DT-Trak need not establish Kolda's actual disclosure or use of the information. Kolda acknowledged and agreed through the Employment Agreement that DT-Trak is entitled to injunctive relief from actual or *threatened* disclosure of confidential information. (APP. 00004, S.R. 0095, Stmt. Facts ¶ 15; APP. 00063-00069, S.R. 0103-0104, Bertsch Aff. Ex. A at ¶ 7.) The UTSA authorizes injunctive relief under the same circumstances. *See* SDCL § 37-29-2. DT-Trak needs only to show that her employment with San Carlos represents a threat of disclosure or use of DT-Trak's confidential information.

An employee who possesses a company's sensitive information is appropriately enjoined from working or continuing work for a new employer when she will inevitably draw upon and use her previous employer's confidential information. For example, in *PepsiCo, Inc. v. Redmond*, the Seventh Circuit held that a managerial employee of a soft drink manufacturer would inevitably disclose trade secrets to a competitor if he accepted employment with that competitor. 54 F.3d 1262, 1271 (7th Cir. 1995). Similarly, in

Cardinal Freight Carriers, Inc. v. J.B. Hunt Transport Services, Inc., the court held that an employee with knowledge about an employer's confidential information would inevitably disclose it to his new employer, because that new employer was servicing the same customers. 987 S.W.2d 642, 645-47 (Ark. 1999). Here, Kolda is working directly for DT-Trak's former customer.

These cases are not outliers but part of a well-established view of the UTSA. *See also Dexxon Digital Storage, Inc. v. Haenszel*, 832 N.E.2d 62, 68-69 (Ohio App. 2005) (Injunctive relief granted based upon inevitable disclosure of trade secrets.); *Procter & Gamble Co. v. Stoneham*, 747 N.E.2d 268, 274 (Ohio 2000) (Injunctive relief granted based upon inevitable disclosure of trade secrets.); *National Starch & Chemical Corp. v. Parker Chemical Corp.* 530 A.2d 31, 33 (N.J. 1987) (Injunctive relief upheld because of inevitable disclosure of chemical trade secrets.). For example, in *American Express Financial Advisors, Inc. v. Yantis*, the Northern District of Iowa granted injunctive relief, finding that the UTSA recognizes the doctrine. 358 F.Supp.2d 818, 833 (N.D. Ia. 2005).

Because of her long tenure with DT-Trak, Kolda possesses significant confidential information related to DT-Trak's confidential and proprietary solutions for IHS and tribal medical providers, including San Carlos. As in *PepsiCo*, Kolda cannot possibly compartmentalize the confidential information and trade secrets she learned at DT-Trak and not incorporate or share DT-Trak's methods and information in working for San Carlos. This enables San Carlos to avoid having to hire DT-Trak to provide those same services.

DT-Trak has already thoroughly briefed why Kolda's continued employment with San Carlos is irreparably harmful. If Kolda (and by extension, other employees) are free to be "poached" by DT-Trak's customers, DT-Trak's customers will simply do that. San Carlos now gets DT-Trak level work utilizing DT-Trak's employees (including Kolda)

instead of having to contract with DT-Trak. In fact, as noted above, Kolda was not the only employee San Carlos poached away from DT-Trak.

CONCLUSION

There is no dispute that Kolda worked for DT-Trak, and that as a condition of her employment, she agreed to the non-competition provisions of the Employment Agreement by Agreement. There is also no dispute that she is violating the Employment Agreement by working in a "Competing Business" as the Employment Agreement defines that term. Indeed, she is individually engaged in the same "business of employer" that she was engaged in as an employee of DT-Trak. Therefore, she is directly and indirectly competing against DT-Trak for San Carlos's business, albeit as an employee. She is also inevitably disclosing DT-Trak's confidential information to San Carlos in the process. Therefore, DT-Trak is entitled to a permanent injunction against Kolda prohibiting her from violating her Employment Agreement.

Moreover, DT-Trak should receive the benefit of its bargain with Kolda. She agreed not to compete for two years. Because she has continuously violated her Employment Agreement, the injunction should run for two years from its entry to cover the amount of time she agreed not to compete with DT-Trak.

WOODS, FULLER, SHULTZ & SMITH P.C.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point) and contains 3,467 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 3rd day of March, 2022.

WOODS, FULLER, SHULTZ & SMITH P.C.

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CERTIFICATE OF SERVICE

I certify that on the 3rd day of March, 2022, I sent via email and United States first-class mail, postage prepaid, two true and correct copies of the foregoing Appellant DT-Trak Consulting, Inc.'s Responsive Brief to the following individual:

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Attorney for Defendant

/s/ Sander J. Morehead Attorneys for Appellant DT-Trak Consulting, Inc.

APPENDIX TABLE OF CONTENTS

TAB A		
Order Denying Motions for Summary Judgment	App. 000117	
TAB B		
Defendant's Statement of Undisputed Material Facts	App. 000118-000123	
Plaintiff's Response to Statement of Undisputed Material Facts	App. 000124-000147	
TAB C		
SDCL 37-29-1	App. 000148-000149	
SDCL 37-29-2	App. 000150	

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
: SS	
COUNTY OF HAND)	THIRD JUDICIAL CIRCUIT
**********	***********
DT-TRAK CONSULTING, INC., a South) FILE NO. 29CIV19-30
Dakota Corporation,)
Plaintiff,)
) ORDER DENYING MOTIONS
VS.) FOR SUMMARY JUDGMENT
)
REMA KOLDA, an Individual,)
Defendant.)
********	<u> </u>

The above entitled matter having come on before the Honorable Kent A. Shelton, Circuit Court Judge, Third Judicial Circuit, State of South Dakota, on the 14th day of June, 2021, pursuant to the partial motion for summary judgment filed by the Plaintiff and the motion for summary judgment filed by the Defendant; and the Plaintiff appearing in the person of its corporate representative and with counsel of record, Sander J. Morehead of Woods, Fuller, Shultz & Smith, P.C.; and the Defendant appearing in person and with her attorney of record Timothy R. Whalen of Whalen Law Office, P.C., and the Court having read and considered the motions, briefs, affidavits, and other filings made by the parties in support of and in resistance to the motions for summary judgment; and the court having heard and considered the arguments of the parties; and the Court having been fully advised in the premises and good cause appearing therefore, it is hereby

Attest: Bertsch, Marla

Clerk/Deputy



Filed on: 06/30/2021 HAND

KENT A. SHELTON - CIRCUIT COURT JUDGE

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

) FILE NO. 29CIV19-30
)
) DEFENDANT'S STATEMENT
) OF UNDISPUTED MATERIAL FACTS

PRELIMINARY MATTERS

References to the depositions taken in the above matter shall be by "Depo." followed by the first initial and last name of the party deposed and the page numbers of the deposition and line numbers if necessary. Deposition exhibits shall be referenced by "Exh." followed by the number or letter, as the case may be. Affidavits filed in support of this statement of undisputed material facts shall be referred to by "Affidavit" followed by the name of the party making the affidavit and the paragraph number of the affidavit.

STATEMENT OF UNDISPUTED MATERIAL FACTS

- 1. Rema Kolda (Rema) was first employed by the Plaintiff in approximately September of 2004 as an employee. R. Kolda, Depo., p. 12-13.
- 2. Rema was trained to become a medical coder while employed with the Plaintiff and attained her certification therefor as well.

 N. Bertsch Depo., p. 85; R. Kolda Depo., pp. 16-17.
- 3. The Plaintiff paid for Rema to become trained as a medical coder and obtain her certification, but Rema was required to continue

Defendant's Statement of Undisputed Material Facts - 29CIV19-30

her employment with the Plaintiff for at least five years. N. Bertsch Depo, pp. 85-86.

- 4. If Rema were to have terminated her employment without having completed five years of employment with the Plaintiff, she would have been required to repay the Plaintiff for the medical coder training and certification. Id., at pp. 85-86.
- 5. Rema's first employment stint with the Plaintiff ended in July of 2016. R. Kolda Depo., pp. 88-89; N. Bertsch, Depo., p. 54; A. VanDerWerff Depo., pp. 13-16.
- 6. Prior to becoming employed with the Plaintiff, Rema had attended approximately two years of formal education to become a registered nurse at Presentation College and worked at the Hand County Memorial Hospital in the Courtyard Villa. R. Kolda Depo., at pp. 9-11.
- 7. Rema re-hired with the Plaintiff in September of 2016 as a medical coder and continued to work in that capacity only until she terminated her employment with the Plaintiff. *Id.*, at p. 102; N. Bertsch Depo., pp. 37-38.
- 8. When Rema re-hired with the Plaintiff in September of 2016, she signed a document entitled Non-Compete, Non-solicitation, Confidentiality, Non-Disclosure, and Non-Use Agreement (Agreement). Exh. A.
- 9. The Agreement indicates that the Plaintiff is a South Dakota Corporation. Exh. A.

Defendant's Statement of Undisputed Material Facts - 29CIV19-30

- 10. Natalie Bertsch is the Vice President over operations and business development for the Plaintiff. N. Bertsch Depo., at p. 6.
- 11. The primary business of the Plaintiff is medical coding, billing services, accounts receivable, compliance auditing, revenue cycle analysis, workflow analysis, medical staffing, staffing positions, and PPE supplies. *Id.*, at p. 15.
- 12. The Plaintiff is an independent contractor that provides the above services and facilitates services to a medical provider customer and not to specific patients. *Id.*, at pp. 19-21; J. Kopfman Depo., pp. 17, 50-52; Exh. A.
- 13. At all times that Rema was employed with the Plaintiff she was an employee. R. Kolda, Depo., p. 12-13; Exh. #64.
- 14. The Agreement defines a "Competing Business" as "... any individual, corporation, partnership, limited partnership, limited liability company, association, trust (business or otherwise), institution, foundation, pool, plan or other entity or organization (other than Employer) that engages or proposes to engage in the Business of Employer." (Emphasis added). Exh. A.
- 15. Rema is not an independent contractor, nor does she own her own medical coding or other similar business, but has been an employee of either the Plaintiff or San Carlos Apache Healthcare (San Carlos) in Peridot, Arizona, at all relevant times to this action. *J. Kopfman Depo.*, pp. 50-52; R. Kolda Depo., p. 4; Defendant's Answers to Interrogatories and Request for Production of Documents (First Set), Answer to Interrogatory No. 14.

Defendant's Statement of Undisputed Material Facts - 29CIV19-30

- 16. Toward the end of Rema's employment with the Plaintiff, she had been actively looking for other employment as a medical coder. R. Kolda Depo., pp. 139-141.
- 17. Rema gave notice of the termination of her employment with the Plaintiff on or about January 31, 2019. Exh. #63.
- 18. Rema accepted employment as a medical coder with San Carlos shortly before she resigned from the Plaintiff. R. Kolda Depo., pp. 140-141; N. Bertsch Depo., pp. 42-43.
- 19. San Carlos is a medical health provider that operates a hospital and clinic. J. Kopfmann Depo., pp. 50-52; R. Kolda Depo., pp. 141.
- 20. San Carlos is not an independent contractor that engages in or proposes to engage in the same business as the Plaintiff. Id., at 50-52; R. Kolda Depo, pp. 142.
- 21. San Carlos had a contract for services with the Plaintiff, but that contract expired on December 31, 2018, and was not renewed.

 N. Bertsch Depo., pp. 42-43; R. Kolda Depo., pp. 145-146.
- 22. Rema works for San Carlos as a medical coder, but her work at San Carlos is not the same type of work she did with the Plaintiff.

 R. Kolda Depo., pp. 145.
- 23. Before Rema accepted the job with San Carlos, she questioned the representatives with San Carlos as to whether or not they had an existing contract with the Plaintiff. R. Kolda Depo., pp. 145-148.
- 24. Rema had worked on the San Carlos account when the Plaintiff had a contract with San Carlos, but it was when Rema was in Quality

Defendant's Statement of Undisputed Material Facts - 29CIV19-30

Assurance when she first began working with the Plaintiff and not when she was a medical coder for the Plaintiff. *Id.*, at p. 148.

- 25. The medical coding system and process is a universal coding system and is known as ICD-10. N. Bertsch Depo., p. 27-31; Exh. C.
- 26. ICD-10 is in the public domain and is accessible by any person who wants to train as a medical coder. N. Bertsch Depo., p. 28-31; Exh. C.
- 27. The Plaintiff did not develop the ICD-10 medical coding system. R. Aalbers Depo., p. 21.
- 28. The Plaintiff does not claim the ICD-10 medical coding system as a trade secret, confidential information, or proprietary in nature in any respect. R. Aalbers Depo., p. 21; J. Kopfmann Depo., pp. 46-49; N. Bertsch Depo., pp. 27-31.
- 29. The Plaintiff claims that the experience and knowledge Rema gained while working for the Plaintiff and utilizing the ICD-10 medical coding system is a trade secret, confidential information, and proprietary. N. Bertsch Depo., p. 29, 39-42; J. Kopfmann Depo., pp. 49, 55-57; R. Aalbers Depo., pp. 17, 26-28, 30, 33-34.
- 30. The Plaintiff does not have any evidence that Rema violated the terms of the Agreement, but only has suspicions that she may have done so. R. Aalbers Depo., p. 37; J. Kopfmann Depo., pp. 55-57.
- 31. The Plaintiff claims that Rema cannot work for any of its current customers, any past customer, any customer that it submitted a bid for work to, or prospective customers regardless of whether or not

Defendant's Statement of Undisputed Material Facts - 29CIV19-30

they are known. *N. Bertsch Depo.*, pp. 40-42; J. Kopfmann Depo., pp. 54, 58-60.

32. The Agreement identifies the geographical limitation of its application as the entire continental United States and Alaska and Hawaii. Exh. A.

Dated this

day of April, 2021.

TIMOTHY R. WHALEN Whalen Law Office P.C.

P.O. Box 127

Lake Andes, SD 57356 Telephone: 605-487-7645 Attorney for the Defendant

whalawtim@cme.coop

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT :SS COUNTY OF HAND THIRD JUDICIAL CIRCUIT) $0 \hbox{-} 0 \hbox{-}$ 29CIV19-000030 DT-TRAK CONSULTING, INC., a South Dakota Corporation, Plaintiff, PLAINTIFF'S RESPONSE TO **DEFENDANT'S STATEMENT OF** v. UNDISPUTED MATERIAL FACTS REMA KOLDA, an individual,

Defendant.

 $0 \hbox{-} 0 \hbox{-}$

Plaintiff, DT-Trak Consulting, Inc. ("DT-Trak"), responds to the statement of undisputed material facts the Defendant filed in support of its motion for partial summary judgment:

1. Rema Kolda (Rema) was first employed by the Plaintiff in approximately September of 2004 as an employee. *R. Kolda, Depo., p.* 12-13.

RESPONSE: Admitted.

2. Rema was trained to become a medical coder while employed with the Plaintiff and attained her certification therefor as well.

N. Bertsch Depo., p. 85; R. Kolda Depo., pp. 16-17.

RESPONSE: Admitted.

3. The Plaintiff paid for Rema to become trained as a medical coder and obtain her certification, but Rema was required to continue

{04224003.1}

Case Number: 29CIV19-000030

Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

her employment with the Plaintiff for at least five years. N. Bertsch Depo, pp. 85-86.

RESPONSE: Admitted

4. If Rema were to have terminated her employment without having completed five years of employment with the Plaintiff, she would have been required to repay the Plaintiff for the medical coder training and certification. *Id.*, at pp. 85-86.

RESPONSE: Admitted.

5. Rema's first employment stint with the Plaintiff ended in July of 2016. R. Kolda Depo., pp. 88-89; N. Bertsch, Depo., p. 54; A. VanDerWerff Depo., pp. 13-16.

RESPONSE: Admitted; Ms. Kolda voluntarily terminated her employment at that time.

6. Prior to becoming employed with the Plaintiff, Rema had attended approximately two years of formal education to become a registered nurse at Presentation College and worked at the Hand County Memorial Hospital in the Courtyard Villa. R. Kolda Depo., at pp. 9-11.

RESPONSE: Admitted.

7. Rema re-hired with the Plaintiff in September of 2016 as a medical coder and continued to work in that capacity only until she terminated her employment with the Plaintiff. Id., at p. 102; N. Bertsch Depo., pp. 37-38.

{04224003.1} - 2 -

Case Number: 29CIV19-000030

Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

RESPONSE: Admitted.

8. When Rema re-hired with the Plaintiff in September of 2016, she signed a document entitled Non-Compete, Non-solicitation, Confidentiality, Non-Disclosure, and Non-Use Agreement (Agreement).

Exh. A.

RESPONSE: Admitted.

9. The Agreement indicates that the Plaintiff is a South Dakota Corporation. Exh. A.

RESPONSE: Admitted.

10. Natalie Bertsch is the Vice President over operations and business development for the Plaintiff. N. Bertsch Depo., at p. 6.

RESPONSE: Admitted.

11. The primary business of the Plaintiff is medical coding, billing services, accounts receivable, compliance auditing, revenue cycle analysis, workflow analysis, medical staffing, staffing positions, and PPE supplies. *Id.*, at p. 15.

RESPONSE: DT-Trak admits that Plaintiff is in the business of providing these services, as well as other services identified in Paragraph 1.3 of the Employment Agreement attached to the Affidavit of Natalie Bertsch dated April 15, 2021, which includes:

Professional medical coding; Electronic Health Record Services (EHR); Electronic Data Entry (any database or software); Error Report Management and Completion; Third Party Billing, all payer sources; Accounts Receivable; Posting; Collections (120+ days, etc.); Quality Assurance of Revenue Generation Cycle; Comprehensive Revenue Generation Services; Compliance Auditing HIPAA,

{04224003.1} - 3 -

Case Number: 29CIV19-000030

Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

etc.; Data Integrity Audits, entire revenue generation cycle; Provider and Staff Education; Patient Registration; Staff & Program Development/Evaluation Criteria Development; Comprehensive Consultative Services for Healthcare Administrative, Financial, HIM and BO Functions; Revenue Enhancement Auditing; Development and Implementation of Work Flow Processes Relating to Revenue Generation Cycle; Planning, Implementing and Facilitation of Training/Workshops; Feasibility Studies for or Development of Revenue Generation Cycle or Development; Internal Controls Policy Evaluation, Implementation and Management; "Special Projects"- Analysis and Development of Various Health an Revenue Generation Studies; Financial Projections for Healthcare Facilities; Cost Analysis Studies for Healthcare Facilities; Chargemaster Audit, Implementation and Utilization.

(Bertsch Aff. Ex. A--Employment Agreement, ¶¶ 1.1, 1.3.)

12. The Plaintiff is an independent contractor that provides the above services and facilitates services to a medical provider customer and not to specific patients. *Id.*, at pp. 19-21; J. Kopfman Depo., pp. 17, 50-52; Exh. A.

RESPONSE: Denied. DT-Trak admits that DT-Trak's clients are primarily medical providers, but DT-Trak's services in that regard are still related to the provision of medical services to patients, maintaining records regarding those services, and billing and collecting for those services, as reflected in a number of the items listed in Ms. Kolda's Employment Agreement with DT-Trak, such as:

Professional medical coding; Electronic Health Record Services (EHR); Electronic Data Entry (any database or software); Error Report Management and Completion; Third Party Billing, all payer sources; Accounts Receivable; Posting; Collections (120+ days, etc.); Quality Assurance of Revenue Generation Cycle; Comprehensive Revenue Generation Services; Compliance Auditing HIPAA, etc.; Data Integrity Audits, entire revenue generation cycle; Provider and Staff Education; Patient Registration; Staff & Program Development/Evaluation Criteria Development; Comprehensive Consultative Services for Healthcare Administrative, Financial, HIM and BO Functions; Revenue Enhancement Auditing; Development and Implementation of Work Flow Processes Relating to

{04224003.1} - 4 -

Case Number: 29CIV19-000030

Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

Revenue Generation Cycle; Planning, Implementing and Facilitation of Training/Workshops; Feasibility Studies for or Development of Revenue Generation Cycle or Development; Internal Controls Policy Evaluation, Implementation and Management; "Special Projects"- Analysis and Development of Various Health an Revenue Generation Studies; Financial Projections for Healthcare Facilities; Cost Analysis Studies for Healthcare Facilities; Chargemaster Audit, Implementation and Utilization.

(*Id.*--Employment Agreement, \P ¶ 1.1, 1.3.)

Essentially, what DT-Trak does is stand in the shoes of or act as their coding, billing, and other administrative systems to provide services on behalf of the medical facility just like an employee of the facility would; i.e., DT-Trak is a contractor, but its employees provide the same services as the facility's employees:

- Q: So when I do business with my local clinic, I get a bill from Minneapolis and I pay that bill and they're billing on behalf of the local clinic. Is that what you do?
- A: That's a private sector type of billing. We have done that in the past for private entities. Right now we work for -- we have always worked primarily for IHS and tribal facilities. Very little of what you're talking about. What we do is we tunnel in and we work on behalf of them on their system. Everything goes to their lockboxes. We're just their employees. We basically operate as an extension as their employees sitting in a different seat, is how they view us.
- Q: I'm sorry.
- A: That's how they view us.
- Q: You facilitate the service as opposed to actually handling the service. Is that a fair way to put it?
- A: We actually provide the service that drives the reimbursement on behalf of the facility exactly like an employee would. And everything goes into the hospital and clinic bank accounts, not through our --or through -- not through our PO box. Everything is electronically pulled through them and then comes to us because we're like an employee.
- Q: But you're a contractor?

{04224003.1} - 5 -

Case Number: 29CIV19-000030

Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

A: We are. We're contractors, but we operate in employee duties.

(Morehead Aff. Ex. D -- Bertsch Dep. 18:12-19:14.)

For example, in the context of medical coding, this process is the assigning of an alpha numeric identifier to medical services which drives reimbursement, statistical analysis, revenue generation, and continuity of patient care. (Morehead Aff. Ex. D—Bertsch Dep. at 17:2-6.)

In addition, DT-Trak's employees will have direct contact with DT-Trak's client's patients, particularly regarding billing and collections:

- Q: Let me rephrase that. That's a bad question. Your contracting relationship is primarily to facilitate services to the facility, not to a specific patient?
- A: Correct. We're brought in as subject matter experts to get the highest reimbursement and quickest turnaround time that we can.
- Q: And in that regard you have no dealing with patients; correct?
- A: Incorrect. At times we have to deal with patients when we're doing the accounts receivable piece.
- Q: Okay.
- A: So if a claim isn't fully paid and we send out a bill on behalf of a clinic, it's the clinic's address on it and the bill goes to the patient and they're not happy, they can call our 800 line and they're assigned to whoever is managing that account to talk to.
- Q: So you from the accounts receivable standpoint, you actually do some collection services for the facilities?
- A: We don't do collections. We do follow-up of unpaid claims and denials. We work the rejections. Once a bill goes to collections, that is actually a collection agency and that has to abide by different rules. We do not do collection agency work, once we've gotten a claim to the extent that we can no longer collect on it with everything we've done.
- Q: I'm trying to understand this. So if there's a bill that a patient disputes, do they deal with you -- your company?

Case Number: 29CIV19-000030

Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

- A: They can.
- Q: They don't have to?
- A: They don't have to.
- Q: Even if you have a contractual relationship with the facility, they can go to the facility or they can go to you?
- A: That's correct.
- Q: The patient has that choice?
- A: Yeah, we -- and the facility then will work with us.

(Morehead Aff. Ex. D – Bertsch Dep. at 19:23-21:12)

13. At all times that Rema was employed with the Plaintiff she was an employee. R. Kolda, Depo., p. 12-13; Exh. #64.

RESPONSE: Admitted.

14. The Agreement defines a "Competing Business" as "... any individual, corporation, partnership, limited partnership, limited liability company, association, trust (business or otherwise), institution, foundation, pool, plan or other entity or organization (other than Employer) that engages or proposes to engage in the Business of Employer." (Emphasis added). Exh. A.

RESPONSE: DT-Trak admits that this is a partial quotation from the Agreement, but it does not also include the capitalized and defined term "Business of Employer," which is defined in the Agreement as:

{04224003.1} - 7 -

Case Number: 29CIV19-000030

Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

...professional medical coding, data entry, third-party billing and accounts receivable services and related activities for healthcare service providers including, but not limited to, the following services:

Professional medical coding; Electronic Health Record Services (EHR); Electronic Data Entry (any database or software); Error Report Management and Completion; Third Party Billing, all payer sources; Accounts Receivable; Posting; Collections (120+ days, etc.); Quality Assurance of Revenue Generation Cycle; Comprehensive Revenue Generation Services; Compliance Auditing HIPAA, etc.; Data Integrity Audits, entire revenue generation cycle; Provider and Staff Education; Patient Registration; Staff & Program Development/Evaluation Criteria Development; Comprehensive Consultative Services for Healthcare Administrative, Financial, HIM and BO Functions; Revenue Enhancement Auditing; Development and Implementation of Work Flow Processes Relating to Revenue Generation Cycle; Planning, Implementing and Facilitation of Training/Workshops; Feasibility Studies for or Development of Revenue Generation Cycle or Development; Internal Controls Policy Evaluation, Implementation and Management; "Special Projects"- Analysis and Development of Various Health an Revenue Generation Studies; Financial Projections for Healthcare Facilities; Cost Analysis Studies for Healthcare Facilities; Chargemaster Audit, Implementation and Utilization.

(Bertsch Affidavit Ex. A--Employment Agreement, ¶¶ 1.1, 1.3.)

In short "competitive" is not found anywhere in the definition of "Business of Employer." In addition, the non-competition portion of the Agreement provides that Kolda will not "engage, *directly or indirectly*, in any capacity whatsoever, whether as an officer, director, stockholder, owner, proprietor, partner, member, co-owner, investor, employee, trustee, manager, consultant, independent contractor, co-venturer, lender, financier, agent, representative or otherwise, in a Competing Business, or otherwise hold any interest in a Competing Business. (*Id.* ¶ 2.)

{04224003.1} - 8 -

Case Number: 29CIV19-000030

Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

In other words, Kolda cannot engage, directly or indirectly, in any capacity whatsoever in a "Competing Business." (*Id.* Employment Agreement ¶ 2.) However, "Competing Business" is not defined by the Employment Agreement to include only "competitors" or "entities," but instead, "Competing Business" refers to any work, including work by *individuals*, that falls within the "Business of Employer" (as permitted by the statute). (*Id.* ¶ 1.3.) Finally "Business of Employer" is defined by the Employment Agreement to mean "professional medical coding . . . *for healthcare service providers*" Kolda agreed she would not work for any entity in DT-Trak's business; this is true. But she also agreed that as an individual, she would not engage in DT-Trak's business either. (*Id.* ¶ 1.1, 1.3.)

Importantly, the Employment Agreement limits the effect of these provisions to two years.

15. Rema is not an independent contractor, nor does she own her own medical coding or other similar business, but has been an employee of either the Plaintiff or San Carlos Apache Healthcare (San Carlos) in Peridot, Arizona, at all relevant times to this action. *J. Kopfman Depo.*, pp. 50-52; R. Kolda Depo., p. 4; Defendant's Answers to Interrogatories and Request for Production of Documents (First Set), Answer to Interrogatory No. 14.

RESPONSE: Admitted, but this is incomplete and based on the same incomplete statement made in SUMF Number 14, i.e., it is based on an incomplete reading of the Employment Agreement that does not acknowledge the definition of "Business of Employer," which is defined in the Employment Agreement as:

{04224003.1} - 9 -

Case Number: 29CIV19-000030

Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

...professional medical coding, data entry, third-party billing and accounts receivable services and related activities for healthcare service providers including, but not limited to, the following services:

Professional medical coding; Electronic Health Record Services (EHR); Electronic Data Entry (any database or software); Error Report Management and Completion; Third Party Billing, all payer sources; Accounts Receivable; Posting; Collections (120+ days, etc.); Quality Assurance of Revenue Generation Cycle; Comprehensive Revenue Generation Services; Compliance Auditing HIPAA, etc.; Data Integrity Audits, entire revenue generation cycle; Provider and Staff Education; Patient Registration; Staff & Program Development/Evaluation Criteria Development; Comprehensive Consultative Services for Healthcare Administrative, Financial, HIM and BO Functions; Revenue Enhancement Auditing; Development and Implementation of Work Flow Processes Relating to Revenue Generation Cycle; Planning, Implementing and Facilitation of Training/Workshops; Feasibility Studies for or Development of Revenue Generation Cycle or Development; Internal Controls Policy Evaluation, Implementation and Management; "Special Projects"- Analysis and Development of Various Health an Revenue Generation Studies; Financial Projections for Healthcare Facilities; Cost Analysis Studies for Healthcare Facilities; Chargemaster Audit, Implementation and Utilization.

(*Id.*--Employment Agreement, ¶¶ 1.1, 1.3.) In short "competitive" is not found anywhere in the definition of "Business of Employer." In addition, the non-competition portion of the Agreement provides that Kolda will not "engage, *directly or indirectly*, in any capacity whatsoever, whether as an officer, director, stockholder, owner, proprietor, partner, member, coowner, investor, employee, trustee, manager, consultant, independent contractor, co-venturer, lender, financier, agent, representative or otherwise, in a Competing Business, or otherwise hold any interest in a Competing Business. (*Id.* ¶ 2.)

In other words, Kolda cannot engage, *directly or indirectly*, in any capacity whatsoever in a "Competing Business." (Employment Agreement \P 2.) However, "Competing Business" is not defined by the Employment Agreement to include only "competitors" or "entities," but

{04224003.1} - 10 -

Case Number: 29CIV19-000030

Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

instead, "Competing Business" refers to any work, including work by *individuals*, that falls within the "Business of Employer" (as permitted by the statute). (*Id.* ¶ 1.3.) Finally "Business of Employer" is defined by the Employment Agreement to mean "professional medical coding... *for healthcare service providers*...." Kolda agreed she would not work for any entity in DT-Trak's business; this is true. But she also agreed that as an individual, she would not engage in DT-Trak's business either. (*Id.* ¶¶ 1.1, 1.3.)

Importantly, the Employment Agreement limits the effect of these provisions to two years.

16. Toward the end of Rema's employment with the Plaintiff, she had been actively looking for other employment as a medical coder. R. Kolda Depo., pp. 139-141.

RESPONSE: Admitted.

17. Rema gave notice of the termination of her employment with the Plaintiff on or about January 31, 2019. Exh. #63.

RESPONSE: Admitted.

18. Rema accepted employment as a medical coder with San Carlos shortly before she resigned from the Plaintiff. R. Kolda Depo., pp. 140-141; N. Bertsch Depo., pp. 42-43.

RESPONSE: Admitted.

18. Rema accepted employment as a medical coder with San Carlos shortly before she resigned from the Plaintiff. R. Kolda Depo., pp. 140-141; N. Bertsch Depo., pp. 42-43.

{04224003.1} - 11 -

Case Number: 29CIV19-000030

Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

RESPONSE: Admitted.

20. San Carlos is not an independent contractor that engages in or proposes to engage in the same business as the Plaintiff. *Id.*, at 50-52; R. Kolda Depo, pp. 142.

RESPONSE: Denied for the reasons stated above regarding SUMF Nos. 14 and 15, i.e., it is based on an incomplete reading of the Employment Agreement that does not acknowledge the definition of "Business of Employer," which is defined in the Employment Agreement as:

...professional medical coding, data entry, third-party billing and accounts receivable services and related activities for healthcare service providers including, but not limited to, the following services:

Professional medical coding; Electronic Health Record Services (EHR); Electronic Data Entry (any database or software); Error Report Management and Completion; Third Party Billing, all payer sources; Accounts Receivable; Posting; Collections (120+ days, etc.); Quality Assurance of Revenue Generation Cycle; Comprehensive Revenue Generation Services; Compliance Auditing HIPAA, etc.; Data Integrity Audits, entire revenue generation cycle; Provider and Staff Education; Patient Registration; Staff & Program Development/Evaluation Criteria Development; Comprehensive Consultative Services for Healthcare Administrative, Financial, HIM and BO Functions; Revenue Enhancement Auditing; Development and Implementation of Work Flow Processes Relating to Revenue Generation Cycle; Planning, Implementing and Facilitation of Training/Workshops; Feasibility Studies for or Development of Revenue Generation Cycle or Development; Internal Controls Policy Evaluation, Implementation and Management; "Special Projects"- Analysis and Development of Various Health an Revenue Generation Studies; Financial Projections for Healthcare Facilities; Cost Analysis Studies for Healthcare Facilities; Chargemaster Audit, Implementation and Utilization.

(Bertch Aff. Ex. A--Employment Agreement, ¶¶ 1.1, 1.3.) In short "competitive" is not found anywhere in the definition of "Business of Employer." In addition, the non-competition portion of the Agreement provides that Kolda will not "engage, *directly or indirectly*, in any capacity

{04224003.1} - 12 -

Case Number: 29CIV19-000030

Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

whatsoever, whether as an officer, director, stockholder, owner, proprietor, partner, member, co-

owner, investor, employee, trustee, manager, consultant, independent contractor, co-venturer,

lender, financier, agent, representative or otherwise, in a Competing Business, or otherwise hold

any interest in a Competing Business. (*Id.* \P 2.)

In other words, Kolda cannot engage, directly or indirectly, in any capacity whatsoever in

a "Competing Business." (Employment Agreement ¶ 2.) However, "Competing Business" is

not defined by the Employment Agreement to include only "competitors" or "entities," but

instead, "Competing Business" refers to any work, including work by *individuals*, that falls

within the "Business of Employer" (as permitted by the statute). (Id. \P 1.3.) Finally "Business

of Employer" is defined by the Employment Agreement to mean "professional medical coding...

. for healthcare service providers " Kolda agreed she would not work for any entity in DT-

Trak's business; this is true. But she also agreed that as an individual, she would not engage in

DT-Trak's business either. (*Id.* \P ¶ 1.1, 1.3.)

Importantly, the Employment Agreement limits the effect of these provisions to two

years.

21. San Carlos had a contract for services with the Plaintiff,

but that contract expired on December 31, 2018, and was not renewed.

N. Bertsch Depo., pp. 42-43; R. Kolda Depo., pp. 145-146.

RESPONSE: Admitted.

- 13 -{04224003.1}

Filed: 6/7/2021 3:15 PM CST Hand County, South Dakota 29CIV19-000030

Case Number: 29CIV19-000030

Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

22. Rema works for San Carlos as a medical coder, but her work at San Carlos is not the same type of work she did with the Plaintiff.

R. Kolda Depo., pp. 145.

RESPONSE: Denied. Kolda works for San Carlos as a medical coder, which is the same work she did for DT-Trak. (Morehead Aff. Ex. E--Kolda Depo. at 4:12-23; 141:13-22.)

23. Before Rema accepted the job with San Carlos, she questioned the representatives with San Carlos as to whether or not they had an existing contract with the Plaintiff. R. Kolda Depo., pp. 145-148.

RESPONSE: DT-Trak admits this is true for purposes of summary judgment only.

24. Rema had worked on the San Carlos account when the Plaintiff had a contract with San Carlos, but it was when Rema was in Quality

Assurance when she first began working with the Plaintiff and not when she was a medical coder for the Plaintiff. *Id.*, at p. 148.

RESPONSE: Admitted, but this is a distinction without a difference, because if she worked in Quality Assurance, Kolda was reviewing the work of the coders:

- Q: Did you ever have any other occasion to train, even on an individual basis, any other employees?
- A: I was a QA person, but I did not train. I just did audits.
- Q: So explain what an "audit" is.
- A: An audit is when the coder does their coding of the individual patient charts, and then the quality assurance will review their performance and their coding to make sure that it is correct and accurate—
- Q: So at some point –

{04224003.1} - 14 -

Case Number: 29CIV19-000030

Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

- A: --before it is going to be sent to billing.
- Q: Sorry. I apologize for that. I didn't mean to interrupt you. Would it be accurate to say that at some point you became a quality assurance person at DT-Trak?
- A: Yes.
- Q: So you would have been doing those audits; correct?
- A: Yes.
- Q: And so you did an audit of an employee; right? That's what you would do?
- A: Yes.
- Q: If errors were made, you would explain what the errors were -- or explain what would happen.
- A: We would have to write down on a sheet what the error was.
- Q: Okay.
- A: So if it was a certain code that they coded but it wasn't the right code, we would let them know that they had to relook to find this other code.

(Morehead Aff. Ex. E—Kolda Dep. 69:10-70:16.)

25. The medical coding system and process is a universal coding system and is known as ICD-10. N. Bertsch Depo., p. 27-31; Exh. C.

RESPONSE: Admitted.

{04224003.1} - 15 -

Case Number: 29CIV19-000030

Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

26. ICD-10 is in the public domain and is accessible by any person who wants to train as a medical coder. N. Bertsch Depo., p. 28-31; Exh. C.

RESPONSE: Admitted.

27. The Plaintiff did not develop the ICD-10 medical coding system. R. Aalbers Depo., p. 21.

RESPONSE: Admitted.

28. The Plaintiff does not claim the ICD-10 medical coding system as a trade secret, confidential information, or proprietary in nature in any respect. R. Aalbers Depo., p. 21; J. Kopfmann Depo., pp. 46-49; N. Bertsch Depo., pp. 27-31.

RESPONSE: Admitted.

29. The Plaintiff claims that the experience and knowledge Rema gained while working for the Plaintiff and utilizing the ICD-10 medical coding system is a trade secret, confidential information, and proprietary. N. Bertsch Depo., p. 29, 39-42; J. Kopfmann Depo., pp. 49, 55-57; R. Aalbers Depo., pp. 17, 26-28, 30, 33-34.

RESPONSE: Denied as a misstatement of the cited testimony, and an incomplete description of DT-Trak's trade secrets and confidential information. For example in response to Kolda's Interrogatory Nos. 9 and 10, DT-Trak provided a lengthy discussion about its confidential information and trade secrets:

{04224003.1}

Case Number: 29CIV19-000030

Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

"DT-Trak's coding training, coding work experience and subsequent proprietary protocols [which] results in confidential information and/or trade secrets specific to meeting the comprehensive coding and data requirements that any coder requires (whether employed or contracted). " (Morehead Aff. Ex. F—DT-Trak's Answers to Interrogatories at Answer to Interrogatory No. 9.) As reflected in those discovery answers, Kolda didn't just learn "coding." Her duties encompassed "broader details than just ICD-10. Included in the coding duty expectations that an IHS/Tribal employee or a contractor would be expected to perform includes reviewing and assigning the other code sets CPT-4 (HCPCS Level I - Current Procedural Terminology), HCPCS Level II coding as well as CDT (Current Dental Terminology). Additional duties include data entry functions, including determining correct providers to enter/ link, merging ancillary data, correct visit data (location, service category, clinic type), GRPA (Government Performance and Results Act) data collection." (*Id.*)

More specifically, DT-Trak is hired by healthcare facilities, such as San Carlos, typically because those facilities are experiencing inefficiencies, insufficient training, and other issues interfering with the proper record-keeping for medical services and collecting revenues for those services. (Morehead Aff. Ex. D – Bertch Dep. at 34:4-36:9.) Because DT-Trak has worked with so many facilities over the years, it is familiar with provider standards, clinic visit types and locations, data entry and coding details. These are the backbone of DT-Trak's proprietary workflow and processing protocols, i.e., DT-Trak's confidential information and trade secrets for meeting all these duty requirements. (Morehead Aff. Ex. F—Answers to Interrogatories at Answer to Interrogatory No. 9, p. 8.) In other words, by working for and rehabilitating so many

{04224003.1} - 17 -

Case Number: 29CIV19-000030

Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

of the IHS providers' administrative departments, including their coding, billing, collecting, and other functions, DT-Trak has developed protocols and processes. These protocols and procedures are not generally known outside of DT-Trak. DT-Trak installs these at IHS facilities to help them optimize their administrative departments. (*Id.*)

DT-Trak's training of its employees, including Kolda, includes training in client-specific workflow processing protocols and proprietary software used for routing, tracking, trending, and reporting specifically tailored to client needs. (*Id.*) These specific workflow and categorizations are not standard routine methods known or practiced by Indian Health Service and tribal facilities. (*Id.*) These are specific categorization, tracking, trending, and reporting methods that DT-Trak offers its IHS/tribal-facility clients as a value-added benefit above and beyond the standard routine processing functions identified and practiced in IHS/Tribal facilities, including San Carlos. (*Id.* at p. 10). In other words, the propriety information DT-Trak has developed is one of the primary reasons entities like San Carlos hire DT-Trak.

These proprietary workflow processes including a unique communication workflow.

(Id.) DT-Trak developed specific communications workflow methods/protocols for communicating deficiencies with DT-Trak's clients, which varied from client to client, including for San Carlos. (Id.) DT-Trak's communication process provides a specific and consistent method of communicating back and forth with DT-Trak's clients. (Id.) Again, this communication includes specific communication categories uniquely designed by DT-Trak.

(Id.)

{04224003.1} - 18 -

Case Number: 29CIV19-000030

Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

In reviewing health records and the coding process, as DT-Trak does with each client, through DT-Trak's years of working with clients, in this case San Carlos, DT-Trak has developed and incorporated DT-Trak's proprietary protocols for each specific clinic visit type for each client. (Id.) DT-Trak's method of defining and developing DT-Trak's proprietary processing protocols allows for DT-Trak to provide DT-Trak's clients with efficiency, consistency and accuracy. This makes DT-Trak uniquely more successful than the employed client (here San Carlos) coding staff who are not knowledgeable or aware of these proprietary finite protocols. (Id.) Indeed, for each DT-Trak client, including San Carlos, multiple specific coding and data entry details need to be defined and refined. (Id. at Answer to Interrogatory No. 10, p. 11.) DT-Trak's identification, gathering, compilation and constructions of these details, which DT-Trak calls its "proprietary protocol notes," is guided by DT-Trak's variety of work experience with multiple clients and developed from work experience specifically with DT-Trak's clients such as San Carlos. (Id.) Essentially, DT-Trak has created an enormous volume of information about how to do things right and, just as crucial, how to avoiding wasting time by doing the wrong thing (including the wrong things its clients have been doing). (Morehead Aff. Ex. G--Aalbers Dep at 26.)

As with DT-Trak's other clients, DT-Trak developed DT-Trak's proprietary coding protocols for San Carlos. Some details include specific coding and data entry details regarding pharmacy, labs, immunizations, clinic types and location details, regional payer-specific requirements, specific notification details, and provider entry details. (Morehead Aff. Ex. F—Answers to Interrogatories at Answer to Interrogatory No. 10 at p. 11.) DT-Trak's knowledge,

{04224003.1} - 19 -

Case Number: 29CIV19-000030

Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

design, and method of identifying and compiling these details is DT-Trak's proprietary trade secret and confidential information, which Defendant would have learned from her training at DT-Trak. (*Id.*) These requirements are sufficiently detailed that it often takes a year or more for a coder to get fully up to speed on each facility the coder works for/on, which results in a tremendous cost to DT-Trak in training coders. (*Id.*)

This proprietary information is not some amorphous mass of experience. DT-Trak has compiled its confidential information and workflows in general into a set of "Master DT Guidelines" (Morehead Aff. Ex. H). Its has organized its San Carlos information and workflows into a "San Carlos Apache Healthcare (SCAH) Coding Protocol Notes v1.1" document for reference (Morehead Aff. Ex. I), as it has for other facilities. (Morehead Aff. Ex. J.) Kolda would have had access to and essentially learned all of the contents of these documents., which DT-Trak's deponents explained:

- Q: So when DT-Trak gets a customer, there a it's a contractual relationship so far as you know, rights?
- A: Correct.
- Q: And then a protocol is established with that particular customer; correct?
- A: Correct
- Q: So what's involved in it? How does it happen? I don't know
- A: You ask a lot of questions that we have developed over the years for experience with the type of workload we do. We know things to ask because of the type of that client, so you would know that ahead of time. And you would ask specific questions related to that, see what their answers are. And, of course, on your experience, you would suggest things, you know, learn things, research things, and establish a protocol that would be specific to that specific site.

Case Number: 29CIV19-000030

Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

- Q: Specific what?
- A: Site. Sorry. Contract
- Q: So if we have customer A, B, and C, most we would have a separate and specific protocol for customer A that would not be like customer B, and C's would not be like A or B. It would be independent and distinctive. Is that a fair conclusion?
- A: Roughly correct.
- Q: There would be some overlapping?
- A: That was my point. Of course. Some two sites may do something exactly alike or two sites may always do something exactly different.

(Morehead Aff. Ex. G--Aalbers Dep. at 11-13 and 17-20).

DT-Trak regularly informed its employees that it had confidential and trade secret information through its employee handbooks, which Kolda acknowledged receiving. (Morehead Aff. Ex. K--Dep. Ex. 11; Morehead Aff. Ex. E--Kolda Dep. 62:11-21 and 132:18-25; Morehead Aff. Ex. L--Exs. 56-57.) Moreover, Kolda admitted that DT-Trak was very persistent about obtaining acknowledgments of receipt from its employees that they had received employee handbooks. (Morehead Aff. Ex. E—Kolda Dep. 122-123.)

30. The Plaintiff does not have any evidence that Rema violated the terms of the Agreement, but only has suspicions that she may have done so. R. Aalbers Depo., p. 37; J. Kopfmann Depo., pp. 55-57.

RESPONSE: Denied. It is undisputed Kolda is working for San Carlos in violation of her non-compete and other obligations.

{04224003.1} - 21 -

Case Number: 29CIV19-000030

Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

31. The Plaintiff claims that Rema cannot work for any of its current customers, any past customer, any customer that it submitted a bid for work to, or prospective customers regardless of whether or not they are known. N. Bertsch Depo., pp. 40-42; J. Kopfmann Depo., pp. 54, 58-60.

RESPONSE: DT-Trak denies this statement because it suggests that Ms. Kolda can never work for those entities again, when the Employment Agreementt provision DT-Trak seeks to enforce has a temporal limit of two years. DT-Trak admits that this covers some of Kolda's duties under the Employment Agreement, but denies that it is a complete statement. DT-Trak admits that this is a partial quotation from the Agreement, but it does not also include the capitalized and defined term "Business of Employer," which is defined in the Agreement as:

...professional medical coding, data entry, third-party billing and accounts receivable services and related activities for healthcare service providers including, but not limited to, the following services:

Professional medical coding; Electronic Health Record Services (EHR); Electronic Data Entry (any database or software); Error Report Management and Completion; Third Party Billing, all payer sources; Accounts Receivable; Posting; Collections (120+ days, etc.); Quality Assurance of Revenue Generation Cycle; Comprehensive Revenue Generation Services; Compliance Auditing HIPAA, etc.; Data Integrity Audits, entire revenue generation cycle; Provider and Staff Education; Patient Registration; Staff & Program Development/Evaluation Criteria Development; Comprehensive Consultative Services for Healthcare Administrative, Financial, HIM and BO Functions; Revenue Enhancement Auditing; Development and Implementation of Work Flow Processes Relating to Revenue Generation Cycle; Planning, Implementing and Facilitation of Training/Workshops; Feasibility Studies for or Development of Revenue Generation Cycle or Development; Internal Controls Policy Evaluation, Implementation and Management; "Special Projects"- Analysis and Development of Various Health an Revenue Generation Studies; Financial Projections for

Case Number: 29CIV19-000030

Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

Healthcare Facilities; Cost Analysis Studies for Healthcare Facilities; Chargemaster Audit, Implementation and Utilization.

anywhere in the definition of "Business of Employer." In addition, the non-competition portion

(Bertch Aff. Ex. A--Employment Agreement, ¶¶ 1.1, 1.3.) In short "competitive" is not found

of the Agreement provides that Kolda will not "engage, directly or indirectly, in any capacity

whatsoever, whether as an officer, director, stockholder, owner, proprietor, partner, member, co-

owner, investor, employee, trustee, manager, consultant, independent contractor, co-venturer,

lender, financier, agent, representative or otherwise, in a Competing Business, or otherwise hold

any interest in a Competing Business. (Id. \P 2.)

In other words, Kolda cannot engage, directly or indirectly, in any capacity whatsoever in

a "Competing Business." (Employment Agreement ¶ 2.) However, "Competing Business" is

not defined by the Employment Agreement to include only "competitors" or "entities," but

instead, "Competing Business" refers to any work, including work by individuals, that falls

within the "Business of Employer" (as permitted by the statute). (Id. \P 1.3.) Finally "Business

of Employer" is defined by the Employment Agreement to mean "professional medical coding . .

. for healthcare service providers " Kolda agreed she would not work for any entity in DT-

Trak's business; this is true. But she also agreed that as an individual, she would not engage in

DT-Trak's business either. (*Id.* ¶¶ 1.1, 1.3.)

32. The Agreement identifies the geographical limitation of its

application as the entire continental United States and Alaska and

Hawaii. Exh. A.

RESPONSE: Admitted.

{04224003.1}

- 23 -

Case Number: 29CIV19-000030

Plaintiff's Response to Defendant's Statement of Undisputed Material Facts

Dated this 7th day of June, 2021.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ Sander J. Morehead

Sander J. Morehead Jordan J. Feist 300 South Phillips Avenue, Suite 300 Post Office Box 5027 Sioux Falls, South Dakota 57117-5027 (605) 336-3890 Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of June, 2021, a true and correct copy of the foregoing Plaintiff's Response to Defendant's Statement of Undisputed Material Facts was electronically filed and served through the Odyssey File and Serve system upon the following individual:

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/s/ Sander J. Morehead
One of the Attorneys for Plaintiff

{04224003.1} - 24 -

Filed: 6/7/2021 3:15 PM CST Hand County, South Dakota 29CIV19-000030

South Dakota Codified Laws

Title 37. Trade Regulation

Chapter 37-29. Uniform Trade Secrets Act (Refs & Annos)

SDCL § 37-29-1

37-29-1. Definitions

Currentness

Terms	used	in	this	chapter	mean:

- (1) "Improper," includes theft, bribery, misrepresentation, breach, or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means;
- (2) "Misappropriation,"
 - (i) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
 - (ii) Disclosure or use of a trade secret of another without express or implied consent by a person who:
 - (A) Used improper means to acquire knowledge of the trade secret; or
 - (B) At the time of disclosure or use, knew or had reason to know that such knowledge of the trade secret was: (I) Derived from or through a person who had utilized improper means to acquire it; (II) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (III) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
 - (C) Before a material change of position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake;
- (3) "Person," a natural person, corporation, business trust, estate, trust, limited liability company, partnership,

association, joint venture, government, governmental subdivision, or agency, or any other legal or commercial entity;

- (4) "Trade secret," information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
 - (i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
 - (ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Credits

Source: SL 1988, ch 354, § 1; SL 1994, ch 351, § 89.

Notes of Decisions (15)

S D C L § 37-29-1, SD ST § 37-29-1

Current through laws of the 2022 Regular Session effective February 14, 2022, Exec. Order 2021-05 and Supreme Court Rule 22-06

End of Document

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South Dakota Codified Laws

Title 37. Trade Regulation

Chapter 37-29. Uniform Trade Secrets Act (Refs & Annos)

SDCL § 37-29-2

37-29-2. Injunctive relief

Currentness

- (a) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.
- (b) In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.
- (c) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

Credits

Source: SL 1988, ch 354, § 2.

Notes of Decisions (1)

S D C L § 37-29-2, SD ST § 37-29-2

Current through laws of the 2022 Regular Session effective February 14, 2022, Exec. Order 2021-05 and Supreme Court Rule 22-06

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APPELLANT'S REPLY BRIEF

DT-TRAK CONSULTING, INC.,
 Plaintiff/Appellee,

vs.

REMA KOLDA,
Defendant/Appellant.

DOCKET #29725

APPEAL FROM THE CIRCUIT COURT THIRD JUDICIAL CIRCUIT HAND COUNTY, SOUTH DAKOTA

HONORABLE KENT A. SHELTON Presiding Circuit Judge

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ORDER GRANTING PETITION FOR ALLOWANCE OF APPEAL FROM INTERMEDIATE ORDER FILED AUGUST 20, 2021

TABLE OF CONTENTS

	Page
Table of Cases and Authorities	ii
Preliminary Statement	1
Statement of the Legal Issues	1
Argument	2
ISSUE 1: Did the trial court err by denying Rema's Motion for Summary Judgment?	2
A. The "business of DT-Trak" or "same business" as DT-Trak	3
B. Trade Secrets, Confidential, and Proprietary Information	4
C. Rema's San Carlos related information	8
Conclusion	9
Request for Oral Argument	9
Certificate of Compliance	9
Certificate of Service	10

TABLE OF CASES AND AUTHORITIES

SC	OUTH DAKOTA SUPREME COURT CASES:	<u>Page</u>
1.	Agreva, LLC v. Eide Bailly, LLP, 2020 S.D. 59, 950 N.W.2d 774	2.3
	Daktronics, Inc. v. McAfee, 1999 S.D. 113, 599 N.W.2d 358	
3.	Edgar v. Mills, 2017 S.D. 7, 892 N.W.2d 223	3,4
4.	Gabriel v. Bauman, 2014 S.D. 30, 847 N.W.2d537	9
4.	Laska v. Barr, 2016 S.D. 13, 876 N.W.2d 50	2,3
5.	Mckie Ford Lincoln, Inc. v. Scott Hanna & Gateway Auto., LLC, 2018	
	S.D. 14, 907 N.W.2d 795	2,3
ST	CATE STATUTES:	
1.	SDCL 37-29-1	2,5,8
2.	SDCL 37-29-1(4)	. 8
3.	SDCL 53-9-8	. 2,3

PRELIMINARY STATEMENT

The Appellant Rema Kolda shall be referred to herein as "Rema." The Appellee DT-Trak Consulting, Inc. shall be referred to herein as "DT-Trak." References to the Register of Actions shall be by "RA" followed by the title of the document, if applicable, and the page number thereof. References to the deposition exhibits shall be by "Depo. Exh." followed by the exhibit number or letter. References to the record to support factual matters shall be to the depositions, affidavits, other discovery, and pleadings. The deposition excerpts and other discovery supporting the record are found in the Affidavit of Timothy R. Whalen and the Second Affidavit of Timothy R. Whalen both of which are filed of record herein. RA, pp. 210, 392. References to the depositions shall be by the identity of the party deposed followed by "Depo." and the page numbers of the deposition. References to DT-Trak's Complaint shall be by "Comp." followed by the paragraph number, references to Rema's Answer and Counterclaim shall be by "Ans." followed by the paragraph number, and References to DT-Trak's Reply to Counterclaim shall be by "Reply" followed by the paragraph number. References to the affidavits filed in the summary judgment proceeding shall be by "Affidavit" followed by the identity of the party making the affidavit and the paragraph number of the affidavit.

Rema shall not restate the Jurisdictional Statement, Statement of the Case, nor Statement of the Facts, and relies upon the Appellant's Brief for these matters.

STATEMENT OF THE LEGAL ISSUE

ISSUE 1: DID THE TRIAL COURT ERR BY DENYING REMA'S MOTION FOR SUMMARY JUDGMENT?

Trial court holding: No.

Relevant court cases:

- 1. Agreva, LLC v. Eide Bailly, LLP, 2020 S.D. 59, 950 N.W.2d 774
- 2. *Laska v. Barr*, 2016 S.D. 13, 876 N.W.2d 50
- 3. Mckie Ford Lincoln, Inc. v. Scott Hanna & Gateway Auto., LLC, 2018 S.D. 14, 907 N.W.2d 795
- 4. Daktronics, Inc. v. McAfee, 1999 S.D. 113, 599 N.W.2d 358

Relevant statutes or authority:

- 1. SDCL 53-9-8
- 2. SDCL 37-29-1

ARGUMENT

The Standard of Review and Standard for Summary Judgment were addressed in detail in the Appellant's Brief and neither matter will be restated herein.

ISSUE 1: DID THE TRIAL COURT ERR BY DENYING REMA'S MOTION FOR SUMMARY JUDGMENT?

DT-Trak misses the import of its own agreement, the facts of this case, and the applicable law. This case is not as complex as DT-Trak would have the Court believe. The essence of this case is that Rema is a medical coder, and medical coding is a profession that is obtainable by studying and learning information that is in the public domain. Moreover, DT-Trak is in a business that is independent and distinct from its customers, and its agreement does not prohibit Rema from working for a hospital. Finally, there is no confidential information at stake in this matter as the process at issue is the ICD-10 medical coding system, which is on the internet, and is in the public domain, is general knowledge, and is readily ascertainable by anyone who wants to see it and use it. Moreover, the process of medical coding is fully discussed and divulged in the training materials available on the internet. Finally, DT-Trak cannot show any facts

or law that support its contention that the ICD-10 medical coding process used by every medical coder and entity in the medical industry is proprietary, confidential, or trade secret information.

A. The "business of DT-Trak" or "same business" as DT-Trak.

DT-Trak's argument on this issue is circular and misleading. DT-Trak argues that the concepts of "business of DT-Trak" and the "same business as DT-Trak" are separate and distinct and the statutory language controls one concept and the Non-Compete, Non-solicitation, Confidentiality, Non-Disclosure, and Non-Use Agreement (Agreement) signed by Rema controls the other. *RA*, *p. 4*, *Comp.*, ¶2; *Depo. Exh. A and #23*. They are not. DT-Trak's effort to bifurcate the issue so as to address two concepts is clearly nothing more than a "red herring" to confuse and unnecessarily complicate the issue. The law is abundantly clear that DT-Trak cannot restrain Rema's profession without a narrowly construed and specific agreement to do so. *SDCL 53-9-8; Mckie Ford Lincoln, Inc. v. Scott Hanna & Gateway Auto., LLC*, 2018 S.D. 14, 907 N.W.2d 795; *Aqreva, LLC v. Eide Bailly, LLP*, 2020 S.D. 59, 950 N.W.2d 774. Moreover, the rules of contract construction clearly prohibit the argument made by DT-Trak as they require that

... [w]hen the meaning of contractual language is plain and unambiguous, construction is not necessary. If a contract is found to be ambiguous the rules of construction apply. ... A contract is ambiguous when application of rules of interpretation leaves a genuine uncertainty as to which of two or more meanings is correct. ... [A] contract is ambiguous only when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement. (Citations omitted).

Laska v. Barr, 2016 S.D. 13, ¶5, 876 N.W.2d 50. Here, the language of the Agreement is plain and unambiguous. Consequently, it is the Court's duty to interpret and enforce the contract as written. Edgar v. Mills, 2017 S.D. 7, ¶28, 892 N.W.2d 223. In doing so, the

Court must look "... to the language that the parties used in the contract to determine their intention ..." and the Court must "... examine the language of an agreement as a whole to determine the terms and conditions ..." thereof. Id., at 7, ¶26. When the Court engages in the proper construction of the Agreement as required by the governing law, it is unquestionable that the intent of the parties and the meaning of the Agreement was not to prohibit Rema from working as a medical coder as an employee of San Carlos Apache Healthcare Corporation (San Carlos) in Peridot, Arizona, but only to prohibit her from working as an employee for a business that engaged in the same business as that of DT-Trak, i.e., a business that provides medical coding services to third parties as an independent contractor. Nothing in the agreement, when it is construed narrowly, prohibits Rema from working for a hospital that provides its own medical coding in-house by its own employees. Moreover, extending the definition of a "competing business" or the "same business" to include hospitals such as San Carlos constitutes a broad and extensive interpretation of the Agreement that restrains Rema's ability to work in her chosen profession anywhere in the United States. This is clearly contrary to the governing law on this issue.

B. Trade Secrets, Confidential, and Proprietary Information.

DT-Trak argues that Rema is at risk of disclosing confidential, proprietary, or trade secret information if she continues to work for San Carlos or any other hospital. This argument is meritless because anything that could remotely be classified as confidential, proprietary, or trade secret information is not at issue here. DT-Trak continually attempts to equate the ICD-10 medical coding system as confidential, proprietary, or a trade secret. The problem with this posture, however, is that it is undisputed that the ICD-10 medical coding system and process is a universal coding

system, is in the public domain, and accessible by any person who wants to train as a medical coder. . RA, p. 204, Defendant's Statement of Undisputed Material Facts, ¶¶25-28; RA, p. 392, Second Affidavit of Timothy R. Whalen with answers to interrogatories attached. Moreover, the use of the ICD-10 medical coding system is explained in detail in the internet materials accessible by the public. Appx. to Appellant's Brief, Appx., pp. 18-25. DT-Trak did not develop the ICD-10 medical coding system and does not, and cannot, claim the ICD-10 coding system or its use as confidential, proprietary, or a trade secret in any respect. In spite of the clear status of the ICD-10 coding system, DT-Trak argues that its use in some way constitutes confidential, proprietary, or trade secret information. This argument is unsupported factually and legally. See, SDCL 37-29-1; Daktronics, Inc. v. McAfee, 1999 S.D. 113, 599 N.W.2d 358. In Daktronics the Court specifically held that "... simply possessing a non-novel idea or concept without more is generally, as a matter of law, insufficient to establish a trade secret ..." under SDCL 37-29-1. *Id.*, at ¶14. This is so because essential to a concept being a trade secret is that there must be "...economic value that is not readily ascertainable by other means." Id., at ¶15. This Court further held in *Daktronics* that the economic value element of a trade secret "... precludes trade secret protection for information generally known within an industry even if not to the public at large." Id., at ¶15. Moreover, Katherine Andersen (Andersen) was previously employed by DT-Trak and is familiar with their processes and procedures for medical coding. RA, p. 376, Affidavit of Katherine Andersen, ¶4. Andersen now works for San Carlos and has at all relevant times hereto. Id. Andersen's factual assertions establish that nothing Rema uses for her work as a medical coder at San Carlos is confidential, proprietary, or trade secret information in the industry, nor is it specific or confidential to DT-Trak. RA, p. 376, Affidavit of Katherine Andersen ¶¶11,

12, and 13. Andersen's factual assertions are undisputed by DT-Trak.

DT-Trak argues that it has special experience or information relative to provider standards, clinic visit types and locations, data entry and coding details which are the backbone of its work. These items are not confidential, proprietary, or trade secrets and are well known in the industry and the general public and are in the public domain. DT-Trak's argument that the manner in which it uses these items is protected is legally insufficient to afford protection to DT-Trak under the law and has been rejected by this Court in prior cases. *Daktronics*, 1999 S.D. at 113. Specific to this issue, this Court held that merely combining the use of information and knowledge within the public domain to devise an application in a particular circumstance is not protected under the trade secret laws. *Id.*, at ¶14-20.

DT-Trak argues that its protocols relative to San Carlos and other facilities that it developed over the years were accessible by Rema and constitute confidential, proprietary, or trade secret information. This argument is irrelevant to the issues in the case at bar and unpersuasive in all respects as to the resolution of the issues associated with the Agreement. It is undisputed that Rema does not use any of DT-Trak's protocols for her work at San Carlos. *Appx. to Appellant's Brief, Appx. pp. 70-71; RA, p. 376, Affidavit of Katherine Andersen ¶¶11-13; RA, p. 110, Affidavit of Sander J. Morehead, Exh. A, pp. 160-161.* Further, it is undisputed that DT-Trak's protocols for its clients changed daily, if not hourly. *RA, p. 210, Affidavit of Timothy R. Whalen, Exh. 3, pp. 30-33; Appx. Appellant's Brief, Appx. pp. 27-29.* Consequently, Rema never had complete knowledge of the protocols nor would anything in the protocols be useful to her in the work she performs for San Carlos. This fact is confirmed by Andersen in her affidavit in support of Rema's motion for summary judgment. *RA, p. 376, Affidavit of Katherine*

Andersen ¶¶11-13. In light of the above, it is impossible for Rema to inevitably disclose anything about the protocols because of their nature and the ever-changing status of same. Additionally, San Carlos terminated its contractual relationship with DT-Trak and no longer utilizes DT-Trak for any services. *Id.*, at ¶¶5-8. Consequently, the protocols for San Carlos are useless in all respects.

It is also noteworthy that it is a question of fact as to whether or not information is "... generally known or readily ascertainable ...", but trial courts should determine such issues on summary judgment when, such as here, there is no genuine issue to material facts and one party is entitled to a judgment as a matter of law. *Dakotronics*, 1999 S.D. at 113, ¶16. Moreover, this Court is cautious about finding information confidential, proprietary, or trade secret even when the information is "... known by sufficiently few people to make it commercially valuable ..." because "... many types of professionals have specialized knowledge and information that they offer to the public in exchange for a fee. ...", but that alone does not justify a finding that same should be afforded confidential, proprietary, or trade secret status. *Id.*, at ¶20.

Finally, DT-Trak cites several cases from other jurisdictions in support of its position, but those cases are distinguishable from the case at bar. Each case cited by DT-Trak in support of its argument for relief of a threatened disclosure of confidential, proprietary, or trade secret information dealt with a specific and detailed formula or legally recognized concept which warranted protection under the law. None of the fact patterns in any case cited by DT-Trak herein are comparable with the case at bar. Moreover, in each case the concept the parties sought to protect was specifically identifiable, had factual support in the record, and was determined to be a trade secret. It is DT-Trak's burden to show confidential, proprietary, and/or trade secret status before

it can assert a claim for protection. *Daktronics*, 1999 S.D. at 113, ¶12. DT-Trak has produced no evidence which would prove anything except that the information it claims as confidential, proprietary, or a trade secret as it relates to the Agreement and Rema's employment with San Carlos is generally known in the industry and the public domain and is not particular or specific to it.

In light of the above and foregoing, DT-Trak has utterly failed in rebutting Rema's motion for summary judgment on the confidential, proprietary, and trade secret information issue, and, as such, it is not entitled to protections of any of the information relevant to this case under *SDCL 37-29-1*. Nothing about any of the information DT-Trak seeks protection from disclosure can in any regard be classified as

- ... information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
- (I) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- (ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

SDCL 37-29-1(4).

C. Rema's San Carlos related information.

DT-Trak argues that it sought a variety of discovery from Rema relative to her work at San Carlos, but Rema objected to same on the basis that it was not reasonably calculated to lead to the discovery of admissible evidence and was confidential and privileged information. DT-Trak never brought a motion to compel discovery nor did it otherwise preserve any issues with regard to this argument for appellate review. DT-Trak now argues that Rema's objection is in some fashion relevant here or subject to appellate consideration. This argument is meritless. It is well settled law that failure to present an

issue to the trial court for determination or to make the appropriate record below for appellate review is a waiver of that issue. *Gabriel v. Bauman*, 2014 S.D. 30, ¶23, 847 N.W.2d 537. Consequently, this argument by DT-Trak's should be disregarded in all respects.

CONCLUSION

The decision of the trial court should be reversed and summary judgment in favor of Rema should be entered, and all counts as plead in DT-Trak's Complaint should be dismissed.

REQUEST FOR ORAL ARGUMENT

Rema hereby requests oral argument.

Dated this 26th day of March, 2022.

/S/TIMOTHY R. WHALEN Whalen Law Office, P.C. P.O. Box 127 Lake Andes, SD 57356 Telephone: 605-487-7645 whalawtim@cme.coop Attorney for the Appellee

CERTIFICATE OF COMPLIANCE

Timothy R. Whalen, the attorney for the Appellee, hereby certifies that the Appellee's Brief complies with the type volume limitations provided for in SDCL 15-26A-66(b)(4). The Appellee's Brief contains 13,217 characters and 2,582 words. Further, the undersigned relied upon the word count of the word processing system used to prepare the Appellee's Brief.

9

/S/ TIMOTHY R. WHALEN Whalen Law Office, P.C. P.O. Box 127 Lake Andes, SD 57356 Telephone: 605-487-7645 whalawtim@cme.coop Attorney for the Appellee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served two true and correct copies of the Appellee's Brief on the attorneys for the Appellee at their address as follows: Sander J. Morehead and Jordan J. Feist, Woods, Fuller, Shultz & Smith, PC, 300 S. Phillips Avenue, Suite 300, P.O. Box 5027, Sioux Falls, SD 57117-5027 jordan.feist@woodsfuller.com and sander.morehead@woodsfuller.com by e-mail and by depositing same in the United States first class mail, postage prepaid, on the 26th day of March, 2022, at Lake Andes, South Dakota. Further, the undersigned hereby certifies that the original and two copies of the above and foregoing Appellee's Brief were mailed to Shirley Jameson-Fergel, Clerk of the Supreme Court, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070 by depositing same in the United States first class mail, postage prepaid, on the 26th day of March, 2022. Further, one copy of the Appellee's Brief was e-mailed to the aforesaid Clerk of the Supreme Court on the 26th day of March, 2022, at her e-mail address as follows: SCClerkBriefs@ujs.state.sd.us.

/S/TIMOTHY R. WHALEN Whalen Law Office, P.C. P.O. Box 127 Lake Andes, SD 57356 Telephone: 605-487-7645 whalawtim@cme.coop

THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

Appeal Nos. 29725 and 29726

DT-TRAK CONSULTING, INC., a South Dakota Corporation

Plaintiff/Appellant,

v.

REMA KOLDA, an individual,

Defendant/Cross-Appellant.

Cross-Appeals from the Circuit Court Third Judicial Circuit Hand County, South Dakota

HONORABLE KENT SHELTON

·----

APPELLANT DT-TRAK CONSULTING, INC.'S BRIEF

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TABLE OF CONTENTS

TABLE OF A	UTHO	RITIES	iii
JURISDICTIO	NAL S	STATEMENT	. 1
STATEMENT	OF LE	EGAL ISSUES PRESENTED	. 1
1.	noncor Confid Agreer with K Corpor	e Circuit Court err in failing to find as a matter of law that the impete provisions of a Non-Compete, Non-Solicitation, lentiality, Non-Disclosure, and Non-Use Agreement ("Employment ment") between DT-Trak and Kolda barred Kolda's employment colda's current employer, San Carlos Apache Healthcare ration ("San Carlos") for a period of two years after entry of an action to that effect?	
STATEMENT	OF TH	HE FACTS	. 1
STATEMENT	OF TH	HE CASE	. 6
ARGUMENT			. 7
I.	Kolda	breached and continues to breach the Employment Agreement	. 7
	A.	The Employment Agreement Is Enforceable	. 8
	B.	Kolda's Interpretation of the Employment Agreement is Incorrec	
II.		s defenses to enforcement presented purely legal arguments that navailing.	17
	A.	The Employment Agreement is not an unconscionable contract of adhesion and not procedurally unconscionable	
	B.	The Employment Agreement cannot be "substantively" unconscionable or unreasonable because it complies with SDCL 53-9-11	-
III.		ak is entitled to a permanent injunction enjoining Kolda from a Competing Business	23
IV.		breach of the Employment Agreement by working for San Carlos	

CONCLUSION	30
CERTIFICATE OF COMPLIANCE	32
CERTIFICATE OF SERVICE	33
APPENDIX TABLE OF CONTENTS	

TABLE OF AUTHORITIES

	Page(s)
Cases	
1st Am. Sys., Inc. v. Rezatto, 311 N.W.2d 51 (S.D. 1981)	12
Baker v. Science Applications Intern. Corp., 2006 WL 2708546 (Sept. 21, 2006)	19, 20
Carstensen Contracting, Inc. v. Mid-Dakota Rural Water Systems, Inc., 2002 S.D. 136, 653 N.W.2d 875	15
Central Monitoring Svc., Inc. v. Zakinski, 1996 S.D. 116, 553 N.W.2d 521	1, 8, 20, 22, 23
Centrol, Inc. v. Morrow, 489 N.W.2d 890	23, 29
Cherne Indus., Inc. v. Grounds & Assocs., Inc., 278 N.W.2d 81 (Minn. 1979)	29
Crowley v. Texaco, Inc., 306 N.W.2d 871 (S.D. 1981)	15, 16
Farlow v. Chambers, 21 S.D. 128, 110 N.W. 94 (1907)	19
FIMCO, Inc., v. Funk, 2017 WL 4798137 (N.D. Iowa Oct. 24, 2017)	23, 27, 29
Franklin v. Forever Venture, Inc., 2005 S.D. 53, 696 N.W.2d 545	12
Giddings v. Media Lodge, Inc., 320 F.Supp.3d 1064 (D. S.D. 2018)	20
Gilmer v. Interstate/Johnson Lane Corp, 500 U.S. 20 (1991)	20
Hedlund v. River Bluff Estates, LLC, 2018 S.D. 20, 908 N.W. 2d 766	30
Holzer v. Dakota Speedway, Inc., 2000 S.D. 65, 610 N.W.2d 787	25

986 F.2d 1080 (7th Cir. 1993)	24
Law Capital, Inc. v. Kettering, 2013 S.D. 66, 836 N.W.2d 642	25
Loescher v. Policky, 84 S.D. 477, 173 N.W.2d 50 (1969)	11
LPN Trust v. Farrar Outdoor Advertising, Inc., 1996 S.D. 97, 552 N.W.2d 796	25
Malcolm v. Malcolm, 365 N.W.2d 863 (S.D. 1985)	15
Mobile Electronic Service, Inc. v. FirsTel, Inc., 2002 S.D. 87, , 649 N.W.2d 603	18
MWI Veterinary Supply Co. v. Wotton, 896 F. Supp. 2d 905 (D. Idaho 2012)	28
N.I.S. Corp. v. Swindle, 724 F.2d 707 (8th Cir. 1984)	23
Nelson v. Schellpfeffer, 2003 S.D. 7, 656 N.W.2d 740	15
Nobles-Hamilton v. Thompson, 883 So.2d 1247 (Ala. Civ. App. 2003)	11
North Atl. Instruments v. Haber, 188 F.3d 38 (2d Cir. 1999)	27
Overholt Crop Ins. Service Co. v. Travis, 941 F.2d 1361 (8th Cir. 1991)	23, 29, 30
Pro Edge, L.P. v. Gue, 374 F. Supp. 2d 711 (N.D. Iowa 2005)	24
Puritan-Bennett Corp. v. Richter, 8 Kan. App. 2d 311 (1983)	29
Raven Industries, Inc. v. Lee, 2010 S.D. 49, 783 N.W.2d 844	23
REG Seneca, LLC v. Harden, 938 F. Supp. 2d 852 (S.D. Iowa 2013)	28

2019 WL 1400093, at (E.D. Cal. Mar. 28, 2019)	
Rozeboom v. Northwestern Bell Telephone Co., 358 N.W.2d 241 (1984)	18
Schwalm v. TCF National Bank, 226 F.Supp.3d 937 (D. S.D. 2016)	
Scotland Vet Supply v. ABA Recovery Svc., Inc., 1998 S.D. 103, 583 N.W.2d	
Simpson v. C&R Supply, Inc., 1999 S.D. 117, 598 N.W.2d 914	12
Sterling Computers Corp. v. Fling, 2019 WL 5104013	26
Sw. Stainless, L.P. v. Sappington, 2008 WL 918706 (N.D.Okla. Apr. 1, 2008)	11
Ward v. Midcom, Inc., 1998 S.D. 10, 575 N.W.2d 233	12
Warner & Co. v. Solberg, 634N.W.2d 65 (N.D. 2001)	11
Statutes	
SDCL § 15-26A-17	1
SDCL § 15-26A-66(b)(4)	32
SDCL § 15-6-65	30
SDCL § 21-8-14	23
SDCL § 53-9-11	1, 7, 8, 9, 10, 12, 13, 14, 16, 22, 29
SDCL § 53-9-8	11
SDCL § 53-9-9	11
SDCL § 59-9-9	12
Rules	
Fed. R. Civ. P. 65	30

JURISDICTIONAL STATEMENT

This Court entered an Order Granting Petition for Allowance of Appeal from Intermediate Order in each of the referenced appeals upon separate petitions filed by DT-Trak Consulting, Inc. ("DT-Trak") and Rema Kolda ("Kolda"). This Court has jurisdiction over these appeals under SDCL § 15-26A-17.

STATEMENT OF LEGAL ISSUES PRESENTED

1. Did the Circuit Court err in failing to find as a matter of law that the noncompete provisions of a Non-Compete, Non-Solicitation, Confidentiality, Non-Disclosure, and Non-Use Agreement ("Employment Agreement") between DT-Trak and Kolda barred Kolda's employment with Kolda's current employer, San Carlos Apache Healthcare Corporation ("San Carlos") for a period of two years after entry of an injunction to that effect?

Yes. The Circuit Court improperly denied DT-Trak's motion for summary judgment. SDCL § 53-9-11.

Central Monitoring Serv., Inc. v. Zakinski, 1996 S.D. 116, 553 N.W.2d 513

1st Am. Sys., Inc. v. Rezatto, 311 N.W.2d 51 (S.D. 1981)

Scotland Vet Supply v. ABA Recovery Svc., Inc. 1998 S.D. 103, 583 N.W.2d 834.

STATEMENT OF THE FACTS

DT-Trak is a South Dakota corporation located in Miller, South Dakota. (APP.¹ 00002, S.R.² 0093, Stmt. of Facts ¶ 1; APP. 00060, S.R. 0100, Bertsch Aff. ¶ 2.) DT-Trak provides medical coding, data entry, billing, accounts receivable, and other support services for medical providers throughout the United States. (APP. 00002, S.R. 0093, Stmt. Facts ¶ 2; APP. 00060, S.R. 0100, Bertsch Aff. ¶ 3.) Many, if not most, of DT-Trak's clients are Indian Health Services ("IHS") facilities and tribal entities, such as

² Settled Record.

¹ Appendix.

Kolda's current employer, San Carlos, a healthcare provider in Peridot, Arizona. (APP. 00002, S.R. 0093, Stmt. Facts ¶ 3; APP. 00061, S.R. 0101, Bertsch Aff. ¶ 4.) DT-Trak has active contracts with clients in 19 states (New Mexico, Arizona, Alaska, Montana, Wyoming, Minnesota, Oregon, Washington, Colorado, South Carolina, South Dakota, California, Rhode Island, Tennessee, Nevada, North Dakota, Idaho, Maine, and Oklahoma); has had contracts in at least ten others, (in Utah, Nebraska, Kansas, Texas, Iowa, Illinois, Wisconsin, Michigan, New York, and Alabama), has periodically bid on contracts for potential clients in three other states (Hawaii, Florida, and Maryland), has pending bids for facilities in Oklahoma, North Dakota, South Dakota, California, Washington, Arizona, and New Mexico; and a pending bid for a nationwide federal Veteran's Administration ("VA") coding project. Thus, DT-Trak does business throughout the United States. (APP. 00002 and 00004, S.R. 0093 and 0095, Stmt. Of Facts ¶¶ 4 and 17; APP. 00061, S.R. 0101, Bertsch Aff. ¶5.)

Kolda resides in St. Lawrence, South Dakota, about a mile from Miller, South Dakota and DT-Trak. (APP. 00003, S.R. 0094, Stmt. of Facts ¶ 5.) DT-Trak employed Kolda from September 20, 2004, until February 15, 2019, in Miller, save for a brief lapse of employment between July 2016 and September 2016. (APP. 00003, S.R. 0094, Stmt. Facts ¶ 6; APP. 00026, S.R. 0115, Kolda Dep. 12:24-25; APP. 00061, S.R. 0101, Bertsch Aff. ¶ 6.) Kolda worked for DT-Trak as a medical coder, a job for which she had no previous experience. (APP. 00003, S.R. 0094, Stmt. Facts ¶ 7; APP. 00027, S.R. 0116, Kolda Dep. 16:6-9.) DT-Trak trained Kolda, which enabled her to become a Certified Professional Coder, Apprentice. (APP. 00003, S.R. 0094, Stmt. Facts¶ 8; APP. 00028, S.R. 0118, Kolda Dep. 24:5-14.) DT-Trak also trained Kolda to be certified in ICD-10

coding. (APP. 00003, S.R. 0094, Stmt. Facts ¶ 9; APP. 00032, S.R. 0127, Kolda Dep. 59:22-25.)

Kolda signed several noncompetition agreements while employed by DT-Trak. (APP. 00003, S.R. 0094, Stmt. Facts ¶ 10; APP. 00030, 00031, and 00034, S.R. 0120, 0123, 0138, Kolda Dep. 32:8-14; 42:14-22; 103:1-10.) The medical coding and claims management industry is competitive, and DT-Trak's customers often try to hire away DT-Trak's employees to avoid hiring DT-Trak. So DT-Trak uses noncompetition and non-disclosure agreements to protect its business and goodwill. (APP. 00004, S.R. 0095, Stmt. Facts ¶ 14; APP. 00062, S.R. 0102, Bertsch Aff. ¶ 9.)

For a few months in 2016, Kolda did not work for DT-Trak. She resigned from her employment on July 20, 2016, but she returned to work for DT-Trak in September 2016. (APP. 00003, S.R. 0094, Stmt. Facts ¶ 11; APP. 00061, S.R. 0101, Bertsch Aff. ¶ 6; APP. 00033, S.R. 0137, Kolda Dep. 99:6-9.) After her resignation, Kolda received a letter in August 2016 reminding her of her noncompetition agreement with DT-Trak. (APP. 00003, S.R. 0094, Stmt. Facts ¶ 12; APP. 00035, S.R. 0139, Kolda Dep. 106:9-14.) When Kolda returned to work at DT-Trak in September 2016, she executed the Employment Agreement as a condition of her employment with DT-Trak, identical to the one she signed before her resignation. (APP. 00003-00004, S.R. 0094-95, Stmt. Facts ¶ 13; APP. 00061 and 00063-00069, S.R. 0101 and 0103-0109, Bertsch Aff. ¶ 7 and Ex. A; APP. 00034, S.R. 0138, Kolda Dep. 103:1-10.)

The Employment Agreement states Kolda may not engage or work in a "competing business" within a specified "business area" for two years following her separation from DT-Trak. (APP. 00004, S.R. 0095, Stmt. Facts ¶ 15; APP. 00063-00069,

S.R. 0103-0104, Bertsch Aff. Ex. A.) A "competing business" is defined as any business that engaged in the "Business of Employer," further defined as:

Professional medical coding; Electronic Health Record Services (EHR); Electronic Data Entry (any database or software); Error Report Management and Completion; Third Party Billing, all payer sources; Accounts Receivable; Posting; Collections (120+ days, etc.); Quality Assurance of Revenue Generation Cycle; Comprehensive Revenue Generation Services; Compliance Auditing HIPAA, etc.; Data Integrity Audits, entire revenue generation cycle; Provider and Staff Education; Patient Registration; Staff & Program Development/Evaluation Criteria Development; Comprehensive Consultative Services for Healthcare Administrative, Financial, HIM and BO Functions; Revenue Enhancement Auditing; Development and Implementation of Work Flow Processes Relating to Revenue Generation Cycle; Planning, Implementing and Facilitation of Training/Workshops; Feasibility Studies for or Development of Revenue Generation Cycle or Development; Internal Controls Policy Evaluation, Implementation and Management; "Special Projects"- Analysis and Development of Various Health an Revenue Generation Studies; Financial Projections for Healthcare Facilities; Cost Analysis Studies for Healthcare Facilities; Chargemaster Audit, Implementation and Utilization.

(APP. 00004-00005, S.R. 0095-96, Stmt. Facts ¶ 16; APP. 00063-00069, S.R. 0103-04, Bertsch Aff. Ex. A, Employment Agreement at Sections 1.1 and 1.3.) "Business area" is defined as:

[e]ach state within the United States of America, including Alaska and Hawaii. The Business Area is so defined because, and Employee so agrees, that the market for the Business is highly specialized and that Employer engages in the Business with and for numerous entities that are located within and throughout the United States.

(APP. 00005, S.R. 0096, Stmt. Facts ¶ 17; APP. 00064, S.R. 0104, Bertsch Aff. Ex. A, Employment Agreement at Section 1.2; APP. 00061, S.R. 0101, Bertsch Aff. ¶ 5.) As noted above, DT-Trak currently has clients in 19 states, has had clients in 10 other states, and is presently soliciting business many others, including a nationwide VA account. (*Id.*)

The Employment Agreement states that if Kolda breaches any provision of the Employment Agreement, DT-Trak is entitled to permanent injunctive relief and the greater of liquidated damages in the amount of \$5,000.00 per incident of breach or DT-Trak's actual damages. (APP. 00005, S.R. 0096, Stmt. Facts ¶ 18; APP. 00066-00067, S.R. 0106-07, Bertsch Aff. Ex. A, Employment Agreement Section 7.) The Employment Agreement further provides DT-Trak is entitled to recover from Kolda the attorneys' fees and costs it incurs in enforcing the Employment Agreement. (APP. 00005, S.R. 0096, Stmt. Facts ¶ 19; APP. 00066-00067, S.R. 0106-07, Bertsch Aff. Ex. A, Employment Agreement Sections 7 and 8.5.)

Kolda voluntarily resigned from DT-Trak on February 15, 2019, ending her employment there. (APP. 00006, S.R. 0097, Stmt. Facts ¶ 20; APP. 00036, S.R. 0147, Kolda Dep 138-139.) Shortly before Kolda resigned, San Carlos offered her a medical coder position. (APP. 00006, S.R. 0097, Stmt. Facts ¶ 21; APP. 00038, S.R. 0149, Kolda Dep. 145:8-19.) Although DT-Trak asked her where she would work and reminded Kolda about her noncompetition agreement, she failed to inform DT-Trak she had accepted a job with San Carlos as a medical coder. (APP. 00006, S.R. 0097, Stmt. Facts ¶ 22; APP. 00039, S.R. 0150, Kolda Dep. 149:2-24.) Notably, San Carlos terminated its contract with DT-Trak effective December 31, 2018, merely six weeks before Kolda left employment with DT-Trak in February 2019. (APP. 00006, S.R. 0097, Stmt. Facts ¶ 23; APP. 00038, S.R. 0149, Kolda Dep. 148:2-7.)

Kolda now performs medical coding for San Carlos, the same work she performed at DT-Trak. (APP. 00006, S.R. 0097, Stmt. Facts ¶ 24; APP. 00025 and 00037, S.R. 0113 and 0148, Kolda Dep. 4:22-23 and 141:13-22.) Kolda works for San

Carlos from her home a mile from DT-Trak via remote access. (APP. 00006, S.R. 0097, Stmt. Facts ¶ 25; APP. 00025, Kolda Dep. 4:14-17.) DT-Trak demanded Kolda cease her employment with San Carlos consistent with the Employment Agreement. (APP. 00006, S.R. 0097, Stmt. Facts ¶ 26; APP. 00061, S.R. 0101, Bertsch Aff. ¶ 8.) But Kolda continues to breach the employment agreement, refusing to terminate her employment with San Carlos. (APP. 00006, S.R. 0097, Stmt. Facts ¶ 27; APP. 00025 and 00037, S.R. 0113 and 0148, Kolda Dep. 4:22-23 and 141:13-22.)³

STATEMENT OF THE CASE

DT-Trak sued Kolda asserting four counts. (Complaint at S.R. 0004-0019.)

Count 1 asserted Kolda breached the nondisclosure covenants of the Employment

Agreement; Count 2 asserted she breached the Employment Agreement's noncompetition

covenants; Count 3 asserted Kolda breached the Employment Agreement's non
solicitation covenants; and Count 4 alleged Kolda misappropriated DT-Trak's trade

secrets. (*Id.* at S.R. 0007-0011.) Kolda counterclaimed for barratry, asserting DT-Trak's

claims were frivolous, malicious, and in bad faith. (Answer and Counterclaim at S.R.

0023-0025.)

DT-Trak filed a Motion for Partial Summary Judgment on Count 2 of its

Amended Complaint, moving for judgment as a matter of law on Kolda's breach of the noncompetition provision of the Employment Agreement. (Motion for Summary Judgment, S.R. 0071.) Kolda filed a cross-motion for summary judgment, asserting that all of DT-Trak's claims should be dismissed as a matter of law. (Motion for Summary

³ San Carlos hired away another DT-Trak employee, Keely Flynn, later in 2019; but Ms. Flynn eventually agreed to stop working for San Carlos after DT-Trak sued to enforce its Employment Agreement with her. (APP. 00007, S.R. 0098--Stmt. of Facts ¶ 28; APP. 00040, S.R. 0115—Kolda Dep. 170:17-20.)

Judgment, S.R. 0202.) The Circuit Court held there were issues of material fact precluding summary judgment for either party, but declined to identify what those issues were. (APP. 000001, S.R. 0657, Order Denying Summary Judgment; APP. 00107-000108, H.T. June 14, 2021 at 38-39.) Both parties filed Petitions for intermediate review, which the Court granted on August 20, 2021. (S.R. 0669-0672.)

ARGUMENT

As both parties noted in their Petitions for intermediate review, there are no material factual disputes. All of the issues presented are legal. The Employment Agreement strictly complies with South Dakota law regarding restrictive covenants. The Employment Agreement is not ambiguous, and there is no doubt Kolda has violated, and continues to violate, its unambiguous terms. DT-Trak was entitled to summary judgment that Kolda was breaching the Employment Agreement. DT-Trak was also entitled to permanent injunctive relief barring Kolda from working for San Carlos in violation of the Employment Agreement for two years post-judgment. Indeed, Kolda agreed in the Employment Agreement that injunctive relief was the appropriate remedy for her breach. The Court should reverse the circuit court's order denying summary judgment and remand the case, instructing the circuit court to enter summary judgment and a permanent injunction in DT-Trak's favor.

I. Kolda breached and continues to breach the Employment Agreement.

South Dakota law specifically recognizes the enforceability of agreements not to compete with a former employer. SDCL § 53-9-11 states:

An employee may agree with an employer at the time of employment or at any time during his employment not to engage directly or indirectly in the same business or profession as that of his employer for any period not exceeding two years from the date of termination of the agreement and not to solicit existing customers of the employer within a specified county, first or second class

municipality, or other specified area for any period not exceeding two years from the date of termination of the agreement, if the employer continues to carry on a like business therein.

A. The Employment Agreement Is Enforceable

Because Kolda resigned, DT-Trak does not have to demonstrate that the Employment Agreement is reasonable as long as it complies with the plain language of SDCL § 53-9-11. *See Central Monitoring Serv., Inc. v. Zakinski*, 1996 S.D. 116, ¶ 47, 553 N.W.2d 513, 521 ("We hold that if an employee voluntarily quits his employment or is fired for good cause, *Centrol, Inc.* and *American Rim & Brake* will control and no further showing of reasonableness will be necessary as long as the noncompetition or non-disclosure agreement complies with SDCL 53-9-11.").

1. The Employment Agreement Complies with the Relevant Statute.

The Employment Agreement complies with SDCL § 53-9-11. The agreement is in writing and signed by Kolda and DT-Trak. (*See* APP. 00069, S.R. 0109, Bertsch Aff. Ex. A, Employment Agreement at 7.) Kolda agreed she would not engage in a "Competing Business" within the meaning stated in the Employment Agreement. (APP. 00065, S.R. 0105, Bertch Aff. Ex. A., Employment Agreement, ¶ 2.) "Competing Business" is defined as any individual or entity "that engages or proposes to engage in the Business of Employer." (APP. 00064, S.R. 0104, Employment Agreement, ¶ 1.3.) "Business of Employer" means "professional medical coding, data entry, third-party billing and accounts receivable services and related activities for healthcare service providers, including but not limited to, the following services . . . Professional medical coding"

Kolda never disputed that San Carlos is engaged in the "Business of Employer" set forth in the Employment Agreement. Nor has she disputed that, in working for San Carlos, she is an individual engaged in the "same business" (i.e., medical coding) as provided by statute, and in a "Competing Business" with DT-Trak as defined by the Employment Agreement. Kolda provides professional medical coding services to San Carlos, a healthcare provider, just as she provided those services to DT-Trak and its clients while working for DT-Trak. (APP. 00025, S.R. 0113, Kolda Depo. at 4:22-23; APP. 00037, S.R. 0148, Kolda Depo. at 141:13-22.) Indeed, she provided those same medical coding services directly to San Carlos while working at DT-Trak when San Carlos was still DT-Trak's customer. (APP. 00038, S.R. 0149, Kolda Depo. at 148:2-7.)

Kolda is also engaged in a Competing Business within the "Business Area" defined in the Employment Agreement. "Business Area" includes every state within the United States because DT-Trak's business is highly specialized and DT-Trak works with numerous entities throughout the United States. (APP. 00064, S.R. 0104, Bertsch Aff. Ex. A, Employment Agreement, ¶ 1.2.) When Kolda signed the Employment Agreement, she agreed the Business Area was properly defined as including the entire United States. (*Id.*) In any event, Kolda is working for San Carlos from her home in St. Lawrence, South Dakota, a mile away from DT-Trak. And San Carlos is located in Arizona, a state where DT-Trak still has active contracts with clients. (APP. 00002 and 000005, S.R. 093 and 096, Stmt. Facts ¶¶ 4 and 17; APP. 00061, S.R. 101, Bertch Aff. ¶ 5.) Finally, the duration of the noncompetition provision of the Employment Agreement is two years after the termination of the agreement, which matches the language of SDCL § 53-9-11.

Because the Employment Agreement complies with SDCL § 53-9-11 in all respects and because there is no dispute that Kolda has breached the Employment Agreement by working in a Competing Business with San Carlos, DT-Trak was entitled to summary judgment.

2. The Employment Agreement is Not Overbroad.

Kolda asserted the geographic limitation of the Employment Agreement is too broad because it effectively prevents her from working as a coder in the United States.

(APP. 00022, S.R. 0363-0364, Kolda Brief at 13-14.) But Kolda's argument ignores the plain text of SDCL § 53-9-11, which states that the Employment Agreement's restriction is per se reasonable if the geographic and temporal restrictions designate "a specified county, first or second class municipality, *or other specified area* for any period not exceeding two years from the date of termination of the agreement, if the employer continues to carry on a like business therein." SDCL § 53-9-11 (emphasis added).

Kolda has never disputed that the Employment Agreement identifies a "specified area," nor that DT-Trak has customers located all over the United States, including Alaska, and has solicited business in Hawaii. But more importantly, whether the Employment Agreement is too geographically broad in the abstract is an academic issue given the narrow relief DT-Trak sought below: an order enjoining Kolda from working for San Carlos. Even if the circuit court had ruled it could only enjoin Kolda's conduct in states where DT-Trak has, at this very minute, a live contract, DT-Trak was still entitled to relief. DT-Trak seeks an injunction enjoining Kolda from working for San Carlos, DT-Trak's former client, located in a state where DT-Trak still has active contracts

(Arizona), from her home mere minutes away from DT-Trak's office, for the two years explicitly permitted by South Dakota law.

Kolda erroneously urged that the Employment Agreement is an "all or nothing" proposition; and that the Court cannot, after the fact, limit its geographic scope.

Assuming for the sake of argument the geographic scope of the Employment Agreement's noncompetition provision was too broad, the general statute regarding restraints of trade states that these contracts are void only "to that extent" that they are unlawful restrictions. SDCL § 53-9-8. So even if the Court agreed the geographic scope of the noncompete here is too broad, this Court, and numerous other courts following its guidance, have uniformly agreed the term "to that extent void" in SDCL § 53-9-8 means a restrictive covenant is "not wholly void" when it exceeds the limits of a statutory exception. Loescher v. Policky, 84 S.D. 477, 482, 173 N.W.2d 50, 53 (1969) (emphasis added).

In *Loescher*, the Court addressed a noncompete agreement that exceeded the scope of the predecessor statute to SDCL § 53-9-9. *Id.* The Court concluded the agreement could be partially enforced to the extent permitted by the statute. *Id.* at 483. In reaching this conclusion, the Court surveyed case law from four other states with similar laws: California, North Dakota, Oklahoma, and Alabama, all of which follow this rationale to this date.⁴ Following *Loescher*, this Court has repeatedly applied the partial enforcement (often called the "blue-pencil") doctrine to *every* purportedly overbroad

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⁴ See, e.g., Roadrunner Intermodal Servs., LLC v. T.G.S Transp., Inc., 2019 WL 1400093 (E.D. Cal. Mar. 28,2019) at *10-*11 (collecting California cases); Warner & Co. v. Solberg, 634 N.W.2d 65, 73 (N.D. 2001); Sw. Stainless, L.P. v. Sappington, 2008 WL 918706, (N.D. Okla. Apr. 1, 2008) at *6; Nobles-Hamilton v. Thompson, 883 So.2d 1247 (Ala. Civ. App. 2003).

noncompete or non-solicit agreement considered, including restrictive covenants in a sale of stock under SDCL § 53-9-9 (*Ward v. Midcom, Inc.*, 1998 S.D. 10, ¶ 14, 575 N.W.2d 233, 238 (reversing trial court's refusal to enforce or "blue pencil" overbroad noncompete agreement partially)); sales of companies under SDCL § 53-9-9, (*Simpson* v. *C&R Supply, Inc.*, 1999 S.D. 117, ¶ 16, 598 N.W.2d 914,920 (same)); *Franklin* v. *Forever Venture, Inc.*, 2005 S.D. 53, ¶ 8, 696 N.W.2d 545, 549 (limiting overbroad description of economic activity in noncompete agreement to the statutory language)); and an employment agreement like Kolda's, under SDCL § 53-9-11 (*1st Am. Sys., Inc.* v. *Rezatto*, 311 N.W.2d 51, 59 (S.D. 1981) (severing void provisions from the remainder of agreement because "South Dakota has 'bluelined' similar covenants since 1969")).

In short, as noted above, even if the Court agreed the "nationwide" geographic scope of the Employment Agreement's restrictive covenant is too broad, this would avail Kolda nothing. Kolda is working for San Carlos (a former DT-Trak client), an entity located in a state where DT-Trak has done and is still doing business (Arizona), and is doing so from her home one mile away from DT-Trak's office. In short, granting Kolda every inference and benefit of the doubt, reasonable or otherwise, regarding the facts and law, the Court must find that the Employment Agreement can be and must be enforced here.

B. Kolda's Interpretation of the Employment Agreement is Incorrect.

Kolda argued that the Employment Agreement did not prohibit her from working for a healthcare provider, like San Carlos, but only prevented her from working for a consulting company, like DT-Trak, that performs consulting services for healthcare

providers. Her argument ignores the plain language of SDCL § 53-9-11 and the Employment Agreement.

1. SDCL 53-9-11 permits employees to agree they will not engage directly or indirectly in the same business or profession as that of the employer, not a "competing business."

Kolda asserted that San Carlos is not a "competitor" or "competing business" of DT-Trak, and that therefore, Kolda's employment with San Carlos cannot violate the Employment Agreement. But SDCL § 53-9-11 is not concerned with the identity or business model of an employee's new employer. The statute is focused solely on the departed employee, and whether she is engaging "directly or indirectly in the same business or profession" as that of her former employer. The statute does not contain the words "competing business." Again, it refers only to the "same business or profession" of the employer. SDCL § 53-9-11 (emphasis added). It also provides the agreement can prevent the employee not only from *directly* engaging in the same business or profession as the employer, but from *indirectly* engaging in that business.

The only statutory limitation on the Employment Agreement is that the Employment Agreement must be limited to preventing Kolda from engaging, directly or indirectly, in the same business or profession of DT-Trak. DT-Trak provides coding and other services to medical providers. There is no dispute Kolda is providing coding services to San Carlos, a medical provider. (APP. 00025, 00037, and 00038, S.R. 0113, 0144, and 0145, Kolda Dep. at 4:22-23; 141:13-22, 148:2-7.) Accordingly, SDCL § 53-9-11 provides no statutory bar to enforcement of the Employment Agreement because that statute is not concerned with what business San Carlos is in, but instead, what services Kolda is providing.

2. Under the Employment Agreement, "Competing Business" is defined to include performing services that are the same business or profession as DT-Trak without regard to competition.

The Employment Agreement, like SDCL § 53-9-11, also does not limit violations to Kolda working for a "competitor" of DT-Trak. Instead, Kolda agreed she would not "engage, directly or indirectly, in any capacity whatsoever" in a "Competing Business," a term defined explicitly by the Employment Agreement and defined more broadly than Kolda claims. (APP. 00063-00065, S.R. 0103-05, Bertsch Aff. Ex. A--Employment Agreement, Sections 1.1, 1.3, and 2.) Although the term "competing business" contains the term "competing," the plain language of the Employment Agreement reflects the term "Competing Business" is defined to include any "individual" that "engages or proposes to engage in the "Business of Employer." (*Id.*, Employment Agreement, Section 1.3.)⁵ So a Competing Business need not be a business at all; the term expressly refers to an individual, like Kolda. (*Id.*)

"Business of Employer" is another defined term that means "professional medical coding, data entry, third-party billing and accounts receivable services and related activities for healthcare service providers including, but not limited to, the following services:

Professional medical coding; Electronic Health Record Services (EHR); Electronic Data Entry (any database or software); Error Report Management and Completion; Third Party Billing, all payer sources; Accounts Receivable; Posting; Collections (120+ days, etc.); Quality Assurance of Revenue Generation Cycle; Comprehensive Revenue

0104, Bertsch Aff. Ex. A, Employment Agreement Section 1.3) (emphasis added).

14

⁵ "Competing Business' shall mean any *individual*, corporation, partnership, limited partnership, limited liability company, association, trust (business or otherwise), institution, foundation, pll, plan, or other entity or organization (other than Employer) that engages or proposes to engage in the Business of Employer." (APP. 00064, S.R.

Generation Services; Compliance Auditing HIPAA, etc.; Data Integrity Audits, entire revenue generation cycle; Provider and Staff Education; Patient Registration; Staff & Program Development/Evaluation Criteria Development; Comprehensive Consultative Services for Healthcare Administrative, Financial, HIM and BO Functions; Revenue Enhancement Auditing; Development and Implementation of Work Flow Processes Relating to Revenue Generation Cycle; Planning, Implementing and Facilitation of Training/Workshops; Feasibility Studies for or Development of Revenue Generation Cycle or Development; Internal Controls Policy Evaluation, Implementation and Management; "Special Projects"- Analysis and Development of Various Health an Revenue Generation Studies; Financial Projections for Healthcare Facilities; Cost Analysis Studies for Healthcare Facilities; Chargemaster Audit, Implementation and Utilization.

(*Id.*, Employment Agreement, Sections 1.1, 1.3) (emphasis added).

In addition, the non-competition portion of the Agreement provides that Kolda will not "engage, *directly or indirectly*, in any capacity whatsoever, whether as an officer, director, stockholder, owner, proprietor, partner, member, co-owner, investor, employee, trustee, manager, consultant, independent contractor, co-venturer, lender, financier, *agent, representative or otherwise*, in a Competing Business, or otherwise hold any interest in a Competing Business.

(*Id.*, Employment Agreement Section 2.)

"It is a fundamental rule of contract interpretation that the entire contract and all its provisions must be given meaning if that can be accomplished consistently and reasonably." *Carstensen Contracting, Inc. v. Mid-Dakota Rural Water Sys., Inc.*, 2002 S.D. 136, ¶ 8, 653 N.W.2d 875, 877 (citing *Malcolm v. Malcolm*, 365 N.W.2d 863, 865 (S.D. 1985)). "The contract is to be read as a whole, making every effort to give effect to all provisions." *Nelson v. Schellpfeffer*, 2003 S.D. 7, ¶ 8, 656 N.W.2d 740, 743 (citing *Crowley v. Texaco, Inc.*, 306 N.W.2d 871 (S.D. 1981)).

When the referenced unambiguous provisions of the Employment Agreement are read in concert and given full meaning and effect, they lead to only one permissible conclusion: Kolda's provision of coding and related services to San Carlos, a medical provider, violates the Employment Agreement. Kolda cannot engage, directly or indirectly (as permitted by the statute), in any capacity whatsoever in a "Competing Business." (Id. Employment Agreement ¶ 2.) However, "Competing Business" is not defined by the Employment Agreement to include only "competitors" or "entities," but instead, "Competing Business" refers to any work, including work by individuals, 6 that falls within the "Business of Employer" (as permitted by the statute). (*Id.* Employment Agreement Section 1.3.) Finally "Business of Employer" is defined by the Employment Agreement to mean "professional medical coding . . . for healthcare service providers" Kolda agreed she would not work for any entity in DT-Trak's business; this is true. But she also agreed that as an individual, she would not engage in DT-Trak's business either. (*Id.* Employment Agreement Sections 1.1, 1.3.) And there is no dispute that San Carlos is a healthcare provider, nor any dispute that Kolda is engaged in the "Business of Employer" (i.e., medical coding) for San Carlos (a medical provider) as she was for DT-Trak, which performed medical coding for medical providers. (APP. 00025, 00037, and 00038, S.R. 0113, 0144, and 0145, Kolda Dep. at 4:22-23; 141:13-22, 148:2-7.)

3. Kolda's argument also ignores the phrase "directly or indirectly."

As noted above, SDCL § 53-9-11 permits an employment agreement to forbid both indirect and direct employment in the employer's business. The Employment

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⁶ See n. 3

Agreement here forbids Kolda from engaging "directly or *indirectly*" in the same business as DT-Trak. (APP. 00063-00064, S.R. 0103-05, Bertsch Aff. Ex. A, Employment Agreement Sections 1 and 2.) (emphasis added). Even if Kolda's argument regarding the term "competing business" was based on the text of the statute and the Employment Agreement, the statute's and Employment Agreement's use of the term "indirect" is fatal to Kolda's argument. When DT-Trak provides services to its clients, like it did with San Carlos, it essentially becomes part of the client, i.e., San Carlos and other providers treat DT-Trak's employees as the facilities' employees because they provide those services by connecting with, and working through, those facilities' systems. (S.R. 0437-0441, Bertsch Dep. at 17:2-6, 18:12-19:14, 19:23-21:12.) So by becoming San Carlos' employee, and providing the same services to San Carlos that she was to DT-Trak, Kolda is undisputedly at least indirectly competing with DT-Trak, because her employment with San Carlos and provision of those services prevents San Carlos from needing to hire DT-Trak to perform those same services.

In sum, Kolda's entire argument about a "competing business" is based on the appearance of one word ("competing") in the Employment Agreement, without reference to the applicable statute and its use of the term "indirect," and without regard to how the term "Competing Business" is defined under the Employment Agreement. In other words, Kolda's position is based on an interpretation of the Employment Agreement that does not apply the plain meaning of the Employment Agreement's applicable terms. As a matter of law, Kolda's interpretation is incorrect.

II. Kolda's defenses to enforcement presented purely legal arguments that were unavailing.

Kolda alternatively argued the Employment Agreement was a "contract of adhesion" and that she was treated poorly as an employee, warranting invalidation of the Employment Agreement. (APP. 00011-00015, S.R. 0380-0385, Kolda Response to DT-Trak's Stmt. Facts ¶¶ 10 and 12-19). This, however, did not present a dispute of fact. Whether a contract is valid and enforceable or voidable on the grounds of mistake, fraud, unconscionability, or lack of consideration is a question of law. *See*, *e.g.*, *Scotland Vet Supply v. ABA Recovery Serv.*, *Inc.* 1998 S.D. 103, ¶ 7, 583 N.W.2d 834, 836. When addressing allegedly "unconscionable" contracts, both "procedural unconscionability" (including whether the contract is one of "adhesion") and "substantive unconscionability" (i.e., the unreasonableness of the contract) are considered. *See*, *e.g.*, *Schwalm v. TCF National Bank*, 226 F.Supp.3d 937, 942-43 (D. S.D. 2016). The Employment Agreement is neither procedurally nor substantively unconscionable.

A. The Employment Agreement is not an unconscionable contract of adhesion and not procedurally unconscionable

South Dakota state and federal courts have consistently refused to find employment agreements or covenants "procedurally unconscionable" contracts of adhesion.⁷ For example, in *Schwalm*, the South Dakota Federal District Court rejected an employee's argument that her employment agreement's arbitration clause was unconscionable and a contract of adhesion. 226 F.Supp.3d 937, 940 (D. S.D. 2016). The employer's standard dispute resolution policy contained the arbitration clause and had a 60-day time period for the employee to opt out. *Id.* at 939. The employee did not opt

 $v.\ FirsTel,\ Inc.,\ 2002\ S.D.\ 87,\ \P\ 11-12,\ 649\ N.W.2d\ 603,\ 606-607\ (same).$

⁷ The only cases DT-Trak located where this Court has found such unconscionability have been where the party presenting the contract was a monopoly, so the party asserting it was unconscionable had no other options (*Rozeboom v. Northwestern Bell Telephone Co.*, 358 N.W.2d 241, 242-43 (1984) (telephone listing in book); *Mobile Elec. Serv., Inc.*

out. *Id.* However, the employee argued she had never received a copy of the policy, she did not know about or understand the policy, and her employer never explained the policy. *Id.* The employer, however, submitted a copy of a document showing the employee had received a copy of the policy, signed by the employee. *Id.* The employee filed an employment discrimination claim, and the employer invoked the arbitration clause as grounds to dismiss the lawsuit.

Judge Schreier enforced the clause over the employee's objection that she did not understand it and her contention it was an unenforceable contract of adhesion. *Id.*Regarding the employees' assertion that she had not read and did not understand the policy, the court noted that the employee had signed a document stating she had received and read the document and understood she was responsible for its contents. *Id.* at 942. The court held this foreclosed her argument because under South Dakota law, a party is presumed to have read and understood a contract the party signed. *Id.* (citing *Farlow v. Chambers*, 21 S.D. 128, 110 N.W. 94 (1907)).

Similarly, in *Baker v. Science Applications Intern. Corp.*, an employee had to sign an employment agreement as a condition of continued employment, which included a mandatory arbitration clause. No. Civ. 06–4096, 2006 WL 2708546, *2 (Sept. 21, 2006). Later, the employee brought an Americans with Disabilities Act claim, and the employer invoked the arbitration clause as a basis for dismissing the lawsuit. *Id.* at *1. The employee asserted the employment agreement and its arbitration clause lacked consideration and was an unenforceable adhesion contract, and moved for discovery on the issues. *Id.* Judge Piersol rejected the motion and decided the issue as a matter of law. First, the court rejected the lack of consideration argument, noting that employment

provided by an employer is sufficient consideration for the employee to surrender certain rights in return. *Id.* at *2.8 The court similarly rejected the employee's argument that the agreement was unconscionable because he had to sign it to keep his job. *Id.* Citing United States Supreme Court precedent, the court noted that there is usually a disparity of bargaining power between employers and employees, but that the employee, like any employee, had the right to reject the contract and walk away. *Id.* ("While Plaintiff states he had no choice but to work for Defendant, Plaintiff had the option of declining employment with Defendant and seeking employment elsewhere") (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)). The court also noted that the employee had worked for the company for nearly twenty years and had the sophistication and ability to read and understand the contract. *Id.* Ultimately, the Court held the employment agreement was not a contract of adhesion and enforced it. *Id.*

Judge Lange rendered a similar decision in *Giddings v. Media Lodge, Inc.*, 320 F.Supp.3d 1064 (D.S.D. 2018). Like the employees in *Schwalm* and *Baker*, the employee in *Giddings* asserted an arbitration clause in an employment agreement was unconscionable because of "great disparity in bargaining power;" because he had a short amount of time to review the agreement; and because had he refused to sign the agreement it would have jeopardized his employment and potentially risked tens of thousands of dollars in deferred compensation and stock options. *Id.* at 1073-76. The court rejected this argument on a motion to dismiss, finding the provision enforceable. *Id.*

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⁸ Additional consideration is not required to enforce a non-compete agreement, even when the agreement is entered into *after* employment has begun. *See*, *e.g.*, *Central Monitoring Serv.*, *Inc. v. Zakinski*, 1996 S.D. 116, ¶¶ 16-25, 553 N.W.2d 513, 516-17.

Like the employees in *Schwalm, Baker*, and *Giddings*, Kolda asserted the Employment Agreement was a contract of adhesion. She claimed this is established because she had to sign the contract to have a job, because she could not negotiate more favorable terms, because it was presented as a "take it or leave it" contract, because she was not paid any additional money, because Natalie Bertsch had allegedly called her once to yell at her before she terminated her employment with DT-Trak in 2016 (before returning a couple of months later), because she claims DT-Trak treated her "oppressively" and hostilely before she quit the first time, and after she returned to work, and because DT-Trak sent her a cease and desist letter and sued her for breaching her Employment Agreement. (APP. 00011-00015, S.R. 0380-0385, Kolda's Responses to DT-Trak's Stmt. Facts ¶ 10, 12-19; APP. 00052-00058, S.R. 0467-0468 and 0470-0472, Kolda's Answers to Interrogatory Nos. 10 and 14-20.)

Even assuming each and every one of these allegations is true, none of them, individually or in combination, invalidates the Employment Agreement. In *Baker*, the agreement was presented as "take it or leave it" without negotiation, and the court held the employee always had the option of walking away, just as Kolda did here. In fact, unlike the employee in *Baker*, Kolda did not have to sign the agreement to preserve existing employment. Indeed, Kolda did not come back to DT-Trak looking for a job. *DT-Trak came to her*, eliminating any claim she lacked the ability to not sign the agreement. (*Id.* at Answer to Interrogatory No 14) ("Jewell Kopfman called me in the end of August or beginning of September of 2016 and asked if I would come back to work.") Moreover, the employees in *Baker*, *Schwalm*, and *Giddings* had gone so far as to

⁹ See Note 6.

file employment law claims against their employers (Baker brought claims under the Americans With Disabilities Act, Age Discrimination in Employment Act, and Family Medical Leave Act; Schwalm asserted claims for age discrimination and retaliation; and Giddings for violations of the USERRA for not employing him after he returned from active military duty). Yet, notwithstanding the alleged mistreatment the employees asserted, the courts consistently found their agreements were not contracts of adhesion and the agreements were enforced. So Kolda's allegations of mistreatment also will not support her claim of adhesion or unconscionability.

In sum, not one allegation Kolda made about the Employment Agreement's alleged "adhesive" nature or her alleged treatment by DT-Trak supports her argument.

B. The Employment Agreement cannot be "substantively" unconscionable or unreasonable because it complies with SDCL § 53-9-11.

The Employment Agreement cannot be substantively unconscionable because the South Dakota Legislature enacted a statute specifically permitting DT-Trak to include the terms at issue in an employment contract. SDCL § 53-9-11. As a matter of law, the substance of the Employment Agreement is permissible. This Court has held that, when an employee resigns, as Kolda undisputedly did here, the employer does not have to separately demonstrate its restrictive covenant is reasonable if it complies with the plain language of SDCL § 53-9-11. *See Central Monitoring Serv., Inc. v. Zakinski*, 1996 S.D. 116, ¶ 47, 553 N.W.2d 513, 521 ("We hold that if an employee voluntarily quits his employment or is fired for good cause, *Centrol, Inc.* and *American Rim & Brake* will control and no further showing of reasonableness will be necessary as long as the noncompetition or non-disclosure agreement complies with SDCL 53-9-11."). As noted above, the Employment Agreement here does so comply.

So the Employment Agreement is not unconscionable. It is fully enforceable.

III. DT-Trak is entitled to a permanent injunction enjoining Kolda from working for a Competing Business.

Permanent injunctions are an appropriate remedy when a former employee breaches a noncompetition agreement. *See Centrol, Inc. v. Morrow*, 489 N.W.2d 890, 897; *Central Monitoring Serv.*, 1996 S.D. 116, ¶ 49. When considering whether to grant a permanent injunction, courts typically consider the following common-law factors:

(1) whether the party to be enjoined caused the harm; (2) whether irreparable harm would be suffered if the injunction were not granted; (3) whether the party to be enjoined acted in bad faith or if the injury-causing behavior was an innocent mistake; and (4) in balancing the equities, whether the hardship to be suffered by the enjoined party would be disproportionate to the benefit to be gained by the injured party.

See Raven Industries, Inc. v. Lee, 2010 S.D. 49, ¶ 23, 783 N.W.2d 844, 851-2 (citation omitted). Here, Kolda is the party causing the harm at issue, the harm is irreparable, and the harm Kolda is causing dwarfs any irreparable harm she may try to assert.

1. Kolda's conduct is causing irreparable harm

"Irreparable harm can be inferred from a trial court's actual finding of a breach of a restrictive covenant by the defendant." *Overholt Crop Ins. Serv. Co. v. Travis*, 941 F.2d 1361, 1371 (8th Cir. 1991) (internal quotation and citation omitted). South Dakota courts and courts throughout the Eighth Circuit and elsewhere regularly recognize the risk of irreparable harm arising from violation of noncompetition agreements. *See, e.g.*, *FIMCO, Inc., v. Funk*, 2017 WL 4798137, at *8, *11 (N.D. Iowa Oct. 24, 2017) (applying South Dakota law; collecting cases finding irreparable harm from violation of noncompetition agreements); *N.I.S. Corp. v. Swindle*, 724 F.2d 707, 710 (8th Cir. 1984)

("If the noncompete agreements are valid, then we think an irreparable injury has been shown," including because "the lack of a preliminary injunction would leave [plaintiff] with the Hobson's choice" of either filing successive suits or else waiting for all customers and goodwill to be poached); *JAK Prods., Inc. v. Wiza*, 986 F.2d 1080, 1084 (7th Cir. 1993) ("Whenever an employee uses his experience gained from an employer in violation of a reasonable covenant not to compete, irreparable injury occurs and injunctive relief is appropriate."); *Pro Edge, L.P. v. Gue*, 374 F. Supp. 2d 711, 749 (N.D. Iowa 2005) ("On many occasions, courts in a number of states, as well as this court, have held that the mere violation of a valid covenant not to compete supports an inference of the existence of a threat of irreparable harm.").

DT-Trak has a strong and legitimate interest in protecting its goodwill and competitive edge. It is undisputed Kolda had no coding experience prior to working for DT-Trak, and that DT-Trak provided her with substantial training. (APP. 00003, S.R. 0094, Stmt. Facts ¶ 7-9; APP. 00028, 00032, S.R. 0118 and 127, Kolda Dep. 24:5-14 and 59:22-25.) Unless DT-Trak can enforce the Employment Agreement by injunction, DT-Trak has no way to protect the investment it makes in its employees.

For example, it is not uncommon for a facility such as San Carlos to periodically re-contract with DT-Trak when it faces recurring challenges, or has new issues to be resolved, because of DT-Trak's existing knowledge and expertise. (APP. 00006, S.R. 0097, Stmt. Facts ¶ 30; S.R. 0191-0193.) Indeed, San Carlos hired DT-Trak to work for its tribally-run program based on DT-Trak's previous success working for San Carlos's IHS-run facility. (SPP. 00006, S.R. 0097, Stmt. Facts ¶ 31 S.R. 0191-0193.) However,

because San Carlos hired away Kolda and other DT-Trak personnel, that likely won't happen again. (APP. 00006, S.R. 0097, Stmt. Facts ¶ 32 S.R. 0191-0193.)

Hiring Kolda and others directly eliminated the need for DT-Trak's services due to the time and expertise DT-Trak put into teaching Kolda its San Carlos-specific solutions. (APP. 00006, S.R. 0097, Stmt. Facts ¶ 33; S.R. 0191-0193.) San Carlos now gets DT-Trak level work utilizing DT-Trak employees (including Kolda) instead of having to contract with DT-Trak. (APP. 00006, S.R. 0097, Stmt. Facts; ¶ 34 S.R. 0191-0193.)

2. <u>Kolda's conduct is not an innocent mistake</u>.

Kolda's injury-causing behavior was certainly not an innocent mistake. A party who signs a contract is presumed to know its contents and assent to its terms. *Holzer v. Dakota Speedway, Inc.*, 2000 S.D. 65, ¶ 28, 610 N.W.2d 787, 795; *accord Law Capital, Inc. v. Kettering* 2013 S.D. 66, ¶ 14, 836 N.W.2d 642, 646 ("[o]ur courts look askance at those signing a contract without reading it and knowing its conditions and then using such ignorance as a basis to avoid the contract's obligations") (citing *LPN Trust v. Farrar Outdoor Advertising, Inc.*, 1996 S.D. 97 ¶ 13, 552 N.W.2d 796, 799 ("[t]o permit a party, when sued on a written contract, to admit that he signed it but to deny that it expresses the agreement he made or to allow him to admit that he signed it but did not read it or know its stipulations would absolutely destroy the value of all contracts").

Moreover, Kolda was specifically reminded of her noncompetition obligations on several occasions. When Kolda briefly resigned in 2016, she received a letter reminding her of her noncompetition obligations. (APP. 00003, S.R. 0094, Stmt. Facts ¶ 12; APP. 00035, S.R. 0139, Kolda Dep. 106:9-14.) When Kolda returned to work for DT-Trak in

September 2016, she signed the Employment Agreement, which was identical to the previous one she signed. (APP. 00003-00004, S.R. 0094-95, Stmt. Facts ¶ 13; APP. 00061 and 00063-00069, S.R. 0101 and 0103-0109, Bertsch Aff. ¶ 7 and Ex. A; APP. 00034, S.R. 0138, Kolda Dep. 103:1-10.) When Kolda resigned her employment with DT-Trak in February 2019, she was reminded about her noncompetition obligation and she was dishonest with DT-Trak about where she would be working. (APP. 00006, S.R. 0097, Stmt. Facts ¶ 22; APP. 00039, S.R. 0150, Kolda Dep. 149:2-24.) Finally, when Kolda went to work for San Carlos, DT-Trak again reminded Kolda of her noncompetition obligations and specifically demanded she stop breaching the Employment Agreement. (APP. 00006, S.R. 0097, Stmt. Facts ¶ 26; APP. 00061, S.R. 0101, Bertsch Aff. ¶ 8.) Despite this demand, Kolda continues to act in bad faith by working for San Carlos in violation of the Employment Agreement. (APP. 00006, S.R. 0097; Stmt. Facts ¶ 27; APP. 00025 and 00037, S.R. 0113 and 0148, Kolda Dep. 4:22-23 and 141:13-22.)

3. <u>The balance of the equities favors a permanent</u> injunction.

In balancing the equities, the only harm Kolda could possibly suffer is the loss of the opportunity to perform certain work she contractually agreed to forgo. There is no equitable harm in this. *See Sterling Computers Corp. v. Fling*, 2019 WL 5104013, (D.S.D. Oct. 11, 2019) at *6 (granting temporary restraining order and preliminary injunction; "[a]ny harm [employee] might face results from [her] breach of [the] contracts with [former employer]"). Indeed, noncompetition agreements would lose their efficacy if they could not be enforced by injunction. DT-Trak uses noncompetition and non-disclosure agreements to protect its legitimate business interests and goodwill. (APP.

00004, S.R. 0095, Stmt. Facts ¶ 14; APP. 00062, S.R. 0102, Bertsch Aff. ¶ 9.) Failure to enforce these agreements would have far-reaching implications, including DT-Trak's customers poaching away DT-Trak's employees to avoid having to re-contract with DT-Trak. (APP. 00006, S.R. 0097, Stmt. Facts ¶¶ 31-34.) By comparison, Kolda only needs to wait two years to work for San Carlos (or any other similar business), and she can pursue any non-competitive profession in the interim.

4. <u>Kolda previously agreed DT-Trak is entitled to a permanent injunction.</u>

Kolda specifically agreed in the Employment Agreement that:

Employee acknowledges and agrees that compliance with the covenants and restrictions set forth in this Agreement is necessary to protect Employer's Business, goodwill, contacts, trade secrets, and Confidential Information and that a breach shall irreparably and continually damage Employer for which money damages might be inadequate. Consequently, if Employee breaches or threatens to breach any of the covenants or promises set forth in this Agreement, Employer shall be entitled, without the necessity of posting a bond or other similar security or without an actual showing of irreparable harm, to preliminary and permanent injunction to prevent the continuation of Employee's breach or threatened breach of the covenants and promises set forth in this Agreement.

(APP. 00066-00067, S.R. 0106, Bertsch Aff. Ex. A--Employment Agreement, Section 7.)

Courts routinely enforce language in noncompetition agreements similar to the language at issue here. *See, e.g., FIMCO*, 2017 WL 4798137, at *8, *11 (applying South Dakota law; quoting comparable acknowledgement in employee's noncompetition agreement); *Mercer Health & Benefits LLC v. DiGregorio*, 307 F. Supp.3dd 326, 348 (S.D.N.Y. 2018) (employee's similar acknowledgment in a non-solicitation agreement "support[s] a finding of irreparable harm"); *see also North Atl. Instruments v. Haber*, 188 F.3d 38, 49 (2d Cir. 1999) (finding irreparable harm shown where employee acknowledged in employment agreement that breach of confidentiality clause would cause irreparable

injury to employer); *REG Seneca*, *LLC.v. Harden*, 938 F. Supp. 2d 852, 860-861 (holding parties' agreement in noncompetition provision that breach of noncompetition provision would result in irreparable injury to employer and that injunctive relief is appropriate in such cases was sufficient to infer irreparable harm); *MWI Veterinary Supply Co.*, 896 F. Supp. 2d at 914 (finding irreparable harm where parties' agreed that breach of noncompetition clause "will result in irreparable harm to [employer] which cannot be reasonably or adequately compensated by damages").

Kolda specifically agreed that if she was found to have breached the Employment Agreement, DT-Trak would be entitled to a permanent injunction against her.

Accordingly, DT-Trak's motion for summary judgment should have been granted, and Kolda should have been enjoined for working for San Carlos.

IV. The Court should extend the permanent injunction by the time that Kolda was in breach of the Employment Agreement by working for San Carlos.

Kolda stopped working for DT-Trak on February 15, 2019. (APP. 00006, S.R. 0097, Stmt. Facts ¶ 20; APP. 00036, S.R. 0147, Kolda Dep 138-139.) She agreed that she would not be employed by a Competing Business like San Carlos for two years after her employment with DT-Trak ended. (APP. 00065, S.R. 0105, Bertsch Aff. Ex. A, Employment Agreement, Section 2.) Kolda has been breaching the Employment Agreement since immediately after her employment with DT-Trak ended, because she started working for San Carlos immediately. Thus, because Kolda is still working for San Carlos, the permanent injunction should run from the day it is entered and for a period of two years thereafter.

Courts routinely issue injunctions based on noncompetition agreements that begin on the date the order is entered to ensure the non-breaching party obtains the full benefit of its bargain. *See Centrol*, 489 N.W.2d at 892 (S.D. 1992) (granting noncompetition injunction for one year after the expiration date of noncompetition agreement); *Overholt Crop Ins. Serv. Co. v. Travis*, 941 F.2d 1361, 1372 (8th Cir. 1991) ("[T]here may be situations where injunctive relief extending beyond the expiration of the period established by the covenant is appropriate.") (quoting *Cherne Indus., Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 93 (Minn. 1979)); *Puritan-Bennett Corp. v. Richter*, 8 Kan.App.2d 311, 315 (1983) (holding courts "in equity may devise a remedy which extends or exceeds the terms of a prior agreement between the parties if it is necessary to make the injured parties whole").

The case of *FIMCO*, *Inc. v. Funk*, 2017 WL 4798137 (N.D. Iowa Oct. 24, 2017) is instructive. There, the District Court for the Northern District of Iowa applied South Dakota law, specifically SDCL § 53-9-11, and enjoined a former employee from working for his new employer for one year from the date of the injunction, even though the one-year term in the noncompetition agreement already expired. *Id.* at *2 and 13. After recognizing South Dakota law specifically authorizes noncompetition agreements and specific performance by statute, the court concluded the "harm that would come from allowing parties to avoid their obligations by drawing out litigation during the pendency of the obligation not to compete" would deprive the employer of the benefits of that specifically authorized agreement. *Id.* at *12.

Similarly, in *Overholt Crop Ins. Serv. Co. v. Travis*, 941 F.2d 1361 (8th Cir. 1991), the employee's two-year noncompetition period would have expired on September 15,

1991, under the noncompetition agreement, but the trial court issued an injunction instead lasting two years from the May 4, 1990 jury verdict. ¹⁰ *Id.* at 1371-72. The Eighth Circuit upheld the injunction and its term, reasoning that the employee's breach had deprived the employer of its bargained-for time to hire a replacement and transition its customer relationships without interference. *Id.* at 1372.

DT-Trak should receive the benefit of its bargain with Kolda. She agreed not to compete for a period of two years. Because she has continuously violated her Employment Agreement, the injunction should run for two years post judgment to cover the amount of time she agreed not to compete with DT-Trak.

CONCLUSION

DT-Trak was entitled to summary judgment and entry of a permanent injunction. Kolda's only arguments to the contrary are legal arguments that should have been resolved against her at summary judgment. Therefore, DT-Trak is entitled to a permanent injunction against Kolda prohibiting her from continuing to violate her Employment Agreement by working for San Carlos. Moreover, the permanent injunction should be extended for a period of two years to begin on the date the Court enters the order of injunction.

preliminary injunctive relief "is consistent with authorities on [the state statute]'s federal counterpart").

South Dakota courts regularly look to federal courts for guidance on preliminary injunctions, since Fed. R. Civ. P. 65 is analogous to SDCL § 15-6-65. See, e.g., Hedlund v. River Bluff Estates, LLC, 2018 S.D. 20, ¶12, 908 N.W. 2d 766, 770-71 (noting parties' argument regarding the right to appeal denial of

Dated this 11th day of January, 2022.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ Sander J. Morehead

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Attorneys for Appellee DT-Trak Consulting, Inc.

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point) and contains 8,471 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 11th day of January, 2022.

WOODS, FULLER, SHULTZ & SMITH P.C.

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Attorneys for Appellant DT-Trak Consulting, Inc.

CERTIFICATE OF SERVICE

I certify that on the 11th day of January, 2022, I sent via email and United States first-class mail, postage prepaid, two true and correct copies of the foregoing Appellant DT-Trak Consulting, Inc.'s Brief to the following individual:

Timothy R. Whalen Whalen Law Office, P.C. PO Box 127 Lake Andes, SD 57356 Phone: (605) 487-7645

Email: whalawtime@cme.coop

Attorney for Defendant

/s/ Sander J. Morehead

Attorneys for Appellant DT-Trak Consulting, Inc.

APPENDIX TABLE OF CONTENTS

TAB A	
Order Denying Motions for Summary Judgment	App. 000001
TAB B	
Statement of Undisputed Material Facts	App. 000002- 000008
Defendant's Response to Statement of Undisputed Material Facts	App. 000009- 000020
TAB C	
Excerpts from Defendant's Brief in Support of Motion for Summary Judgment	App. 000021- 000023
Excerpts from the Deposition of Rema Kolda	App. 000024- 000040
Excerpts from the Deposition of Natalie Bertsch	App. 000041- 000050
Excerpts from Defendant's Answers to Interrogatories and Request for Production of Documents (First Set)	App. 000051- 000059
Affidavit of Natalie Bertsch	App. 000060- 000069
Transcript of Summary Judgment Hearing	App. 000070- 000113
TAB D	
SDCL 53-9-8	App. 000114
SDCL 53-9-9	App. 000115
SDCL 53-9-11	App. 000116

APP. 00001

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
: SS	
COUNTY OF HAND)	THIRD JUDICIAL CIRCUIT
*********	* * * * * * * * * * * * * * * * * * * *
DT-TRAK CONSULTING, INC., a South	n) FILE NO. 29CIV19-30
Dakota Corporation,)
Plaintiff,)
) ORDER DENYING MOTIONS
VS.) FOR SUMMARY JUDGMENT
)
REMA KOLDA, an Individual,)
Defendant.)
* * * * * * * * * * * * * * * * * * *	* * * * * * * * * * * * * * * * * * *

The above entitled matter having come on before the Honorable Kent A. Shelton, Circuit Court Judge, Third Judicial Circuit, State of South Dakota, on the 14th day of June, 2021, pursuant to the partial motion for summary judgment filed by the Plaintiff and the motion for summary judgment filed by the Defendant; and the Plaintiff appearing in the person of its corporate representative and with counsel of record, Sander J. Morehead of Woods, Fuller, Shultz & Smith, P.C.; and the Defendant appearing in person and with her attorney of record Timothy R. Whalen of Whalen Law Office, P.C., and the Court having read and considered the motions, briefs, affidavits, and other filings made by the parties in support of and in resistance to the motions for summary judgment; and the court having heard and considered the arguments of the parties; and the Court having been fully advised in the premises and good cause appearing therefore, it is hereby

ORDERED that the Plaintiff's motion for partial summary judgment and the Defendant's motion for summary ignation are both hereby denied in their entiret

Attest: Bertsch, Marla

Clerk/Deputy



KENT A. SHELTON - CIRCUIT COURT JUDGE

APP. 00002

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
	:SS	
COUNTY OF HAND)	THIRD JUDICIAL CIRCUIT
0-	0-0-0-0	
		29CIV19-000030
DT-TRAK CONSULTING, INC., a South	:	
Dakota Corporation,		
	:	
Plaintiff,		
	:	STATEMENT OF UNDISPUTED
V.		MATERIAL FACTS
	:	
REMA KOLDA, an individual,		
	:	
Defendant.		

Plaintiff, DT-Trak Consulting, Inc. ("DT-Trak"), submits the following statement of undisputed material facts in support of its motion for partial summary judgment:

- 1. DT-Trak is a South Dakota corporation with its principal place of business in Miller, South Dakota. (Bertsch Aff. ¶ 2.)
- 2. DT-Trak provides medical coding, data entry, billing, accounts receivable services, and other support services for medical providers throughout the United States. (Bertsch Aff. ¶ 3.)
- 3. Many of DT-Trak's primary clients are Indian Health Services ("IHS") and other tribal entities. (Bertsch Aff. ¶ 4; Kolda Depo. 66:16-20.)
- 4. DT-Trak currently does business in at least nineteen states across the United States. (Bertsch Aff. ¶ 5.)

{04125720.1} - 1 -

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APP. 00003

Case Number: 29CIV19-000030 Statement of Undisputed Material Facts

- 5. Defendant, Rema Kolda ("Kolda"), is an individual last known to reside in St. Lawrence, South Dakota. (Complaint ¶ 2; Answer ¶ 4.)
- 6. Kolda was employed by DT-Trak from September 20, 2004, until February 15, 2019, in Miller, South Dakota, save for a brief lapse of employment between July 2017 and September 2017. (Kolda Depo. 12:24-25; Bertsch Aff ¶ 6.)
- 7. Kolda worked for DT-Trak as a medical coder, a job for which she had no experience before beginning her employment at DT-Trak. (Kolda Depo. 16:6-9.)
- 8. DT-Trak trained Kolda, and that training allowed her to become a Certified Professional Coder, Apprentice. (Kolda Depo. 24:5-14.)
- 9. DT-Trak also provided Kolda with training that allowed her to become certified in ICD-10 coding. (Kolda Depo. 59:22-25.)
- (10.) During her employment with DT-Trak, Kolda signed several non-competition agreements. (*See* Kolda Depo. 32:8-14; 42:14-22; 103:1-10.)
- 11. For a few months in 2016, Kolda did not work for DT-Trak because she resigned her employment on July 20, 2016 (Bertsch Aff. ¶ 6), but she returned to work for DT-Trak in September 2016. (Kolda Depo. 99: 6-9).
- (12.) After her resignation, Kolda received a letter in August 2016 reminding her of her non-competition agreement with DT-Trak. (Kolda Depo. 106:9-14.)
- ("Employment Agreement") as a condition of her employment with DT-Trak, which was

{04125720.1} - 2 -

Case Number: 29CIV19-000030 Statement of Undisputed Material Facts

identical to the one she had most-recently signed before her resignation in July 2016. (Kolda Depo. 103:1-10; Bertsch Aff. ¶ 7 and Ex. A--Employment Agreement¹.)

- 14. Given the competitive nature of the marketplace in the medical claims management industry, ad the frequency with with DT-Trak's customers try to hire away DT-Trak's employees to avoid hiring DT-Trak, DT-Trak uses non-compete and non-disclosure agreements to protect its business and goodwill. (Bertsch Aff. ¶ 9.)
- 15. The Employment Agreement states that Kolda is prohibited from engaging in or working in a "competing business" within a specified "business area" for two years following her separation from DT-Trak. (Bertsch Aff. Ex. A--Employment Agreement, ¶ 2.)
- 16. A "competing business" is defined as any business that engaged in the "Business" of Employer," further defined as follows:

Professional medical coding; Electronic Health Record Services (EHR); Electronic Data Entry (any database or software); Error Report Management and Completion; Third Party Billing, all payer sources; Accounts Receivable; Posting; Collections (120+ days, etc.); Quality Assurance of Revenue Generation Cycle; Comprehensive Revenue Generation Services; Compliance Auditing HIPAA, etc.; Data Integrity Audits, entire revenue generation cycle; Provider and Staff Education; Patient Registration; Staff & Program Development/Evaluation Criteria Development; Comprehensive Consultative Services for Healthcare Administrative, Financial, HIM and BO Functions; Revenue Enhancement Auditing; Development and Implementation of Work Flow Processes Relating to Revenue Generation Cycle; Planning, Implementing and Facilitation of Training/Workshops; Feasibility Studies for or Development of Revenue Generation Cycle or Development; Internal Controls Policy Evaluation, Implementation and Management; "Special Projects"- Analysis and Development of Various Health an Revenue Generation Studies; Financial Projections for Healthcare Facilities; Cost Analysis Studies for Healthcare Facilities; Chargemaster Audit, Implementation and Utilization.

{04125720.1} - 3 -

¹ The Employment Agreement is attached to the Deposition of Rema Kolda as Exhibit 23 and to the Affidavit of Natalie Bertsch as Exhibit A.

Case Number: 29CIV19-000030 Statement of Undisputed Material Facts

(*Id.*--Employment Agreement, ¶¶ 1.1, 1.3.)

- of America, including Alaska and Hawaii. The Business Area is so defined because, and Employee so agrees, that the market for the Business is highly specialized and that Employer engages in the Business with and for numerous entities that are located within and throughout the United States." (*Id.*--Employment Agreement, ¶ 1.2.) As noted above, DT-Trak has active contracts in 19 states (New Mexico, Arizona, Alaska, Montana, Wyoming, Minnesota, Oregon, Washington, Colorado, South Carolina, South Dakota, California, Rhode Island, Tennessee, Nevada, North Dakota, Idaho, Maine, and Oklahoma); has had contracts in at least 10 others, (in Utah, Nebraska, Kansas, Texas, Iowa, Illinois, Wisconsin, Michigan, New York, and Alabama), has periodically bid on contracts in three other states (Hawaii, Florda, and Maryland.) and has pending bids out for Oklahoma, North Dakota, South Dakota, California, Washington, Arizona, and New Mexico facilities; as well as on a nationwide Veteran's Administration ("VA") coding project, so DT-Trak does business throughout the United States. (Bertsch Aff. ¶ 5.)
- The Employment Agreement states that if Kolda breaches any provision of the Employment Agreement, DT-Trak is entitled to permanent injunctive relief and liquidated damages in the amount of \$5,000.00 per incident of breach, or the actual damages of DT-Trak, whichever is greater. (Bertsch Aff. Ex. A--Employment Agreement, ¶ 7.)
- 19. The Employment Agreement also states DT-Trak is entitled to recover its attorneys' fees and costs from Kolda that DT-Trak incurs in enforcing the Employment Agreement. (*Id.*--Employment Agreement, ¶¶ 7 and 8.5.)

{04125720.1} - 4 -

Case Number: 29CIV19-000030 Statement of Undisputed Material Facts

- 20. Kolda's employment at DT-Trak terminated on February 15, 2019, when she voluntarily resigned. (Kolda Depo. 138:22-129:11.)
- 21. Shortly before Kolda resigned her position at DT-Trak, she was offered a position working as a medical coder for San Carlos Apache Healthcare Corporation ("San Carlos"), a healthcare provider in Peridot, Arizona. (Kolda Depo. 145:8-19.)
- 22. Although Kolda had already secured a job at San Carlos, she did not inform DT-Trak she had accepted a job with San Carlos as a medical coder, despite being asked where she would work and being reminded about her non-competition agreement. (Kolda Depo. 149:2-24.)
- When Kolda was employed by DT-Trak, she provided medical coding quality assurance services directly for San Carlos, who was DT-Trak's customer, but San Carlos terminated its contract with DT-Trak effective December 31, 2018, just before Kolda left employment with DT-Trak in February 2019. (Kolda Depo. 148:2-7.)
- 24. Kolda works for San Carlos as a medical coder, which is the same work she did for DT-Trak. (Kolda Depo. at 4:22-23; 141:13-22.)
- 25. Kolda works for San Carlos from South Dakota via remote access. (Kolda Depo. at 4:14-17.)
- 26. DT-Trak demanded that Kolda cease her employment with San Carlos pursuant to her obligations under the Employment Agreement. (Bertsch Aff. ¶ 8.)
- 27. Despite DT-Trak's demand, Kolda has refused to terminate her employment with San Carlos. (Kolda Depo. 4:22-23; 141:13-22.)

{04125720.1} - 5 -

Case Number: 29CIV19-000030 Statement of Undisputed Material Facts

- 28. San Carlos hired away another DT-Trak employee, Keely Flynn, later in 2019; but Ms. Flynn eventually agreed to stop working for San Carlos after DT-Trak sued to enforce its Employment Agreement with her. (Kolda Depo. 170:17-20.)
 - 29. San Carlos is a tribal entity. (Bertsch Aff. ¶ 4.)
- 30. It is not uncommon for a facility such as San Carlos to periodically re-contract with DT-Trak when it faces recurring challenges, or has new issues to be resolved, because of DT-Trak's existing knowledge and expertise. (Morehead Aff. Ex. C--DT-Trak's Discovery Responses at Answer to Interrogatory No. 11.)
- 31. For example, San Carlos hired DT-Trak to work for its tribally-run program based on DT-Trak's previous success working for San Carlos's IHS-run facility. (*Id.*)
- 32. However, because San Carlos has hired away Kolda and other DT-Trak personnel, that isn't likely to occur now. (*Id.*)
- 33. Hiring Kolda and others directly eliminated the need for DT-Trak's services due to the time and expertise DT-Trak put into teaching Kolda its San Carlos specific solutions. (*Id.*)
- 34. (San Carlos now gets DT-Trak level work utilizing DT-Trak's employees including Kolda instead of having to contract with DT-Trak. (*Id.*)

Case Number: 29CIV19-000030 Statement of Undisputed Material Facts

Dated this 16th day of April, 2021.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ Sander J. Morehead

Sander J. Morehead Jordan J. Feist 300 South Phillips Avenue, Suite 300 Post Office Box 5027 Sioux Falls, South Dakota 57117-5027 (605) 336-3890 Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of April, 2021, a true and correct copy of the foregoing Statement of Undisputed Material Facts was electronically filed and served through the Odyssey File and Serve system upon the following individual:

Timothy R. Whalen Whalen Law Office, P.C. PO Box 127 Lake Andes, SD 57356

Phone: (605) 487-7645

Email: whalawtime@cme.coop

Attorney for Defendant

/s/ Sander J. Morehead
One of the Attorneys for Plaintiff

{04125720.1} - 7 -

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
: SS	
COUNTY OF HAND)	THIRD JUDICIAL CIRCUIT
DT-TRAK CONSULTING, INC. a South) FILE NO. 29CIV19-30
Plaintiff,	
)
VS.) DEFENDANT'S RESPONSE TO
) STATEMENT OF UNDISPUTED
REMA KOLDA, an individual,) MATERIAL FACTS
Defendant.)
**********	**********

Comes now the above named Defendant, by and through her attorney of record, Timothy R. Whalen of Whalen Law Office, P.C., and for her response to the Plaintiff's Statement of Undisputed Material Facts (PSUMF) states as follows:

- 1. Defendant does not dispute paragraph numbered 1 of the PSUMF.
- 2. Defendant does not dispute that portion of paragraph numbered 2 of the PSUMF that indicates that the Plaintiff provides the identified services. The Defendant disputes that the Plaintiff's services occur "throughout the United States", because its services are predominantly provided remotely from Miller, South Dakota, and a few other states, and the services are for entities which are located in approximately 19 states. N. Bertsch Depo., p. 11; N. Bertsch Affidavit ¶5.
 - 3. Defendant does not dispute paragraph numbered 3 of the PSUMF.
 - 4. Defendant does not dispute paragraph numbered 4 of the PSUMF.
 - 5. Defendant does not dispute paragraph numbered 5 of the PSUMF.
 - 6. Defendant does not dispute paragraph numbered 6 of the PSUMF.
 - 7. Defendant does not dispute paragraph numbered 7 of the PSUMF.
- 8. Defendant disputes paragraph numbered 8 of the PSUMF because the Plaintiff did not train the Defendant to become a Certified

Defendant's Response to Statement of Undisputed Material Facts - 29CIV19-30

Professional Coder, Apprentice. The Plaintiff facilitated the Defendant's training through a third party qualified trainer so that she could become a Certified Professional Coder, Apprentice. N.

Bertsch Depo, pp. 85-86; Defendant's Answers to Interrogatories and Request for Production of Documents (First Set), Answer to
Interrogatory number 21. The Plaintiff paid for the training, but the Defendant was obligated to work for at least five years for the Plaintiff after she completed the training. Id. If the Defendant terminated her employment with the Plaintiff prior to the five years expiring, then she would have been required to repay the Plaintiff for the training. Id. Moreover, once the credentials were earned by the Defendant for the Plaintiff, the Defendant paid the annual dues and fees to maintain the credentials through a payroll deduction.

Defendant's Answers to Interrogatories and Request for Production of Documents (First Set), Answer to Interrogatory number 21.

9. Defendant disputes paragraph numbered 9 of the PSUMF because the Plaintiff did not train the Defendant to become a ICD-10 coder. The Plaintiff facilitated the Defendant's training through a third party qualified trainer so that she could become an ICD-10 coder. N. Bertsch Depo, pp. 85-86; Defendant's Answers to Interrogatories and Request for Production of Documents (First Set), Answer to Interrogatory number 21. The Plaintiff paid for the training, but the Defendant was obligated to work for at least five years for the Plaintiff after she completed the training. Id. If the Defendant

Defendant's Response to Statement of Undisputed Material Facts - 29CIV19-30

expiring, then she would have been required to repay the Plaintiff for the training. *Id.* Moreover, once the credentials were earned by the Defendant for the Plaintiff, the Defendant paid the annual dues and fees to maintain the credentials through a payroll deduction.

Defendant's Answers to Interrogatories and Request for Production of Documents (First Set), Answer to Interrogatory number 21.

- 10. Defendant does not dispute that portion of paragraph numbered 10 of the PSUMF which states she signed several agreements with the Plaintiff, but asserts that the agreements were adhesion contracts which were unilateral in nature and all provisions therein were not binding upon her nor valid and enforceable as a matter of law.

 Defendant's Answers to Interrogatories and Request for Production of Documents (First Set), Answer to Interrogatory number 10.
- 11. Defendant does not dispute paragraph numbered 11 of the PSUMF.
- 12. Defendant does not dispute that portion of paragraph numbered 12 of the PSUMF that indicates she received a letter regarding her employment with the Plaintiff, but asserts that the purpose of the letter was to oppress, threaten, and harass her and keep her from pursuing her chosen line of employment. Moreover, the contents of the letter were not legally correct nor valid. Defendant's Answers to Interrogatories and Request for Production of Documents (First Set), Answers to Interrogatories numbered 10 and 14.

Defendant's Response to Statement of Undisputed Material Facts - 29CIV19-30

- 13. Defendant does not dispute paragraph numbered 13 of the PSUMF which states that when she returned to work for the Plaintiff in September of 2016 she executed additional contracts, but asserts that the agreements were adhesion contracts which were unilateral in nature and all provisions therein were not binding upon her nor valid and enforceable as a matter of law. Defendant's Answers to Interrogatories and Request for Production of Documents (First Set), Answer to Interrogatory number 10.
- 14. Defendant disputes paragraph numbered 14 of the PSUMF on the grounds that the Plaintiff does not use the provisions of the agreements it requires its employees to sign to protect its interests, but uses same as a tool to oppress, malign, harass, intimidate, threaten and generally discourage or keep certain of its employees from pursuing their chosen profession or trade outside of employment with the Plaintiff. Defendant's Answers to Interrogatories and Request for Production of Documents (First Set), Answers to Interrogatories numbered 10 and 14; Kolda Depo, pp. 142-145.
- 15. Defendant does not dispute that the agreement referenced in paragraph numbered 15 of the PSUMF states what is represented, but asserts that the agreement is an adhesion contract which was unilateral in nature and all provisions therein were not binding upon her nor valid and enforceable as a matter of law. Defendant's Answers to Interrogatories and Request for Production of Documents (First Set), Answer to Interrogatory number 10. Further, the definition of a

Defendant's Response to Statement of Undisputed Material Facts - 29CIV19-30

"competing business" and specified "business area" do not apply to the Defendant. Defendant's Statement of Undisputed Material Facts, ¶¶1128, inclusive, and the citations to the record therein.

- agreement referenced in paragraph numbered 16 of the PSUMF states what is represented, but asserts that the agreement is an adhesion contract which was unilateral in nature and all provisions therein were not binding upon her nor valid and enforceable as a matter of law.

 Defendant's Answers to Interrogatories and Request for Production of Documents (First Set), Answers to Interrogatories number 10, 14-20.

 Further, the definition of a "competing business" and "Business of Employer" do not apply to the Defendant. Defendant's Statement of Undisputed Material Facts, IIII-28, inclusive, and the citations to the record therein; see also, Kolda Depo., pp. 142-143.
- agreement referenced in paragraph numbered 17 of the PSUMF defines what the Plaintiff claims as its "business area" and that said "business area" is the entire United States of America, but disputes the basis for the inclusion of all the United States as the Plaintiff's "business area." The Defendant further asserts that the agreement is an adhesion contract which was unilateral in nature and all provisions therein were not binding upon her nor valid and enforceable as a matter of law. Defendant's Answers to Interrogatories and Request for Production of Documents (First Set),

Defendant's Response to Statement of Undisputed Material Facts - 29CIV19-30

Answers to Interrogatories number 10, 14-20. Further, Plaintiff's services and business are predominantly provided remotely from Miller, South Dakota, and a few other states, and occur in approximately 19 states. N. Bertsch Depo., p. 11; N. Bertsch Affidavit ¶5. Moreover, the definition of the Plaintiff's "business area" is not binding upon the Defendant, is not valid, and violates South Dakota law governing employment contracts and, therefore, is not enforceable nor valid as a matter of law.

- agreement referenced in paragraph numbered 18 of the PSUMF states what is referenced, but asserts that the agreement is an adhesion contract which was unilateral in nature and all provisions therein were not binding upon her nor valid and enforceable as a matter of law.

 Defendant's Answers to Interrogatories and Request for Production of Documents (First Set), Answers to Interrogatories number 10, 14-20.

 Further, the Defendant disputes that she breached the terms and provisions of any agreement she had with the Plaintiff. Defendant's Statement of Undisputed Material Facts, \$\frac{\pi 111-28}{\pi 111-28}\$, inclusive, and the citations to the record therein; Kolda Depo., pp. 142-145; Defendant's Answers to Interrogatories and Request for Production of Documents (First Set), Answers to Interrogatories numbered 10, 14-20; Affidavit of Rema Kolda, \$\frac{\pi 8}{\pi 8}\$ and 9.
- 19. Defendant does not dispute that the provision of the agreement referenced in paragraph numbered 19 of the PSUMF states what

Defendant's Response to Statement of Undisputed Material Facts - 29CIV19-30

is referenced, but asserts that the agreement is an adhesion contract which was unilateral in nature and all provisions therein were not binding upon her nor valid and enforceable as a matter of law.

Defendant's Answers to Interrogatories and Request for Production of Documents (First Set), Answers to Interrogatories number 10, 14-20.

Further, the Defendant disputes that she breached the terms and provisions of any agreement she had with the Plaintiff. Defendant's Statement of Undisputed Material Facts, ¶¶11-28, inclusive, and the citations to the record therein; Kolda Depo., pp. 142-145; Defendant's Answers to Interrogatories and Request for Production of Documents (First Set), Answers to Interrogatories numbered 10, 14-20; Affidavit of Rema Kolda, ¶¶8 and 9.

- 20. Defendant does not dispute paragraph numbered 20 of the PSUMF, but asserts that the reason for her resignation was because of the hostile treatment and environment created by the Plaintiff and its staff. Defendant's Answers to Interrogatories and Request for Production of Documents (First Set), Answers to Interrogatories numbered 10, 14-20.
- 21. Defendant does not dispute paragraph numbered 21 of the PSUMF, but asserts that prior to resigning her position with the Plaintiff, she had looked for other jobs in her field and before accepting the position with San Carlos Apache Healthcare Corporation (San Carlos) she took proper steps to ensure that the Plaintiff did not have a contract with the Plaintiff. *Kolda Depo.*, pp. 139-148.

Defendant's Response to Statement of Undisputed Material Facts - 29CIV19-30

- 22. Defendant does not dispute paragraph numbered 22 of the PSUMF, but clarifies that she was under no obligation to the Plaintiff to advise it of her new employment because it did not violate the terms and provisions of any agreement she had with the Plaintiff. *Id.*
- 23. Defendant disputes paragraph numbered 23 of the PSUMF because she did not provide services directly to San Carlos while employed with the Plaintiff, but worked in the Plaintiff's Quality Assurance department and engaged in the work assigned to her by the Plaintiff. Affidavit of Rema Kolda, ¶¶3, 4 and 5. Moreover, the work the Defendant performed for the Plaintiff while in Quality Assurance was not exclusively for San Carlos' projects. Id. Further, the work the Defendant did for the Plaintiff on San Carlos' projects when she was in Quality Assurance was several years prior to her accepting employment with San Carlos. Id.; Kolda Depo., p. 148.
- 24. Defendant does not dispute that she is an employee of San Carlos as stated in PSUMF numbered 24, but disputes the manner in which the statement is written because it gives the impression that the Defendant is doing the same work as she did for the Plaintiff. This is not true. The Defendant is an employee with San Carlos and is not a private, independent contractor who is in a competing business with the Plaintiff. Defendant's Statement of Undisputed Material Facts, III1-28, inclusive, and the citations to the record therein. Further, San Carlos is not a competing business with the Plaintiff, but is a hospital with a clinic and is not a contractor who provides

Defendant's Response to Statement of Undisputed Material Facts - 29CIV19-30

medical coding services to other medical service providers on a contract basis. Id.

- 25. Defendant does not dispute paragraph numbered 25 of the PSUMF.
- 26. Defendant does not dispute paragraph numbered 26 of the PSUMF.
- 27. Defendant does not dispute paragraph numbered 27 of the PSUMF.
- 28. Defendant disputes paragraph numbered 28 of the PSUMF because she is not familiar with all of the facts and circumstances associated with the matter involving Keely Flynn. Affidavit of Rema Kolda, ¶5.
- 29. Defendant disputes paragraph numbered 29 of the PSUMF because she does not know for certain whether or not San Carlos is a tribal entity, but the evidence shows that it is a corporation. Affidavit of N. Bertsch, ¶4.
- 30. Defendant disputes paragraph numbered 30 of the PSUMF because it was her understanding that San Carlos had no intentions of utilizing the Plaintiff's services in the future because it was not satisfied with the Plaintiff's services and wanted to be self sustaining in its services. Affidavit of Rema Kolda, ¶7; Affidavit of Katherine Andersen. ¶¶4-10; Defendant's Statement of Undisputed Material Facts, ¶¶11-28, inclusive, and the citations to the record therein.

Defendant's Response to Statement of Undisputed Material Facts - 29CIV19-30

- 31. Defendant disputes paragraph numbered 31 of the PSUMF because it was her understanding that San Carlos had no intentions of utilizing the Plaintiff's services in the future because it was not satisfied with the Plaintiff's services and wanted to be self sustaining in its services. Affidavit of Rema Kolda, ¶7; Affidavit of Katherine Andersen, ¶¶4-10; Defendant's Statement of Undisputed Material Facts, ¶¶11-28, inclusive, and the citations to the record therein.
- 32. Defendant disputes paragraph numbered 32 of the PSUMF because it was her understanding that San Carlos had no intentions of utilizing the Plaintiff's services in the future because it was not satisfied with the Plaintiff's services and wanted to be self sustaining in its services. Affidavit of Rema Kolda, ¶7; Affidavit of Katherine Andersen. ¶¶4-10; Defendant's Statement of Undisputed Material Facts, ¶¶11-28, inclusive, and the citations to the record therein.
- 33. Defendant disputes paragraph numbered 33 of the PSUMF because it was her understanding that San Carlos had no intentions of utilizing the Plaintiff's services in the future because it was not satisfied with the Plaintiff's services and wanted to be self sustaining in its services. Affidavit of Rema Kolda, ¶7; Affidavit of Katherine Andersen. ¶¶4-10; Defendant's Statement of Undisputed Material Facts, ¶¶11-28, inclusive, and the citations to the record therein. Moreover, when the Defendant was hired by San Carlos she had

Defendant's Response to Statement of Undisputed Material Facts - 29CIV19-30

to be retrained by San Carlos staff because San Carlos does not use the same processes and procedures that the Plaintiff utilized when it provided services to San Carlos. Affidavit of Rema Kolda, ¶13; Affidavit of Katherine Andersen, ¶¶12-13; Defendant's Statement of Undisputed Material Facts, ¶¶11-28, inclusive, and the citations to the record therein. Also, the ICD-10 code is not a trade secret and is public knowledge so nothing the Defendant learned about medical coding can be attributed to the Plaintiff or considered a trade secret or confidential information. Affidavit of Katherine Andersen. ¶¶12-13; Defendant's Statement of Undisputed Material Facts, ¶¶11-28, inclusive, and the citations to the record therein.

34. Defendant disputes paragraph numbered 34 of the PSUMF because it was her understanding that San Carlos had no intentions of utilizing the Plaintiff's services in the future because it was not satisfied with the Plaintiff's services and wanted to be self sustaining in its services. Affidavit of Rema Kolda, ¶7; Affidavit of Katherine Andersen, ¶¶4-10; Defendant's Statement of Undisputed Material Facts, ¶¶11-28, inclusive, and the citations to the record therein. Moreover, when the Defendant was hired by San Carlos she had to be retrained by San Carlos staff because San Carlos does not use the same processes and procedures that the Plaintiff utilized when it provided services to San Carlos. Affidavit of Rema Kolda, ¶13; Affidavit of Katherine Andersen, ¶¶12-13; Defendant's Statement of Undisputed Material Facts, ¶¶11-28, inclusive, and the citations to

the record therein. Also, the ICD-10 code is not a trade secret and is public knowledge so nothing the Defendant learned about medical coding can be attributed to the Plaintiff or considered a trade secret or confidential information. Affidavit of Katherine Andersen, ¶13; Defendant's Statement of Undisputed Material Facts, ¶¶11-28, inclusive, and the catalons to the record therein.

Dated this

day of June, 2021

TIMOTHY R. WAZLEN

Whalen Law Oftice, P.C.

P.O. Box 127

Lake Andes, SD 57356 Telephone: 605-487-7645 Attorney for the Defendant

whalawtim@cme.coop

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
: SS	
COUNTY OF HAND)	THIRD JUDICIAL CIRCUIT
*********	**********
DT-TRAK CONSULTING, INC., a South) FILE NO. 29CIV19-30
Dakota Corporation,)
Plaintiff,)
) DEFENDANT'S BRIEF IN
vs.) SUPPORT OF MOTION FOR
) SUMMARY JUDGMENT
REMA KOLDA, an Individual,)
Defendant.)
*******	**********

PRELIMINARY MATTERS

The Defendant, Rema Kolda (Rema), has made a Motion for Summary Judgment pursuant to SDCL 15-6-56(a) because there are no genuine issues as to material facts and she is entitled to a judgment as a matter of law on all counts in the Plaintiff's Complaint. This brief is submitted in support of the aforesaid motion.

PROCEDURAL BACKGROUND

This action was commenced by the Plaintiff after Rema terminated her employment with the Plaintiff in January of 2019. The Plaintiff's Complaint alleges four counts against Rema, namely, Count I: Breach of Non-Disclosure Covenants; Count II: Breach of Non-Compete Covenants; Count III: Breach of Non-Solicitation Covenants; and Count IV: Misappropriation of Trade Secrets. Plaintiff's Complaint. The Plaintiff seeks monetary damages and injunctive relief. Id. The gravamen of the Plaintiff's claims against Rema is that she breached a Non-Compete, Non-Solicitation, Confidentiality, Non-Disclosure, and Non-Use Agreement (Agreement) she signed on September 12, 2016, by accepting employment with San Carlos Apache Healthcare (San Carlos) in Peridot, Arizona. Rema denies breaching the Agreement in all respects

Defendant's Brief in Support of Motion for Summary Judgment- 29CIV19-30

Under the governing statutes and rules of contract construction and the Aqerva test it is clear that a narrow construction of the Agreement supports granting the Defendant's motion for summary judgment as to all counts of the Plaintiff's Complaint.

B. Geographical Limitations.

Generally, an employee cannot challenge a covenant not to compete on the basis of "reasonableness" if the employee voluntarily terminates employment. Central Monitoring Service, Inc. v. Zakinski, 1996 S.D. (116, ¶47, 553 N.W.2d 513. However, in order for the Zakinski prohibition to apply, the covenant not to compete must comply in all respects with SDCL 53-9-11. Id., at 116, ¶47. The Agreement in this case does not comply with SDCL 53-9-11. In order to comply with SDCL 53-9-11, the geographical limitation of the Agreement must be a specified area. The "business" of the Plaintiff is defined in the Agreement as a variety of matters, but specifically includes medical coding. If Rema is covered under the definition of "business" of the Plaintiff, the geographical limitation under the Agreement prohibits her from working in the continental United States and Alaska and Hawaii. See, Exh. A. Effectively, Rema will be prohibited from working in her chosen profession. This clearly violates SDCL 53-9-8 and the public policy behind said statute, part of which is to encourage and promote the continued employment of employees in South Dakota. Lindskov v. Lindskov, 2011 S.D. 34, ¶12, 800 N.W.2d 715; Communications Tech. Sys., Inc. v. Densmore, 1998 S.D. 87, ¶18, 583 N.W.2d 125. The obvious intent of SDCL 53-9-11 is to allow an

employer some protections, but also to allow an employee to work in their chosen profession. The "specified area" language cannot be taken any other way. Geographical limitations covering the entire United States does not constitute a specified area, as it covers the entire country. Moreover, allowing such a broad geographical limitation violates the legal requirement that covenants not to compete be narrowly construed. To enforce this geographical limitation on Rema's employment is an unlawful restraint on her chosen profession and clearly violates SDCL 53-9-8 and the case law applying said statutory restriction. See, Mckie, 2018 S.D. 14, ¶12.

In light of the above and foregoing, the Defendant's motion for summary judgment should be granted as to all of the Plaintiff's claims.

C. Trade Secrets and Confidential and Proprietary Information.

The Uniform Trade Secrets Act (UTSA) is found at SDCL Chapter 37-29. SDCL 37-29-1(4) defines a trade secret as

- ... information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
- (I) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- (ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Clearly, a trade secret must be "... information, including a formula, pattern, compilation, program, device, method, technique, or process ..." SDCL 37-29-1. The Plaintiff claims that certain protocols were protected as trade secrets, but the deposition testimony clearly

In The Matter Of:

DT-TRACK CONSULTING, INC., v. REMA KOLDA

Rema Kolda January 13, 2021

Pat Beck, Court Reporter

Original File 011321Kolda.txt

Min-U-Script® with Word Index

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Page 2
                                                    Page 1
   STATE OF SOUTH DAKOTA)
                                         IN CIRCUIT COURT
                                                                                     INDEX OF EXAMINATION
                                 THIRD JUDICIAL CIRCUIT
                                                                By Mr. Morehead:
                                                                                     P. 5
    COUNTY OF HAND
                                                             3
                                                                                     INDEX TO EXHIBITS
    DT-TRAK CONSULTING, INC., a South
                                           29CIV19-000030
4
   Dakota Corporation,
                                                             4
                                                                                        Marked for
                                                                                                          Offered into
                                                                (Exhibit Nos. 1 through 72
                                                                                                           Evidence
5
                            Plaintiff,
                                                             5
                                                                Marked Prior to the Deposition)
6
         -vs-
   REMA KOLDA, an individual,
                                                             7
8
                            Defendant.
                                                             8
                            Hand County Courthouse
Miller, South Dakota
January 13, 2021
10:00 a.m.
9
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                                                            11
12
                                                            12
13
                 DEPOSITION
                                                            13
                         REMA KOLDA
15
                                                            15
16
   APPEARANCES:
                                                            16
                     Mr. Sander J. Morehead
Woods, Fuller, Shultz & Smith
300 South Phillips Avenue
17
                                                            17
18
                      Suite 300
                                                            18
                      Sioux Falls, South Dakota 57104
19
                                                            19
                     Attorney for the Plaintiff;
20
                     Mr. Timothy R. Whalen Whalen Law Office, P.C.
21
                     Whalen Law O
                                                            21
                      Lake Andes, South Dakota 57356
22
                                                            22
23
                      Attorney for the Defendant.
                                                            23
24
   ALSO PRESENT: Natalie Bertsch
                                                            24
25
                                                            25
                                                    Page 3
                                                                                                                Page 4
                                                             1 EXAMINATION BY MR. MOREHEAD:
1
                   STIPULATION
               It is stipulated and agreed, by and
                                                                Q Good morning. Could you please state and spell
2
                                                                your name for the record?
   between the above-named parties through their
                                                                A Rema Kolda. R-E-M-A, K-O-L-D-A.
4
   attorneys of record, whose appearances have been
                                                                Q Would you prefer that I call you Rema or
   hereinabove noted, that the deposition of REMA KOLDA
                                                                Ms. Kolda?
   may be taken at this time and place, that is, at the
                                                                A Rema is fine.
   Hand County Courthouse, Miller, South Dakota, on the
                                                                   Rema, where do you live?
   13th day of January, 2021, commencing at the hour of
                                                                    St. Lawrence, South Dakota.
   10:00 a.m.; said deposition taken before Pat L.
                                                                0
                                                                   What's your address?
   Beck, Registered Merit Reporter and Notary Public
                                                                    106 North Oak Street, St. Lawrence.
   within and for the States of South Dakota and
11
                                                                   Where do you work?
   Minnesota; said deposition taken for the purpose of
12
                                                                   San Carlos Apache Healthcare.
    discovery or for use at trial or for each of said
                                                                Q Would it be fair to say that you work for
14
    purposes; and said deposition is taken in accordance
                                                                San Carlos -- I'm going to call it "San Carlos" if
15
   with the applicable Rules of Civil Procedure as if
                                                                that's okay.
16
    taken pursuant to written notice. Objections,
                                                                A Yes.
17
    except as to the form of the question, are reserved
                                                                   -- San Carlos remotely?
18
    until the time of trial. Insofar as counsel are
                                                                   Yes.
    concerned, the reading and the signing of the
19
                                                                   Is that similar to what you did at DT-Trak?
                                                                0
    transcript by the witness is waived.
                                                                    Yes.
21
          (Deposition Exhibit Nos. 1 through 72 marked
                                                                   What's your position at San Carlos?
22
                 prior to the deposition.)
                                                                   I'm a HIMs Coder, Level 3.
23
                        REMA KOLDA,
                                                                Q What does that mean for somebody like me that
24
    called as a witness, being first duly sworn, deposed
   and said as follows:
                                                                doesn't code?
```

Page 9

- 1 Q While you were at Hand County Hospital, sounds
- 2 like you had a number of positions. Was that
- 3 something where you received any training while you
- 4 were there? And by "training," I mean apart from
- 5 training by the people employing you, school,
- 6 continuing education, anything like that.
- A We had -- working at Courtyard Villa, we had to
- 8 take a medical class to be able to distribute
- 9 medications to the patients and residents.
- 10 Q You said you were an EMT. Is that something
- where you needed to be trained as well?
- 12 A Yes, I did.
- 13 Q Were you a certified EMT?
- 14 A Yes. And I still am currently certified.
- 15 Q What caused you or what was the reason that
- your employment ended at Hand County Hospital?
- 17 A I just wanted to further my knowledge and
- 18 further my abilities and there was an opening at
- 19 DT-Trak.
- 20 Q Okay. Had you been exposed -- exposed is a bad
- word. Had you gotten familiar with medical coding
- while you were at Hand County Medical?
- 23 A Not coding in general. I did go to school to
- be a nurse and so I have training in that.
- 25 Q Okay. When did you go to school to be a nurse?

- 1 A Probably about two years -- between 2001 and
- 2 2002.
- 3 Q I'll come back to that in a minute because you
- 4 just helped me out on one question here. You went
- 5 to Southeast Tech and it sounds like you graduated
- 6 in May 1994?
- 7 A Yes.
- 8 Q We're going to talk about the nursing training
- 9 in a minute. Was there any other school in between
- 10 there?
- 11 A No.
- 12 Q Okay.
- 13 A Well, the same program, the nursing program.
- 14 Q Right, that you just mentioned?
- 15 A Yes.
- 16 Q 2001 to 2002?
- 17 A Yes.
- 18 Q Where did you get that training?
- 19 A It was through Presentation College. It was a
- 20 distant learning. It was called the Seed Program.
- 21 Q At the time you were working at Builders
- 22 Cashway; right?
- 23 A No.
- 24 Q No?
- 25 A No. That was when I was working at Hand County

Page 11

Page 12

- Memorial Hospital in the Courtyard Villa.
- 2 Q That's right. I didn't read my own notes very
- 3 well. Okay. What was it that caused you after you
- 4 had a degree in engineering to decide you want to be
- 5 a nurse?
- 6 A I just liked the medical field. I took the EMT
- 7 class. I liked helping people, being there for
- 8 people, and I just wanted to continue my education.
- 9 Q Did you get a degree in the Presentation Seed
- 10 Program?
- 11 A I was one semester short.
- 12 O Okay. So had you completed that last semester,
- 13 I know -- I don't remember what they all are --
- 14 there's different types of nurses. They have
- 15 different designations. What was the one that you
- 16 were --
- 17 A I would have been a registered nurse.
- 18 Q An RN? And you had one semester left?
- 19 A Yes
- 20 Q What was it that caused you to say, "I want to
- be done with this"?
- 22 A There was an incident -- an instance that
- 23 happened to my daughter that I would not like to
- 24 disclose.
- 25 Q That's fair. I don't want to do anything

- 1 that's super -- some sort of conflict between your
- 2 daughter, maybe, and somebody in the program?
- 3 A No. It was legal, something legal that
- 4 happened to her.
- 5 Q Okay. That's fair. If we feel like we need to
- 6 ask more questions. I just wanted to get a sense of
- 7 what it was.
- 8 In the years since, have you ever thought
- 9 about going back and finishing that last semester?
- 10 A No. I enjoy doing what I'm doing now as a
- 11 medical coder.
- 12 Q So we've talked about you going to Southeast
- Tech and we're up through the end of you working for
- 14 Hand County Medical. Is there anything else we
- haven't talked about that you've had in terms of,
- 16 like, formal education?
- 17 A That should be it.
- 18 Q Any other employment?
- 19 A No
- Q Okay. How did you hear about the position at
- 21 DT-Trak?
- 22 A Through family and other people within the
- 23 community and newspaper.
- Q When did you start working at DT-Trak?
- A I believe that was September of 2004.

Page 13

- 1 Q By then was DT-Trak fairly well known in the
- 2 community?
- 3 A It was a small business.
- 4 Q Okay. What was DT-Trak's reputation at that
- 5 time?
- 6 A I think fairly good.
- 7 Q What was it about DT-Trak that made you say,
- 8 "That's a place I want to go to work"?
- A I just knew that people, like my family
- 10 members, knew Natalie and they just said that would
- probably be a good job.
- 12 Q Which family members knew Natalie?
- A My husband. My whole husband's family.
- 14 Q Okay. Did they have a good opinion of Natalie?
- 15 A Somewhat.
- 16 Q So what was your position when you first
- 17 started working at DT-Trak?
- 18 A I was a data entry person.
- 19 Q There's some exhibits that I've put together.
- 20 I have a number of different questions that I'll ask
- about them. I figured that would be easier than
- 22 paper shuffle. I've got tabs on there, so if I give
- you a number, that will be the one that I want to
- 24 talk about.
- 25 A Yes.

- Q So if we could start with Exhibit No. 1. Do
- 2 you recognize this document?
- 3 A Well, it looks like a document that I signed in
- 4 June of 2005.
- 5 Q Is it June or is it July 7? I'm not trying
- 6 to --
- 7 A July.
- 8 Q I just want to make sure I get it right.
- 9 A It says June here, but then it's signed July.
- Q The two pages are DT132 and -133. It says
- "Data Entry Clerk" in the title. Do you see that on
- 12 the first page?
- 13 A Yes.
- 14 Q Take a couple of minutes maybe and look at the
- job summary and job duties and just let me know if
- 16 that's an accurate description of what you were
- doing when you first started working at DT-Trak.
- 18 A Yes, it does.
- Q Okay. And at that time it looks like your name
- 20 was Klages, K-L-A-G-E-S. How is that pronounced? I
- 21 apologize.
- 22 A Klages.
- 23 Q Klages. Was that a maiden name?
- 24 A That was my previous married name.
- 25 Q Okay.

Page 15

Page 16

- 1 MR. WHALEN: Mister --
- MR. MOREHEAD: That's okay.
- 3 MR. WHALEN: -- Sander Morehead, did you
- 4 disclose this in your discovery? That exhibit?
- 5 MR. MOREHEAD: Yes. It was one of the first
- 6 documents we produced. That's why it's got the
- 7 Bates number on it.
- 8 MR. WHALEN: I got it now. Okay. Very good.
- That's all I had.

10

- MR. MOREHEAD: No problem.
- 11 Q (By Mr. Morehead) I think you mentioned --
- before we go any further, if you want to take a look
- at Exhibit 5 also. I just want to cover this now.
- Exhibit 5 is called "Defendant's Answers
- to Interrogatories and Requests for Production of
- 16 Documents, First Set." Do you see that?
- 17 A Uh-huh.
- MR. WHALEN: You have to answer.
- THE WITNESS: Yes.
- Q (By Mr. Morehead) That's okay. If you turn to
- 21 the last page, please, it's page 18. Is that your
- signature dated the 23rd day of April, 2020?
- 23 A Yes
- 24 Q Okay. Are you familiar with this document?
- 25 A Yes.

- MR. WHALEN: I would note for the record that
- 2 the exhibit does not contain the attachments.
- MR. MOREHEAD: I'll stipulate to that. We'll
- 4 be going through some of the attachments as we go
- 5 through today.
- 6 Q (By Mr. Morehead) Okay. So when you started
- working for DT-Trak, you said you had no prior
- medical coding experience; correct?
- 9 A Correct.
- Q When you started working as a data entry clerk,
- 11 what did you do as it relates to what you now know
- .2 about coding? What does a data entry clerk do?
- 13 A The data entry clerk enters the information
- that the coder has given them on -- at that time it
- us paper charts -- and the data entry clerk entered
- them under their own access to verify into the RPMS
- 17 system.
- 18 Q So would it be accurate to say that it would be
- 19 characterized as an entry-level position?
 - o A Yes.
- 21 Q Okay. DT-Trak had to train you on that
- 22 position?
- 23 A Yes.
- 24 Q And then they continued to train you in
- 25 DT-Trak's business after that?

Page 21

- MR. WHALEN: I'm going to object. It calls for
- 2 mental impressions of another party. So to the
- 3 extent you're able to answer, go ahead. You can
- answer, if you can.
- 5 THE WITNESS: Can you repeat the question?
- 6 MR. MOREHEAD: Sure. Could you please read it
- 7 back?
- 8 (The requested portion of the record was read by the
- court reporter.)
- THE WITNESS: Yes, I had no reason to not.
- 11 Q (By Mr. Morehead) Okay. I just want to talk to
- you now about Exhibit 3. Exhibit 3 is a single-page
- document Bates numbered DT188. For the record, I won't be saying 000 over and over again to spare
- 14 Work be saying 000 over and over again to sp
- everyone. Do you recognize Exhibit 3?
- 16 A I do not.
- 17 Q Okay. Tell you what, let's talk about
- Exhibit 4 at the same time. Exhibit 4 is Bates
- numbered DT189. Do you recognize first at the
- 20 bottom of the page that as your signature?
- A Yes, I do.
- 22 Q Why don't you take a couple of minutes and
- 23 review Exhibit 4.
- 24 A (Witness complies with request.) Okay.
- 25 Q Do you believe you wrote Exhibit 4?

- 1 A I wrote that, and this is a prime example of
- 2 the bullying that went on at DT-Trak and how we were
- 3 made to apologize for and bow down to Mrs. Bertsch.
- 4 Q Okay. So just to be clear, though, you did
- 5 write Exhibit 4?
- 6 A Yes.
- 7 Q Something you typed up yourself?
- 8 A Yes
- 9 Q I just want to talk about a few statements in
- Exhibit 4. Line 3 -- do you see the first
- 11 paragraph, line 3, "This company." Do you see that?
- 12 A Yes.
- 13 Q "This company has been a wonderful place to
- work and it's been a great improvement to this
- 15 community." Do you see that?
- 16 A Yes.
- 17 Q Okay. Those were your words; correct?
- 18 A Yes.
- 19 Q Did you mean them when you wrote them?
- 20 A At that time, yes. That was in 2007 before I
- 21 knew everything else that was going on.
- Q Okay. And we'll talk about that, Exhibit 4.
- 23 If you look at Exhibit 3, you see the date, it says
- September 24, 2007, at the top. It says, "To Rema
- 25 Kolda, CPC-A."

Page 23

raye 24

- 1 A On Exhibit 3?
- 2 Q On Exhibit 3. I apologize. I probably blew
- 3 right by that. Do you see where it's dated
- 4 September 24, 2007?
- 5 A Yes.
- 6 Q Do you think Exhibit 3 and Exhibit 4 go
- 7 together as in you wrote Exhibit 4 after you got
- 8 Exhibit 3?
- 9 A You know, I could not say.
- 10 Q Okay. Exhibit 3 says it's a letter of
- 11 reprimand. Do you remember ever getting any other
- letters of reprimand from the company?
- 13 A No.
- 14 Q And then Exhibit 4, do you remember writing any
- other letters like that to the company?
- 16 A No. We had to apologize verbally.
- 17 Q Okay. Going back to the first paragraph of
- Exhibit 4, line 4, after the statement we just
- 19 talked about, you said, "I've said before that there
- 20 is no other place in this community that has shown
- 21 how grateful they are to their employees." Do you
- 22 see that?
- 23 A Yes.
- 24 Q That apparently was your belief at that time?

Filed: 4/16/2021 9:57 AM CST Hand County, South Dakota

s A At that time, but no longer.

- 1 Q By this time, in 2007, you'd been working there
- 2 a few years. It looks like -- in Exhibit 3 it says,
- 3 "To: Rema Kolda, CPC-A." Do you see that?
- 4 A Yes
- O What does "CPC-A" mean?
- 6 A Certified Professional Coder, Apprentice.
- Q Okay. By that time had DT-Trak been training
 - you to be a coder?
- A They trained us in a two-week session in
- January of 2006.
- Q Okay. Is that training that would have led to
- you receiving that certification that's designated
- by the CPC-A?
- A Yes.
- Q So by 2007 you're working on becoming an actual
- coder instead of just a data entry person; is that
- 17 fair?
- 18 A I had gone -- the CPC-A means that I was a
- 19 certified professional coder at that time.
- 20 Q And you said that DT-Trak had you attend a
- 21 two-week training for that; correct?
- 22 A Yes.
- Q Was that at the company's expense?
- A It was at the company's expense and I completed
- the requirements of that, repayment.

Page 28

Page 25

- 1 Q You said "repayment." What repayment was that?
- A I had to work for a certain amount of time.
- Q Okay. If you turn to Exhibit 6. I'm going to
- apologize in advance because Exhibit 6 is
- accidentally two documents. Rather than mess up the
- order, I just want to talk about the last page of
- Exhibit 6. It's DT195. Do you see that?
- A Yes.
- Q This is an agreement that at the top says,
- "Made this 9th day of January, 2006." Do you see
- that? 11
- A Yes. 12
- Q Do you recognize that as your signature at the
- bottom?
- A Yes, I do. 15
- Q Do you recognize that as Dan Prue's signature
- at the bottom? 17
- A Yes. I did not sign that in front of him 18
- 19 either.
- Q Okay. And, again, it doesn't say that he did 20
- witness your signature; right? 21
- A I'm just saying I did not sign that in front of
- him. There was no negotiation. 23
- Q I understand that. I just want to make sure I
- understand. You don't dispute that you did sign it?

- A That is my signature.
- Q And you had an opportunity to read it?
- A No.
- Q So none of the words that were on here were on
- there when you signed it?
- A The document was given to us. We did not have
- time to review it. We could not take it home and
- review it. We could not ask another attorney. It
- was either you sign it or you don't have a job.
- Q Okay. So do you remember when you got this
- particular agreement?
- A No. 12
- Q Okay. 13
- A It must have been somewhere in January of 2006.
- Q Okay. So you don't remember where you were
- when you received it?
- A We must have -- myself and the other employees
- must have been in the building at DataTrak.
- Q But you don't remember independently, sitting
- here today?
- A No. 21
- Q In paragraph 14 -- actually, paragraph 13, in
- the middle of the page, it says, "The employee
- agrees to obligate their services to the company for
- a period of five years." Do you see that?

Page 27

THE WITNESS: Yes.

ahead and answer, if you can.

- Q (By Mr. Morehead) Now we'll turn to the rest of
- Exhibit 6. That starts DT000190 and ends DT000192.
- MR. MOREHEAD: And if everybody doesn't mind, I
- see there's another document that doesn't belong in
- here, DT -- that ends in 193 and it's out of order.
- Does anybody object to me taking that out and I will
- add it later with a different number?
- MR. WHALEN: That's fine. That's acceptable. 10
- So take out 193?
- MR. MOREHEAD: Take out 193 and put it off to 12
- the side for now and we'll talk about it later. I
- apologize for that.
- MR. WHALEN: Do you want to do that with 195, 15
- too, or just leave it there? 16
- MR. MOREHEAD: No, let's leave that there.
- I'll make sure the record's clear about which part
- is which for now. If we need to make it something
- different for trial, we will.
- Q (By Mr. Morehead) So turning back to Exhibit 6,
- DT190 through DT192. First, turning to the last
- page, do you recognize on the employee signature
- line that as your signature?
- A Yes. 25

1 A Yes, I do.

- Q Is that the type of language you were talking
- about a little bit ago when you said you essentially
- made good -- that's not right -- payback for the
- training you received for two weeks?
- A Yes.
- Q Okay. Do you see the second "Whereas" clause
- on the top where it says, "Whereas, such
- training/education is important to the future of the
- company"? Do you see that? 10
- A Yes. 11
- O Do you agree with that statement? 12
- MR. WHALEN: Just the first sentence? 13
- MR. MOREHEAD: Yes. 14
- THE WITNESS: Yes, it was important to the 15
- company because they had to have certified coders 16
- for their contracts. 17
- Q (By Mr. Morehead) Okay. And as you noted, you
- fulfilled working for at least five years, right,
- under this agreement for DT-Trak?
- A Yes. 21
- Q And that was reasonable for DT-Trak to believe 22
- that you would do that; right? 23
- MR. WHALEN: I'm going to object. Calls for
- mental impressions of DT-Trak and their staff. Go

(7) Pages 25 - 28

Page 32

Page 29

- 1 Q The document says it's dated December 21, 2012;
- 2 correct?
- з A Yes.
- 4 Q Does that appear to be your handwriting as far
- 5 as the date?
- 6 A Yes.
- 7 Q Okay. And on the first page it calls it a
- B "Performance Planning and Review Document." Do you
- see that?
- 10 A Yes.
- 11 Q Is this a document of a type -- I understand
- maybe there might be different versions -- but is
- this the type of document that you had to fill out
- or provide information for periodically while you
- 15 worked for DT-Trak?
- 16 A I did not prepare this document.
- 17 Q Okay. There is a column that says, "Employee's
- 18 Comments." Do you see that?
- 19 A Okay.
- 20 Q Did you have periodic evaluations with DT-Trak?
- 21 A Very few. I believe maybe -- maybe three or
- four in the 14 and a half years I was there.
- 23 Q Okay. And if you take a look just a little bit
- 24 at the "Employee's Comments" column, I just want to
- see if you recall any particular evaluation that you

- 1 would have had where you would have provided those
- 2 comments?
- 3 A Can you repeat that?
- 4 Q Yeah. That's why I slowed down at the end.
- 5 Were you asked to provide comments during
- 6 evaluations about your own perception of your
- 7 performance?
- 8 A Yes.
- 9 Q Okay. How frequently were you asked to provide
- your comments about your perception of your
- 11 performance at DT-Trak?
- 12 A The only time that we were given a review
- 13 document --
- 14 Q Okay.
- 15 A -- similar to this.
- 16 Q Okay.
- 17 A Which was, like I said, maybe three or four
- times in the 14 years that I worked there.
- 19 Q So this one is dated December 21 of 2012. Do
- you remember whether there were any after that?
- 21 A I do not remember any after that.
- 22 Q Fair enough.
- A I was supposed to get one, I believe, in 2018
- 24 and I never did.
- 25 Q Why do you say that you believed you were

Page 31

- supposed to get one in 2018?
- 2 A I was scheduled to have an employee evaluation
- 3 and it was not done.
- 4 Q Do you know why it wasn't done?
- 5 A My perception of it is that I was doing very
- 6 well and they didn't want to give me a raise.
- Q Okay. And we'll talk more about 2018 as we getthere, but I appreciate that.
- 9 So if we look at Exhibit 7, Exhibit 7 is
- 10 Bates numbered DT148 through -151.
 - MR. WHALEN: Before we start on that, I don't believe that you disclosed all of the performance
- planning and review documents, only this one. Is
- 13 planning and review documents, only this
- 14 that correct?

11

12

- MR. MOREHEAD: That is the only one that I am aware that we've disclosed. Do you want other ones?
- MR. WHALEN: Yes. If there's others, would you disclose those?
- MR. MOREHEAD: Sure.
- MR. WHALEN: Do you want me to make a formal request or is this good enough?
- MR. MOREHEAD: I'm going to write down a note.
- If you don't mind just sending an e-mail. I'm not going to make you serve a request for production.
- Does that make sense?

MR. WHALEN: That's perfect.

- MR. MOREHEAD: It wasn't not disclosed for any
- з reason.
- 4 MR. WHALEN: I fully understand there was no
- 5 deceit or anything there. Just a document that I
- 6 would like to see.
- 7 MR. MOREHEAD: Sure.
- 8 Q (By Mr. Morehead) So looking at Exhibit 7, I
- 9 think we said it was DT148 through DT151. First, if
- we turn to the last page, Rema, do you recognize --
- 11 11 11 11 1 1 C 11 TI
- well, actually the page before that. The next to the last page, DT150, do you recognize that as your
- signature?
- A That is my signature.
- 15 Q It looks like on the next page somebody
- 16 notarized your signature; fair?
- 17 A I did not sign this document in front of Kathi
- 18 Gortmaker, which it's saying that she is the notary
- 19 public on this.
- Q Okay. So you're claiming -- you independently
- 21 remember today that you signed this document, but it
- was not notarized by somebody at the time you signed
- 23 it?
- 24 A Exactly.
- 25 Q Okay.

Page 41

- frowned upon to talk to other coders, other
- employees about documents of this nature.
- Q When did she tell you that?
- A I do not remember that time.
- Q Do you independently remember her telling you
- that? 6
- A It was in a group session, I believe.
- Q When you say "group session," is that you and
- other DT-Trak employees?
- A Yes. 10
- Q So would this have been a meeting where DT-Trak 11
- management was talking to DT-Trak employees? 12
- A I don't recall. 13
- Q Okay. You just recall that there was a meeting
- and it was a meeting where other DT-Trak employees
- were there; right?
- A Uh-huh. 17
- Q And you said you were told you were not 18
- supposed to talk about what specifically? 19
- A Legal documents. If we have you sign stuff, 20
- you're not supposed to talk to other people about 21
- 22
- Q Was there a discussion, then, about any of 23
- these non-competition or confidentiality agreements?

- Q How did you know which documents they were
- talking about?
- A I didn't know.
- Q Okay. So then how did you know what to not
- talk about?
- A I assumed that that was -- anything that they
- handed us to sign, we weren't supposed to discuss
- with anybody else.
- Q Okay. If we turn to Exhibit 8. Actually skip
- Exhibit 8. 8 appears to be a duplicate to me,
- unless somebody disagrees. I think 7 and 8 are the
- same document.
- MR. WHALEN: It looks like they are. 13
- Q (By Mr. Morehead) Let's move on to Exhibit 9.
- Exhibit 9 is Bates numbered DT141 through DT147. Do
- you see at the top it says, "Non-Compete,"
- Non-Solicitation, Confidentiality, Non-Disclosure,
- and Non-Use Agreement"? Do you see that?
- A Yes.
- Q Okay. If you turn to the last page of the
- document, do you recognize that as your signature?
- A Yes. Again, I recognize that as my signature.
- But, again, I did not sign this in front of Marlys
- or Natalie Bertsch, and there was no negotiation
- about this.

Page 43

Page 44

- Q Okay. Do you specifically, sitting here today,
- remember signing Exhibit 9?
- A I do not remember signing it.
- Q Do you remember where you were when you signed
- it? Obviously, that's a bad question. You told me
- you don't even remember signing it; right?
- A Uh-huh.
- Q So, again, it would be fair to say you don't
- remember anything that would have been told to you
- about this specific document at the time it was
- presented to you; is that correct? 11
- A Correct. 12
- Q And if you turn to the second page of
- Exhibit 9, do you see in paragraph 1.4 it talks
- about confidential information belonging to DT-Trak; 15
- right? 16
- A Yes. 17
- Q Okay. And then paragraph 2 on the next page,
- DT143, it talks about non-competition; correct?
- A Yes. Yes.
- Q It says that -- it says what it says. I don't 21
- want to mischaracterize the record, but basically it
- says you agree to abide by the terms of the 23
- non-competition terms that are in paragraph 2, which

Filed: 4/16/2021 9:57 AM CST Hand County, South Dakota

speak for themselves, for a period of two years

- after the end of your employment; right?
- A It is saying in the business area for two years
- after such date, and it also is saying for a
- competing business. I do not currently work for a
- competing business. 5
- Q Okay.
- A I work for an independent hospital. And
- basically to me this sounds like the business area
- means that I'm not supposed to be able to work as a
- coder at all for two years after leaving DT-Trak.
- Q And what you're talking about is, for example,
- on the first page of Exhibit 9, DT141, you're
- talking about the definition section 1.1 where it
- says, "Business" or "Business of Employer"?
- A Where are you? 15
- Q Bottom of the first page. I apologize. First
- page of Exhibit 9, bottom of the first page.
- A And what was the question? 18
- Q You're talking about -- you made some
- statements about business area, business of
- employer, do you remember, when you were answering 21
- my question about the non-compete? I'm just asking
- if paragraph 1.1 is one of the definitions you're
- talking about, "Business" or "Business of Employer"? A "Business" or "Business Areas" meaning that --

11) Pages 41 - 44

Page 57

- 1 Q So obtaining a certificate like this would be
- beneficial to somebody, if they wanted to have a
- 3 position in a company, being a CPC in this
- 4 particular case?
- 5 A It would benefit anybody if anybody wanted a
- 6 job in any career, so it's the same thing. Whether
- 7 it be a contract -- a construction worker or a nurse
- or anything. It's just like getting a career.
- Q What I'm saying, though, is some coding
- companies, if they want to hire somebody to be a
- 11 CPC, they might say, "Hey, I want to see that you've
- had the training to be one"; fair?
- 13 A Yes.
- 14 Q Okay. That's fine. The second one also says
- "American Academy of Professional Coders" at the
- 16 top.
- 17 A Yes.
- 18 Q And then this says, "Certified Professional
- 19 Coder." Do you remember the circumstances -- strike
- 20 that.
- Do you remember when you would have
- 22 received this certificate?
- 23 A This would have been after I completed the
- 24 five-hour test --
- 25 Q Okay.

- 1 A -- and passed it.
- 2 Q Do you remember roughly when that was?
- 3 A It had to have been in January of 2006.
- 4 Q Okay. So it was about 2006 you became a
- 5 certified professional coder?
- 6 A Yes.
- 7 Q Okay. Moving to the next one, it says "Indian
- 8 Health Service." Do you see that certificate?
- 9 A Yes.
- 10 Q Can you explain to me what this is?
- 11 A This is a security awareness training that each
- employee, if working for -- in the Indian Health
- Service, needs to take. It's a yearly training.
- 14 It's on a computer. You go on and you listen to a
- webinar, like, little training that you have to --
- that you will keep your access/verify codes secure,
- that you will not share them, you will keep them so
- 18 nobody else sees them, nobody else can use them.
- 19 It's basically the HIPAA compliance.
- Q So if somebody's going to be a coder and they
- 21 want to do work for Indian Health Service, this
- 22 certificate relates to the training they have to do
- 23 if they want to do that?
- 24 A Yeah. It's about an hour, hour and a half each
- 25 year.

Page 59

Page 60

- Q Okay. So in addition to this certificate that says January 4, 2013, you would have had that
- training other years as well, that hour of training?
- 4 A Yes.
- 5 Q Is that something you had to pay for? Is it
- 6 free?
- 7 A Nobody pays for it. It's free.
- 8 Q Okay.
- 9 A It's a requirement of Indian Health Service.
- 10 Q Okay. The next one, "Certificate of ICD-10-CM
- 11 Proficiency." This one says December 1, 2013. Can
- 12 you explain what that is?
- A This is to say that I took the ICD-10-CMS --
- -CM Proficiency Course to become an ICD-10 trainer,
- which I never -- I did not train anyone. My
- understanding is that they needed employees to be
- able to put on their contract to say that they had
- 18 people to train for ICD-10.
- Q Okay. So we've talked about -- and ICD-10 is
- different than just being a certified coder; right?
- A ICD-10 is the actual set of codes.
- Q So in addition to becoming a certified coder,
- becoming certified in ICD-10 is like an additional
- certification; is that fair?
- A Yes.

- Q Okay. Would it be fair to say that that's
- 2 training and knowledge that you still use today at
- 3 your current job?
- 4 A I do not train anybody at my current job.
- 5 Q I'm just talking about these coding and ICD-10
- 6 coding. You do that kind of work at your current
- 7 job; right?
- 8 A Yes. I do code ICD-10 because that is the
- 9 current set of codes that are required to be used.
- Q Okay. I'm learning stuff today because they don't teach us this stuff in law school.

2 So I think that answers the question on

- the next couple -- the next couple of certificates, if you look at them. One is dated June 30, 2013.
- 15 That's actually the valid through date. And then
- the other one is the valid through date of June 30,
- 17 2016. Do you see those?
- 18 A Yes.
- 19 Q You talked about that you got certified to be a
- o trainer. Are these just certificates saying Rema
- 21 Kolda -- Rema J. Kolda -- is certified to be a
- trainer up through this certain day?
- 23 A Yes. And I did not train anybody. I was told
- that I would not be training anybody. Like I said,
- 25 it was just so they could have a number of people on

Page 97

- 1 Q What was the phone number that you received all
- of these telephone calls -- or what I've been
- calling, and I don't mean it sarcastically, mean
- calls from management?
- A It would be their personal -- it would be
- Renae's personal phone.
- Q Your telephone number that they called. What
- was your telephone number that they called?
- A My personal cell phone number.
- Q Which is? 10
- A (605) 870-3282. 11
- Q So you said this started in 2006. I think that 12
- was the first event that you talked about. 2006,
- there was a hospitalization, and it was July of 2016
- that you quit; right?
- A Yes. 16
- Q So during those ten years did you look at 17
- employment anywhere else, think about working 18
- 19 somewhere else?
- A Yes, I did. 20
- Q Did you apply anywhere else? 21
- A Yes, I did. 22
- Q Who did you apply with? 23
- A Several places. You just have to Google.
- There was several places. I can't name all of them.

- Throughout the United States.
- Q What category -- what category of work would it
- have been, I guess?
- Medical coder.
- You said you did apply? Q
- Yes, I applied for jobs.
- Okay. Did you ever get any offers?
- Α Yes, I did.
- Okay. Do you remember how many offers you got?
- I don't know. I cannot recall how many. Α 10
- Why did you turn them down? 11
- A Because I would have to be -- they were either
- short-term, like, you'd work for three months, then
- you may not work for another three months, or I'd
- have to be on-site for a month at a time. It wasn't
- conducive -- I didn't want to be away from my family
- and I wanted to be able to work from home.
- Q Okay. So this conversation happens on July 22.
- Did you at any point during that conversation or
- before that ask DT-Trak or anybody in management,
- "Why don't you just fire me?" 21
- A No, because I needed to have a paycheck to pay 22
- my bills and to help support my family. And it was
- July 20. It was not July 22.
- Q July 20th. Sorry about that. Did you consider

Page 99

Page 100

- 1 employment other than the medical coding business?
- A Yes, but I couldn't make what I was making at
- that point.
- Q How much were you making at that time?
- A Nineteen dollars.
- Q So you started working for DT-Trak again after
- that, in September; right?
- A Only after Jewel Kopfmann called me and asked
- me to come speak with her.
- Q That was going to be my next question. What 10
- made you start working for DT-Trak again?
- A That was a very hard decision to make to come 12
- back.
- Q Why? 14
- A Because I was afraid that nothing had changed 15
- in the work environment. And my husband and I -- I
- didn't want it to come between my husband and I 17
- again. And my husband and I talked at length about
- me going back and that I would continue to look for 19
- more work, different, somewhere else.
- Q Was your husband wanting you to keep working 21
- there or wanted you to stop working there when you
- 23
- A He did not want me to work there.
- Q Okay.

- 1 A He was very upset about the way that I was
- Q Okay. So you said you had a conversation with
- Jewel Kopfmann?
- A She called me.
- Q Okay. And do you remember when she called you?
- A It had to have been -- I would say end of
- August, beginning of September --
- O Okav.
- A -- of 2016. 10
- Q Okay. And what did the two of you talk about?
- A She wanted -- she -- as far as I can recall,
- she asked if I really wanted to not work at DT-Trak.
- That -- you know, "Do you need a job? Would you
- come in and talk to me?"
- Q What was your relationship like with Jewel
- Kopfmann before that?
- A I respect Jewel as a coder, as a person. I
- have witnessed Natalie and Jewel in arguments and
- how Jewel would back down.
- Q Okay. Did you have a good relationship with 21 Jewel?
- MR. WHALEN: Did you ask if she did or if 23

Natalie did?

MR. MOREHEAD: If she did. 25

22

24

Page 101

- 1 MR. WHALEN: I'm sorry.
- THE WITNESS: It's okay.
- 3 Q (By Mr. Morehead) So why did you come back? I
- 4 mean, I realize you had a conversation with Jewel
- 5 and she asked you, but what was the reason you came
- 6 back to DT-Trak?
- A It had only probably been a short time, a month
- 8 or two, and I hadn't found work yet. I had
- 9 interviews but did not get a new job yet. And my
- 10 husband and I talked, and we just needed to be paid.
- We had to support our children, and so knowing that
- the environment was still not going to be the
- greatest, but hoping for the best, I went back.
- Q Okay. Did you attach any conditions to you
- coming back when you were talking to DT-Trak about
- it, about coming back?
- 17 A I just asked if I could still have the same
- pay. They were not going to give me anything more
- to come back. I would have to be a new employee. I
- 20 would still get my vacation time that I had
- 21 previously, but that was -- there was no other --
- there was no other amount of money given to me, no
- other stipulations, just that I could get -- work
- 24 from home, have the same pay, and have my vacation.
- 25 Q Did you ask them for anything more than that?

- 1 A I did not ask for any more because I was not
- 2 expecting that they would give it to me.
- 3 Q Okay. Would it be -- you started working for
- 4 them again, then, in September; correct?
- 5 A Yes.
- 6 Q If you look at Exhibit 23, please. Exhibit 23
- 7 are -- and Exhibit 24, actually. I'll start with
- 8 Exhibit 24. Exhibit 24 is DT154 to -158. These all
- 9 look like forms dated September 12, 2016. Are those
- 10 all your signatures on the signature lines for all
- of these forms?
- MR. WHALEN: Are you referring to Exhibit 24?
- MR. MOREHEAD: Only Exhibit 24.
- MR. WHALEN: You said 24; right? Not
- 15 Exhibit 23.
- MR. MOREHEAD: Only 24.
- THE WITNESS: Yes, those look like my
- 18 signatures.
- 19 Q (By Mr. Morehead) Okay. And in the date line
- 20 it says 9-12-16. Is that your handwriting?
- 21 A It looks like it.
- 22 Q Okay. So would it be your recollection that's
- 23 probably either at or near when you started working
- 24 for DT-Trak again?
- 25 A Yes.

Page 103

Page 104

- 1 Q Okay. Now look at Exhibit 23. And I'll go
- 2 first, again, to the last page of the seven-page
- document. Do you recognize that as your signature
- on that document?
- A I recognize that as my signature, and I will
- acknowledge that I did not sign anything in front of
- 7 April VanDerWerff or Natalie Bertsch. There was no
- 8 discussion of this document with them.
- 9 Q Okay. You did sign it, though; correct?
- A That is my signature.
- 11 Q Okay. You're not claiming somebody else put
- the signature on there, are you?
- 13 A I'm saying that is my signature.
- MR. WHALEN: He wants to know if you signed it or not, yes or no.
- 16 THE WITNESS: Yes.
- 17 Q (By Mr. Morehead) Okay. But you are saying
- that the witness, April VanDerWerff, wasn't actually
- 19 there?
- 20 A No.
- 21 Q I think I already know the answer to the
- 22 question based on your answers, but do you actually
- 23 remember signing this document?
- 24 A I remember a group of papers given to me and
- 25 April handed them to me, and I had -- she said,

- "Sign all of these." And I said, "I would like to
- 2 read them." And she says, "Well, if you don't sign
- 3 them, you don't have a job."
- 4 Q Okay.
- 5 A I had no discussion with anybody about anything
- 6 that I signed.
- 7 Q Okay. If I look at the first page of the
- 8 Exhibit 23, it says that it's dated the 12th day of
- 9 September and then the two thousand is blank. Do
- 10 you see that?
- 11 A Yes, I do.
- Q September 12 is the same date as the date of
- the other documents that we looked at in Exhibit 24;
- .4 correct?
- 15 A Yes.
- 16 Q So that's probably the same September 12 that
- we're talking about?
- 18 A It may be. I cannot verify that.
- 19 Q Okay. You don't know either way?
- o A Right.
- 21 Q So if somebody else were to testify that it's
- the same September 12th and it's 2016, you have no
- basis to deny it?
- 24 A Yes.
- 25 Q Have you had a chance to look at Exhibit 23

Page 105

- 1 before today?
- 2 A Since being pursued by DT-Trak, yes.
- 3 Q Okay. Before the lawsuit started, you received
- 4 a letter; right?
- 5 A No, I did not. Oh, I received a letter that
- 6 they were going to pursue me.
- 7 Q Okay. A letter from my office?
- в A Yes.
- 9 Q Okay. That's the letter I'm talking about.
- 10 Sorry.
- 11 A Okay.
- 12 Q Informing you about Exhibit 23; correct?
- A Well, there was -- the first letter you sent me
- was -- there was no exhibit to it.
- 15 Q Okay. Did you know which document was being
- referred to?
- 17 A I just knew that it was a non-compete,
- 18 non-solicitation.
- MR. MOREHEAD: Okay. Now is a good time. It's
- 20 12:30.
- MR. WHALEN: You call it.
- MR. MOREHEAD: This is a good time.
- MR. WHALEN: Okay.
- (Recess taken from 12:31 p.m. to 1:01 p.m.)
- 25 Q (By Mr. Morehead) When we left off, we were

- talking about Exhibit 23. I just want to move back
- 2 for a minute to Exhibit 9. So Exhibit 9, as we
- 3 discussed earlier, was the document called
- 4 "Non-compete, Non-Solicitation, Confidentiality,
- 5 Non-Disclosure, Non-Use Agreement." Do you see
- 6 that? And it said January 14th, 2010, on it. We
- 7 talked about that before.
- в A Okay.
- 9 Q Do you remember this document? After you
- resigned on July 20th of 2016, did DT-Trak or
- anybody acting on DT-Trak's behalf contact you and
- remind you about this agreement?
- A Yes. I received a letter in August that I
- signed a non-compete.
- 15 Q Okay. And did it include a copy of the
- 16 non-compete?
- 17 A I do not know.
- MR. WHALEN: Speak up.
- THE WITNESS: I do not know.
- Q (By Mr. Morehead) Okay. And then Exhibit 23 is
- 21 the document we were just talking about before the
- break. So at the time you would have received that,
- 23 you would have previously received that
- 24 communication reminding you that you had previously
- signed a non-compete; correct? That was in August.

Page 107

Page 108

- 1 A Can you repeat that?
- 2 Q It was a little convoluted. You said you got
- 3 the letter in August of 2016; correct?
- 4 A Yes.
- 5 Q You started working again in September of 2016?
- 6 A Yes
- 7 Q So by the time you started working for DT-Trak
- 8 again, you had received a letter from somebody
- 9 reminding you you had a non-compete?
- 10 A Just the letter in August of 2016.
- 11 Q Yes.
- 12 A That is the only one.
- Q Okay. Please turn to Exhibit 26. Exhibit 26
- is Bates numbered DT13 and -14. This looks again
- 15 like an e-mail from April VanDerWerff in December of
- 2016 providing some statistics again that we've
- 17 talked about; right?
- 18 A Yes, that's what it looks like.
- 19 Q Productivity statistics depending on the
- particular facility?
- 21 A Yes.
- 22 Q Do you remember what the acronym "WINB" stands

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- 23 for?
- 24 A I believe that's Winnebago.
- 25 Q Nebraska?

- 1 A I don't know where it's at.
- 2 Q Okay. And, again, it looks like April
- 3 VanDerWerff is providing you with statistics and
- 4 giving you information about the improvement that
- 5 somebody would like to see. Is that fair?
- 6 A That's what it looks like.
- 7 Q This e-mail dated December 6 from April
- 8 VanDerWerff, would you regard that as a -- I just
- 9 want to make sure I'm understanding what we're
- talking about. Would you regard that as a polite
- 11 e-mail or a terse e-mail?
- 12 A From April?
- 13 Q From April.
- 14 A It was just standard procedure.
- 15 Q And then you would e-mail her back a few
- ninutes later, "April, thank you for the feedback
- and encouragement," smile emoji; right?
- 18 A Yes.
- 19 Q So your relationship with April VanDerWerff was
- o pretty good?
- A No. I just tried to be positive.
- 22 Q Okay. Exhibit 27. During the same time
- period, December 8, 2016, this is an e-mail from
- 24 Dallas Forman. What did Dallas Forman do at
- DT-Trak?

Page 137

- 1 It concludes with an e-mail from the same date,
- 2 45 minutes later. Do you recognize these e-mails?
- 3 A I sent a request for an early --
- 4 MR. WHALEN: He's just asking if you recognize
- 5 them.
- 6 THE WITNESS: Yes.
- 7 Q (By Mr. Morehead) You asked to have an early
- 8 buyout of your vacation hours of two weeks and four
- 9 days for a hardship; correct?
- 10 A Yes.
- 11 Q Not typical policy for the company; correct?
- 12 A Not that I know of.
- 13 Q You say in an e-mail, "I understand it is not a
- standard practice." Do you see that?
- 15 A Yes.
- 16 Q Natalie Bertsch, less than half an hour later,
- 17 "Hi Emily: Could you please apply this early
- vacation buyout to Rema's next paycheck? We have
- authorized the early withdrawal due to hardship."
- 20 Do you see that?
- 21 A Yes.
- 22 Q And then the next e-mail, she e-mails you.
- ²³ "Please see below and reach out to April or whomever
- 24 to fill out the appropriate forms for her to have on
- 25 file." And then, "Prayers for" -- I think she meant

- "your mom"; right?
- 2 A Yes. It wasn't standard practice, but it was
- 3 my vacation money and it would have come back to me
- 4 in one form or another.
- 5 Q You asked for something that was out of the
- 6 ordinary and Natalie Bertsch, less than 30 minutes,
- 7 without even asking you why, just did it, didn't
- 8 she?
- A I guess I don't know if there was a
- 10 conversation between that time of me asking and her
- 11 responding.
- 12 Q Do you remember her asking you for any
- 13 justification for your request?
- 14 A Well, there had to have been somewhere along
- the line because she knew it was my mother because,
- obviously, between the first e-mail of me asking, I
- 17 did not say anything about my mom, but she
- 18 knew about -- she knew about my mom.
- 19 Q Is it possible she knew about your mom for some
- 20 other reason?
- 21 A No, she did not.
- Q Okay. Exhibit 63, DT105 and -106. I know that
- you weren't involved in the first page, DT105, so
- we'll talk about DT106. It's dated January 31,
- 25 2019. Do you recognize DT106?

Page 139

Page 140

- 1 A Yes.
- 2 Q It would be accurate to say this is your notice
- 3 to DT-Trak that you're leaving employment?
- A Yes
- 5 MR. MOREHEAD: Okay. Let's take a break.
- 6 (Recess taken from 1:54 p.m. to 2:01 p.m.)
- MR. MOREHEAD: We'll go back on the record.
- 8 Q (By Mr. Morehead) We were talking about
- Exhibit 63 and your e-mail dated January 31, 2019,
- resigning from DT-Trak; correct?
- A Yes.
- Q So you work at San Carlos now?
- A Yes.
- Q Okay. At the time you sent that e-mail, had
- you applied anywhere other than San Carlos?
- 16 A I had other applications in other places, yes.
- 17 Q Okay. Such as?
- 18 A I don't remember the names.
- 19 Q How did you find out about a position being
- available at San Carlos?
- 21 A Through Google, looking for jobs. Also,
- 22 Jennifer Card told me that DT-Trak no longer had a
- 23 contract with San Carlos.
- 24 Q Okay. Now, by this time Kathy Andersen was
- working for San Carlos; correct?

- 1 A Yes. Yes.
- ² Q Okay. And she had previously worked with you
- 3 at DT-Trak; correct?
- 4 A Yes
- 5 Q Okay. Did she contact you about the position
- 6 at San Carlos?
- 7 A No.
- 8 Q Okay. So you never had any conversation
- 9 with her before the time you started working for
- 10 San Carlos about working there?
- 11 A NO
- 12 O Okay. Your sole source of information that
- there was a position available at San Carlos was
- 14 Google and Ms. Card?
- 15 A Yes.
- 16 Q Nothing else?
- 17 A No.
- 18 Q Okay. So when did you apply for the position
- 19 at San Carlos?
- 20 A Towards the end of January.
- 21 Q Of 2019?
- 22 A Yes.
- Q Okay. When did you start looking at working at
- 24 San Carlos? Do you know what I mean? When did you
- 25 start looking and obtaining information that a

Page 144

Page 141

- position was available?
- 2 A Towards the end of January 2019.
- 3 Q Okay. And who was the person who you dealt
- 4 with at San Carlos, like, for your job interview?
- 5 A There was three people in on that meeting.
- 6 Q Who were they?
- 7 A I don't remember their names. There was a
- 8 gentleman, another lady, and Kathy Andersen was in
- 9 that interview.
- 10 Q So Kathy Andersen was in the interview?
- 11 A Yes, because she runs -- she is the supervisor
- 12 for the HIM Department.
- Q Just to clarify, what is San Carlos?
- A It is a hospital.
- Q Okay. And you do coding there; correct?
- 16 A Yes.
- Q Would it be fair to say you do a number of the
- same things there as an employee that you were doing
- on a contract basis for DT-Trak?
- A I am a medical coder. That is my career, my
- job. It didn't matter where I would be working, I
- do coding.
- 23 Q Okay. So just wanted to make sure. Kathy
- 24 Andersen was in on the interview. I assume she
- 25 recognized you?

- 1 A Yes.
- 2 Q Okay. Did Kathy Andersen express any concerns
- 3 that you were applying after working for DT-Trak?
- 4 A No, because I asked in my interview if there
- 5 was a current contract with DT-Trak, and I made sure
- 6 that there was no contract.
- 7 Q Although you had a contract with DT-Trak;
- 8 right?

18

19

- 9 A I had -- I was an employee.
- .o Q That you wouldn't compete or work for someone
- in that field for two years after you left
- employment; correct?
- MR. WHALEN: Hold on. I'm going to object to
- 4 that because that calls for a legal conclusion, and
- that's clearly the basis for our defense -- one of
- the bases for our defense. So absent rendering any
- sort of legal conclusion, you can answer the
 - question to the best of your ability.
 - THE WITNESS: San Carlos is not a contractor.
- 20 It does not do the same as what DT-Trak Consulting
- 21 does. DT-Trak Consulting is a contractor. They
- 22 contract with hospitals.
- I am a direct employee of a hospital just
- as other coders that have worked at DT-Trak have
- gone to hospitals such as Avera. There's also been
- Page 143
- 1 O So--
- 2 A Because like --
- 3 Q They should have just --
- 4 A -- an example.
- 5 MR. WHALEN: Hold on. She needs to finish her
- answer so you're not talking over each other.
- MR. MOREHEAD: Well, for the record -- and I've
- been real polite about it -- for the record, I'm
- 9 getting a lot of speeches that aren't answers, but
- 10 she can finish her answer.
- 11 THE WITNESS: For example, one of the ladies
- that -- she was a Native, I don't know her name --
- but Kathy Andersen can witness to that, that she
- is -- she was Native American, and she wanted to go
 - .5 back to work at her -- that facility and be back
- with her people. And at that current time DT-Trak
- had a contract with that facility, and when she said
- 17 Had a contract with that facility, and when she said
- that she wanted to go back, Natalie says, "Well, you
- can't. We'll sue you. You signed a non-compete."
 - Come to find out, she did not sign a
- non-compete, and then at a later date a non-competewith her signature showed up.
- 23 Q (By Mr. Morehead) And you heard this from who?
- 24 A Kathy Andersen.
 - Q You don't know any of this personally; right?

rage 143

coders that have gone to IHS facilities that DT-Trak still had a contract with and they were not sued.

- 3 Q (By Mr. Morehead) Who?
- 4 A I do not have the name of that person, but that
- 5 can be brought.
- 6 Q Who knows? Who will you have to talk to to
- 7 find out?
- 8 A Kathy Andersen, Becky Beenken, Jennifer Gienau,
- 9 Terri Waltari.
- Q Who were the people who went to work for
- somebody other than a tribal facility? I think you
- 12 mentioned --
- 13 A DeLonne Yeaton.
- 14 Q Do you know the circumstances?
- 15 A She said that she was getting laid off from
- DT-Trak and that Natalie approached her and said
- that there was a job at Avera and that she would
- help her get that job, and that's how that was.
- 19 Q Okay. If somebody from DT-Trak testified that,
- in fact, people who were given some leeway on the
- non-compete were people who came to them, who were honest with them and had special circumstances,
- would you have any basis to dispute that?
- 24 A There is no special circumstances. They were
- iust allowed to go.

Page 145

- 1 A No. But she said she has the documentation to
- 2 prove it.
- 3 Q Okay. Where is Kathy Andersen located now?
- 4 A She's in Arizona.
- 5 Q Okay. Is it your thought that you're going to
- 6 ask her to come testify?
- 7 A Yes.
- 8 Q So Kathy Andersen's in on your interview at
- 9 San Carlos, and we went through the question. You
- said you're doing the same thing for San Carlos that
- you were doing at DT-Trak; correct?
- A I am a medical coder. I do not do the same
- processes. I do medical coding.
- Q Okay. So when did you find out that you'd been
- 15 hired?
- A Shortly before my resignation, they offered me
- the job.
- Q So just before January 31?
- A Yeah. Maybe like the day before.
- 20 Q Did you tell them that you had signed a
- 21 non-compete?
- 22 A Yes. I asked them in my interview to make sure
- that there was no contract with DT-Trak because I
- 24 signed a non-compete.
- 25 Q You said two different things there.

- 1 A No, I did not.
- 2 Q No. That's fine. I think I understand you're
- 3 saying there was no contract at that time between
- 4 DT-Trak and San Carlos; right? That's what you're
- 5 saying?
- б A Right.
- Q My question was: Did you tell San Carlos that
- 8 you had signed a non-compete with DT-Trak? And I
- 9 think your answer is yes. Is it?
- 10 A I told them that I had signed a non-compete
- with DT-Trak, and that if there was a contract with
- San Carlos and DT-Trak, that I would not work for
- 13 you. There was no contract is what they said to me.
- 14 Q Did you --
- 15 A And the contract --
- MR. WHALEN: Hold on.
- 17 Q (By Mr. Morehead) Go ahead.
- MR. WHALEN: Go ahead and ask your next
- 19 question.
- 20 Q (By Mr. Morehead) Did you provide them with a
- 21 сору --
- 22 A No.
- 23 Q -- of the non-compete?
- 24 A No.
- 25 Q Did they ask you for one?

Page 147

Page 148

- 1 A No. Because they said there was no contract
- 2 with DT-Trak.
- 3 Q Did you look into the contract -- did you look
- at the non-compete to see whether it said, "As long
- 5 as there's no contract, this doesn't apply"?
- 6 A I did not have a copy of it. I was not given a
- 7 copy of that from when I was rehired at DT-Trak.
- 8 Q How did you provide the copy you provided in
- 9 discovery?
- 10 A You sent it to me in the second --
- 11 Q I just wanted to make sure.
- 12 A When I had to come up to the sheriff's office,
- 13 you sent it. That was when I saw it.
- 14 Q During the interview, did anybody say what
- they perceived to be the value you could bring to
- 16 San Carlos?
- 17 A No.
- 18 Q During the interview, did you need to tell them
- what you thought the value would be that you would
- bring to San Carlos?
- 21 A No.
- 22 Q So what did you talk about in your job
- 23 interview?
- 24 A They asked me what I knew, how did I know
- coding, my work experience. Normal interview

Filed: 4/16/2021 9:57 AM CST Hand County, South Dakota

- 1 questions.
- Q Okay. While you were with DT-Trak, you had
- worked on the San Carlos contract; correct?
- A Prior to -- I believe when I was in QA.
- Okay. So that's a yes, you did work with
- 6 San Carlos?
- 7 A Yeah. But that was many years ago.
- 8 Q Okay. And Kathy Andersen would have known
- 9 that; correct?
- 10 A I don't know if Kathy was there at the time I
- was working there -- or when I -- no, Kathy was
- 12 not -- Kathy was not working when I was in QA. She
- was not at DT-Trak, so I did not work on San Carlos
- when Kathy was employed at DT-Trak.
- 15 Q After you sent the resignation e-mail,
- 16 Exhibit 63, we're still looking at that.
- 17 A Okay.
- 18 Q Did you ever have a conversation with anybody
- 19 from DT-Trak after that?
- 20 A Yes. Ten minutes after I sent the e-mail,
- 21 April VanDerWerff called me and asked me what was
- 22 going on, and I just explained to her that I was
- 23 resigning and that was it.
- 24 Q Is that the extent of the conversations you
- ever had with anybody from DT-Trak?

Page 149

- 1 A That I recall.
- 2 Q So if Jewel, who we've been talking about,
- would testify that she had a face-to-face
- 4 conversation with you after that, you would say that
- that's not true?
- 6 A I think -- as I recall, when I came in at a
- 7 later date to have my 401(k) signed, I told Jewel,
- 8 "Thank you" and "Good-bye."
- Q Okay. If they testified that you told them you
- weren't going to be working in the coding business,
- that you were just quitting because you needed the
- time, you would say that's not true?
- A I don't recall saying it that way. I recall
- saying that I don't know where for sure I am going
- or what I am going to do, that I needed to -- you
- know, as it says here provide for my family and take
- a different direction.
- Q Did she remind you about the non-compete during
- that meeting?
- A April VanDerWerff said something about -- she
- said there is a non-compete, that you cannot go to
- work for a contractor. You cannot go to work for
- 23 anybody that we have a contract with or a facility
- that we are looking at doing a contract with.
- 25 Q Okay. Who is it that said that?

- A April VanDerWerff.
- 2 Q And you told them you weren't going to do that;
- з right?
- A I said I didn't know what I was going to do for
- 5 sure.
- Q Do you have an employment contract with
- 7 San Carlos?
- A No. What do you mean by an "employment
- 9 contract"?
- 10 Q Do you have -- well, we looked today, you had
- to sign certain documents while you were with
- 12 DT-Trak. Have you had to sign certain
- acknowledgments or agreements in the time you've
- 14 been working for San Carlos?
- 15 A No.
- 16 Q Have you had to sign a confidentiality
- 17 agreement?
- 18 A I signed documents stating that I worked there
- and for, like, my paychecks, how to do my paychecks,
- but, no, I do not have a non-compete,
- 21 confidentiality.
- 22 Q Okay. Do you have any type of employee
- 23 handbook?
- 24 A No.
- 25 Q Okay. Do you have any document that provides

Page 151

Page 152

- 1 you with guidance on what your job description is?
- 2 A Just that I've been told, to code.
- 3 Q Nothing in writing?
- 4 A No. Oh, I have something that says my job
- 5 descriptions. Yes, I do.
- 6 Q Okay. How much do you get paid an hour?
- 7 A \$33.50.
- 8 Q Any benefits beyond that?
- 9 A Insurance.
- 10 Q Do you have to pay for part of that or is it
- 11 all --
- 12 A There's a portion that comes out.
- 13 Q Did you apply at Avera by any chance?
- 14 A Yes, I did.
- 15 Q Okay. Did they hire you?
- 16 A I had an interview.
- 17 Q I should have said: Did they offer to hire
- 18 you?
- 19 A Yes. It was for a desk position.
- Q So they did offer to hire you?
- 21 A I went in for an interview.
- 22 Q Okay.
- 23 A That was prior -- that was in 2016, and that
- was prior to Jewel Kopfmann calling me.
- 5 Q Oh, I'm sorry. I'm talking about at the time

Filed: 4/16/2021 9:57 AM CST Hand County, South Dakota

- 1 that you started working for San Carlos. I'm
- 2 talking in 2019 or even late 2018.
- з A Okay.
- 4 Q Had you been offered a position by anyone else
- 5 other than San Carlos?
- 6 A Yes.
- Q Who?
- 8 A A place in -- it was either Wyoming or Montana.
- 9 Q Was that also an IHS or tribal facility?
- 10 A No.
- 11 Q Do you remember what the name of the entity
- 12 was?
- 13 A I don't recall the name, but it wasn't suitable
- 14 for --
- MR. WHALEN: It wasn't what?
- THE WITNESS: I don't recall the name. It just
- wasn't suitable for what I wanted to do.
- 18 Q (By Mr. Morehead) Okay. Was there anybody
- working at that facility who you knew personally
- 20 before that?
- 21 A No.
- 22 Q Okay. Turning to Exhibit 64. Do you recognize
- 23 Exhibit 64?
- 24 A Yes, I do.
- 25 Q Did you write Exhibit 64?

Page 170

Page 169

- 1 And we've talked about a bunch of them. We talked
- about Kathy Andersen today. You've mentioned Becky
- Beenken. You mentioned DeLonne Yeaton. Just so I'm
- sure I'm right, that's the one that you said she
- went to Avera --
- A Yes. 6
- Q -- because she was going to get laid off?
- A Yes. Natalie helped her get that job.
- Q And then Becky Beenken and Terri Waltari and
- Jennifer Lewin-Gienau? Is it Gienau?
- A Gienau, I believe.
- Q Those were three of the folks that you said had
- said they had still kept using the passwords, right,
- sharing the passwords?
- A And they know of others using them.
- Q Okay. We didn't talk about Julie -- is it
- Zaato -- today? Who is Julie Zaato? 17
- A She's a medical coder. 18
- O Is she now at DT-Trak?
- A I don't know who's currently at DT-Trak. 20
- Q Okay. Just somebody that you've talked to 21
- recently that you think knows just basically
- about -- are these people who basically are going to
- come and testify about the work environment at
- DT-Trak?

- 1 A Work environment, the oppressive manner.
- Q Okay.
- A The bullying, the wrongful use of access/verify
- codes. That all comes into how the work environment
- Q Okay. We didn't talk about Jonna Gruppe,
- G-R-U-P-P-E?
- A Gruppe.
- Q Just the same thing with her?
- A Yeah. Yes.
- Thelma Hirsch, same thing? 0
- Yes. Α
- Q Jessie Ford? 13
- Yes. Α
- Q How about Keeley Flynn?
- A Yes.
- Q Okay. You know Keeley Flynn agreed to stop
- working for someone under a non-compete; right?
- A She agreed to -- she was -- DT-Trak went after
- her about the same time they went after me. From
- what I understand is that -- what she told me is she
- could not take the stress of this even though she
- knew she did not violate the non-compete. Her and
- her husband were trying to have children and were
- having a difficult time and doing procedures to be

Page 171

able to become pregnant.

At the time of this, I understand that she

- found out that she was pregnant, so she said she
- didn't want to go through the stress because they
- really wanted a family, and she couldn't handle the
- stress of going through this from DT-Trak. And,
- unfortunately, a week or two after signing the
- contract that she wouldn't -- she would stop working
- at San Carlos, she lost her baby because of all the stress. 10

11

MR. MOREHEAD: I don't have any other

questions. 12

> MR. WHALEN: Rema, you have the opportunity to read and sign the deposition. You can't necessarily

change your answers. You can complete what's called 15

an errata sheet that says I think this is how I 16

answered. I know Pat Beck. She's an excellent 17

court reporter. And instead of reading and signing, you can waive the right to read and sign, and then

she'll prepare the transcript. So I would advise

you to waive the right to read and sign the 21

transcript. Will you do so? 22

THE WITNESS: Yes. 23 (Witness excused.)

24

25

Page 172

:SS

CERTIFICATE

1 STATE OF SOUTH DAKOTA 2

COUNTY OF LINCOLN)

I, Pat L. Beck, Registered Merit Reporter and Notary Public within and for the State of South

6 Dakota:

3

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13

14

15

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17

21

2021.

DO HEREBY CERTIFY that the witness was first duly sworn by me to testify to the truth, the

whole truth, and nothing but the truth relative to 10

the matter under consideration, and that the foregoing pages 1-171, inclusive, are a true and 11 12 correct transcript of my stenotype notes made during

the time of the taking of the deposition of this witness.

I FURTHER CERTIFY that I am not an attorney for, nor related to the parties to this action, and that I am in no way interested in the

18 outcome of this action. 19 In testimony whereof, I have hereto set my 20 hand and official seal this 25th day of January,

23 Pat L. Beck, Notary Public

24 Expiration Date: June 11, 2023 25 Iowa CSR: No. 1185

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		1			
1	STATE OF SOUTH DAKOTA) IN CIRCUIT COURT:				
2	COUNTY OF HAND) THIRD JUDICIAL CIRCUIT				
3	DT-TRAK CONSULTING, INC., a South 29CIV19-000030				
5	Dakota Corporation, Plaintiff,				
6	-vs-				
7	REMA KOLDA, an individual,				
8	Defendant.				
9	Hand County Courthouse Miller, South Dakota				
10	January 14, 2021 9:30 a.m.				
11					
12	* * * * * * * * * * * * * * * * * * * *				
13	DEPOSITION OF				
14	NATALIE BERTSCH				
15	* * * * * * * * * * * * * * * * * * * *				
16	APPEARANCES: Mr. Sander J. Morehead				
17	Woods, Fuller, Shultz & Smith 300 South Phillips Avenue				
18 19	Suite 300 Sioux Falls, South Dakota 57104				
20	Attorney for the Plaintiff;				
21	Mr. Timothy R. Whalen Whalen Law Office, P.C.				
22	P.O. Box 127 Lake Andes, South Dakota 57356				
23	Attorney for the Defendant.				
24					
25					

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			2
1		INDEX OF EXAMINATIONS	
2	By Mr.	Whalen: Page 4	
3			
4		INDEX OF EXHIBITS	
5	NUMBER	DESCRIPTION	
6	A	Non-compete	
7	C	ICD-10-CM web printout	
8	E	DT-TRAK Consulting Agreement	
9	F	Professional Services Agreement	
10	G	Indeed reviews	
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		17
1	A	About 18 and a half.
2	Q	Okay. So exactly what is the medical coding?
3		What explain that.
4	A	It's assigning alpha numeric identifiers that drive
5		reimbursement, statistic analysis, and revenue
6		generation, continuity of patient care.
7	Q	So when I get my explanation of benefits and my
8		insurance company says this service isn't covered and
9		I call my insurance company and complain and they
10		say, Well, it's coded wrong. Is that what they're
11		talking about? This code, when they tell me it's
12		coded wrong from the medical supplier, is that what
13		they're referring to, that medical coding?
14	A	It can be.
15	Q	Okay. And sometimes they'll send it back and say,
16		We'll talk to the medical provider, and then they
17		say, Well, we'll recode it because there was a
18		mistake made in the coding, and then I might get my
19		bill paid by my insurance company. Is that am I
20		on the right track when I explain that?
21	A	Yeah, that's how it can work.
22	Q	What exactly do you do by way of billing services?
23		Is it affiliated with coding or is it something
24		completely separate from the coding?
25	A	It depends on the facility contract. Some facilities

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		18
1		we do their coding and their billing and their
2		accounts receivable. Some we just do their billing.
3	Q	Okay. When you say billing, does that mean actually
4		sending out the bill and collecting the payment for
5		the service and then turning over the proceeds to the
6		provider?
7	A	No. We tunnel into their system. We don't handle
8		any money. So we approve the claim for payment
9		through various steps that we have to go through and
10		then it's either dropped to paper, but primarily it's
11		an electronic export to the payer.
12	Q	So when I do business with my local clinic, I get a
13		bill from Minneapolis and I pay that bill and they're
14		billing on behalf of the local clinic. Is that what
<mark>15</mark>		you do?
<mark>16</mark>	A	That's a private sector type of billing. We have
17		done that in the past for private entities. Right
18		now we work for we have always worked primarily
19		for IHS and tribal facilities. Very little of what
20		you're talking about. What we do is we tunnel in and
21		we work on behalf of them on their system.
22		Everything goes to their lockboxes. We're just their
23		employees. We basically operate as an extension as
24		their employees sitting in a different seat, is how
25		they view us.

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		19
1	Q	I'm sorry.
2	A	That's how they view us.
3	Q	You facilitate the service as opposed to actually
4		handling the service. Is that a fair way to put it?
5	A	We actually provide the service that drives the
6		reimbursement on behalf of the facility exactly like
7		an employee would. And everything goes into the
8		hospital and clinic bank accounts, not through our
9		or through not through our PO box. Everything is
10		electronically pulled through them and then comes to
11		us because we're like an employee.
12	Q	But you're a contractor?
13	A	We are. We're contractors, but we operate in
14		employee duties.
15	Q	What percentage of DT-Trak's services are encompassed
16		by medical coding?
17	A	I would say 70 65, 70 percent at least, yeah.
18	Q	And DT-Trak is not a hospital; correct?
19	A	We are not.
20	Q	You're not a you don't you're not a medical
21		provider or service provider of any sort; correct?
22	A	We are
23	Q	Let me rephrase that. That's a bad question.
24		Your contracting relationship is primarily to
25		facilitate services to the facility, not to a

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			20
1		specific patient?	
2	A	Correct. We're brought in as subject matter experts	
3		to get the highest reimbursement and quickest	
4		turnaround time that we can.	
5	Q	And in that regard you have no dealings with	
6		<pre>patients; correct?</pre>	
7	A	Incorrect. At times we have to deal with patients	
8		when we're doing the accounts receivable piece.	
9	Q	Okay.	
10	A	So if a claim isn't fully paid and we send out a bill	L
11		on behalf of a clinic, it's the clinic's address on	
12		it and the bill goes to the patient and they're not	
13		happy, they can call our 800 line and they're	
14		assigned to whoever is managing that account to talk	
15		to.	
16	Q	So you from the accounts receivable standpoint,	
17		you actually do some collection services for the	
18		<pre>facilities?</pre>	
19	A	We don't do collections. We do follow-up of unpaid	
20		claims and denials. We work the rejections. Once a	
21		bill goes to collections, that is actually a	
22		collection agency and that has to abide by different	
23		rules. We do not do collection agency work, once	
24		we've gotten a claim to the extent that we can no	
25		longer collect on it with everything we've done.	

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		21
1	Q	I'm trying to understand this. So if there's a bill
2		that a patient disputes, do they deal with you
3		your company?
4	A	They can.
5	Q	They don't have to?
6	A	They don't have to.
7	Q	Even if you have a contractual relationship with the
8		facility, they can go to the facility or they can go
9		to you?
10	A	That's correct.
11	Q	The patient has that choice?
12	A	Yeah, we and the facility then will work with us.
13	Q	Are you licensed is DT-Trak licensed in any
14		respect other than sales tax license?
15	A	We are not required to have any licenses besides our
16		certified coders.
17	Q	And actually the facility the DT-Trak corporation
18		is not the certified coder, the people within it that
19		work for it are the certified coders; correct? Does
20		that make sense?
21	A	You cannot certify a company
22	Q	Right.
23	A	as a certified coder.
24	Q	It has to be a person?
25	A	Yeah. Correct. We have several certifications, but

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		34
1		identify if the doctor wasn't clear enough on his
2		diagnoses, they'll send out a question to ask him,
3		Did you want this or did you want that?
4	Q	And that process that you just described for a
5		medical coder, that would apply to somebody who is a
6		medical coder for DT-Trak or someone who is a medical
7		coder as an in-house employee at any facility, isn't
8		that true? The process is the same?
9	A	I don't know if it is or not. What the internal
10		coders do, the processes, we have different processes
11		than them.
12	Q	Okay. And is that because of the protocols that you
13		establish with the customer?
14	A	It is. And that, again, is something that Jewel and
15		Renae can speak to better how that works. But how
16		the in-house coders, how we've identified how they've
17		done work, we have a more efficient system and a
18		different way of doing it.
19	Q	So it's the it's DT-Trak's claim that the
20		utilization of the ICD-10 medical coding system is
21		confidential and proprietary or a trade secret in the
22		manner in which it's used? If I should ask the other
23		ladies about that, just tell me.
24		THE WITNESS: I am not sure what he's getting at.
	1	

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25

What I'm --

1		MR. WHALEN: Okay. Let me rephrase the question.
2		MR. MOREHEAD: Go ahead and re-ask your question.
3	A	All I have to say is ICD this is ICD-10 and, yes,
4		this is how you do it right. But when you get into
5		real life and apply it, it's not black and white like
6		this. You have to know a lot of different things.
7		All of the different components that we take that we
8		know how to work efficiently, do the processes
9		different, look at it differently, so we can have a
10		quicker, more accurate process with less rejections,
11		kickbacks, or errors, that is what we do are
12		specialized in. And it is different than how the
13		tribes and how IHS does their workload.
14	Q	(By Mr. Whalen) By way of analogy, a guy goes to
15		school to become a plumber, they teach him how to do
16		the plumbing work. When he gets out on the job, he
17		says, Okay, some of that stuff is great, but here is
18		real life how I need to apply this to solve this
19		problem?
20		MR. MOREHEAD: I'll object to form. You have to
21		answer.
22	Q	(By Mr. Whalen) Is that a fair analogy?
23	A	Somewhat, yes.
24	Q	I mean, education is one thing, but the practical
25		application and use of it is what experience and the

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		36
1		ability of the particular person I mean, that is
2		dependent upon them, isn't it?
3	A	We it's dependent on how you teach them to do it
4		per facility to make it work better for them, be more
5		knowledgeable, how to be faster, where to look for
6		things, how to process things, and how to finish the
7		record accurately internally, much quicker, and more
8		correct through less steps and processes than what
9		everybody else does in the real world.
L0	Q	In that regard, experience is a great teacher, isn't
11		it?
L2	A	It is.
L3	Q	Did as far as the billing goes, is there anything
L4		in the billing service portion of DT-Trak's business
L5		that is a trade secret, confidential information, or
L6		proprietary information as it relates to Rema? Let
L7		me clarify. Let me ask it this way instead of that.
L8		Rema was a medical coder in the end and that's
L9		all she did; right?
20	A	Correct.
21	Q	She didn't handle billing; correct?
22	A	No.
23	Q	Okay. So there's no allegation that Rema breached
24		any contract related to billing?
25		MR. MOREHEAD: Object to the form.

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STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF HAND

THIRD JUDICIAL CIRCUIT

29CIV19-000030

DT-TRAK CONSULTING, INC., a South

Dakota Corporation,

Plaintiff,

DEFENDANT'S ANSWERS TO INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS (FIRST SET)

v.

REMA KOLDA, an individual,

Defendant.

State the full name, present address, phone number, date of birth, and occupation
of the person(s) answering these interrogatories.

:

ANSWER: Rema J. Kolda, PO Box 7, St. Lawrence, SD 57373

State the names, present addresses and job titles of your supervisors at San Carlos
 Apache Healthcare Corporation ("San Carlos").

ANSWER: Katherine Andersen, Director of Health Information Management and Privacy Office, San Carlos Apache Healthcare Corp., 103 Medicine Way, Peridot, AZ 85542.

3. State the date of your hire at San Carlos and your job title.

ANSWER: 2-11-19. Health Information Coder III.

Describe all jobs duties, responsibilities, and/or day-to-day activities which you
have performed as an employee of San Carlos.

ANSWER: Abstract and code patient medical charts.

1

{03607180.1}

Case Number: 29CilV19-000030

Name of Document: Plaintiff's Interrogatories and Requests for Production of Documents to Defendant Rema Kolda(First Set)

8. Identify all facts, Documents, and Persons with knowledge regarding the facts and Documents supporting the allegation in Paragraph 6 of your Answer that DT-Trak is prohibited from asserting any claim against you by virtue of its actions and conduct which constitute a waiver, including a particular description of those actions.

ANSWER: DT-Trak and its supervisory staff have violated numerous contracts and provisions of contracts it had with customers while I was working there. Also, DT-Trak violated its customer's privacy rights on a regular basis regarding access to passwords and other security measures. The violations were encouraged by Natalie and the other supervisory staff. See Exhibit C attached hereto. Also, the alleged agreement DT-Trak seeks to enforce is not a legal and binding contract. See answers to interrogatories herein.

9. Identify all facts, Documents, and Persons with knowledge regarding the facts and Documents supporting the allegation in Paragraph 7 of your Answer that DT-Trak is estopped from asserting any of the claims in its Complaint by virtue of its actions and conduct, including a particular description of those actions.

ANSWER: See answer to other interrogatories herein and documents attached.

- 10. Identify all facts, Documents, and Persons with knowledge regarding the facts and Documents supporting the allegations in Paragraph 8 of your Answer that there is no legal and binding contract between the parties, including all responsive facts, Documents, and Persons regarding your allegations of
 - a. no meeting of the minds and mutual assent of the parties, including all facts supporting this allegation;
 - b. no consent to the agreement, including all facts supporting this allegation;

{03607180.1}

Case Number: 29CiIV19-000030

Name of Document: Plaintiff's Interrogatories and Requests for Production of Documents to Defendant Rema Kolda(First Set)

c. no agreement as to the subject matter of the contract, including all facts supporting this allegation;

- d. that the contract was illegal, including a particular itemization of all statutes, common law cases, or other authority supporting the allegation that the contract was illegal;
- e. that there was a failure of consideration, including a particular description of what consideration failed and why you assert it failed; and
- that the agreement is an unconscionable adhesion contract which violates the public policy of the laws of the state of South Dakota, including a particular and itemized listing of all statutes, regulations, cases, or other sources of public policy supporting this allegation.

ANSWER: The alleged agreement between DT-Trak and me is oppressive, over reaching, overly broad in its application, claims a business area that is worldwide, was presented on a take it or leave it basis and was not negotiated in any respect, it is not dated, purports to prohibit me from engaging in any work in a variety of employment areas throughout the world, I was not paid any additional money upon the presentation of the agreement, and I never believed nor agreed that I would not be able to continue to work in the field of medical coding if I signed the agreement.

The field of medical coding is known publicly and anyone can be trained to work as a medical coder so it is inappropriate in my mind for DT-Trak to try to corner the market on medical coders for its own profit and to the detriment of its employees. This is simply greedy and arrogant on DT-Trak and its owners and supervisory staff. The field of medical coding does not involve

{03607180.1}

4

Case Number: 29CilV19-000030

Name of Document: Plaintiff's Interrogatories and Requests for Production of Documents to Defendant Rema Kolda(First Set)

trade secrets or confidential information of DT-Trak. In spite of all of the above, DT-Trak is attempting to keep me from working anywhere as a medical coder and this is not appropriate.

11. Identify all facts, Documents, and Persons with knowledge regarding the facts and Documents supporting the allegation in Paragraph 9 of your Answer that the contract does not contain valid, legal, or enforceable covenants, including a particularized listing of all facts and statutes, regulations, or other sources of law upon which this allegation is based.

ANSWER: See the agreement which is attached hereto as Exhibit D.

12. Identify all facts, Documents, and Persons with knowledge regarding the facts and Documents supporting the allegation in Paragraph 10 of your Answer that DT-Trak does not have any valid trade secrets, confidential information, or other secret information which may be protected by the law.

ANSWER: See answers to other interrogatories herein and the documents attached. Also, the ICD 10 CPT code is public knowledge and is accessible by anyone who wants to learn the code. The medial records are private and confidential, but they are not owned by the Plaintiff. The password to access facility records are not the Plaintiffs trade secrets, but are private to the customers/facility. There is a customer/facility list that the Plaintiff has, but it is not a trade secret or confidential because their customers are all medical providers known to the general public. Also, anyone in the world can be a coder and work anywhere in the world as a coder.

13. Identify all facts, Documents, and Persons with knowledge regarding the facts and Documents supporting the allegation in Paragraph 11 of your Answer that you are entitled to attorneys' fees.

ANSWER: Objection. This interrogatory calls for a legal conclusion.

{03607180.1}

5

Case Number: 29CilV19-000030

Name of Document: Plaintiff's Interrogatories and Requests for Production of Documents to Defendant Rema Kolda(First Set)

14. Identify all facts, Documents, and Persons with knowledge regarding the facts and Documents supporting the allegation in Paragraph 3 of your Counterclaim that the owner of DT-Trak engaged in "malicious and oppressive conduct" including a particularized description of the alleged "malicious and oppressive conduct" and an identification of the "owner" referenced. ANSWER: Natalie Bertsch is the owner referenced in the Counterclaim. Natalie called me at home on my personal phone and I put her on the speaker and my husband witnessed the yelling and screaming from Natalie toward me. I remained calm and asked my husband if I could resign and he agreed that I should. This occurred in July of 2016, the first time I resigned. This ended my employment with DT-Trak. Jewel Kopfman called me in the end of August or beginning of September of 2016 and asked if I would come back to work. I met with Jewel only and told her I would have to speak with my husband about it. I then returned to work in September of 2016 thinking that things might have improved. After I returned to work, I found things were still the same, but I could not find other work. I continued to look for other work for the next two years and then I found the job with San Carlos. Before I took the job with San Carlos I verified that San Carlos did not have a contract with DT-Trak. Once I found that San Carlos did not have a contract with DT-Trak, I resigned from DT-Trak in January of 2019 and began to work with San Carlos in February of 2019. After I resigned with DT-Trak, I began to receive letters from the Plaintiff's attorneys threatening to sue me and I was eventually sued. Persons who know of the hostile, malicious and oppressive work environment and attitude of Natalie are as follows: Kathy Anderson, Keeley Flynn, Becky Beenken, DeLonne Yeaton, Terri Waltari, Jennifer Lewin-Gienau, Julie Zaato, Melissa Morris, Jonna Gruppe, Thelma Hirsch, and Jessie Ford. Also, I Googled DT-Trak to check employee reviews after I was sued and found the comments from

{03607180.1}

Case Number: 29CiIV19-000030

Name of Document: Plaintiff's Interrogatories and Requests for Production of Documents to Defendant Rema Kolda(First Set)

"Indeed" which are attached as Exhibit E. These comments are consistent with the conduct of DT-Trak while I was working there and I experienced the same type of behavior and conduct from Natalie and the other supervisory staff at DT-Trak as described in Exhibit E. See also answers to other interrogatories herein, Exhibit C and other documents attached hereto.

15. Identify all facts, Documents, and Persons with knowledge regarding the facts and Documents supporting the allegation in Paragraph 5 of your Counterclaim that the "owner" of DT-Trak was "overbearing, oppressive, malicious, demanding and extremely hostile to the Defendant and other employees," including identifying the referenced "owner," and identifying each and every occasion the conduct alleged occurred, by date, location, and detailed description thereof, and, in the case of the "other employees," an identification of each and every "other employee" referenced.

ANSWER: The owner referred to in the Counterclaim is Natalie Bertsch. See answers to other interrogatories herein and the documents attached hereto.

16. Identify all facts, Documents, and Persons with knowledge regarding the facts and Documents supporting the allegation in Paragraph 6 of your Counterclaim that DT-Trak used a complex employment agreement which contained detailed, overly broad and over-reaching provision so as to intimidate, harass, harangue, oppress, and coerce employees, including identifying all employees referenced.

ANSWER: See the agreement attached as Exhibit D. Also, the Agreement is a take it or leave it type of agreement. It is over-reaching and prohibits me from working in my chosen profession worldwide. See also the answers to other interrogatories herein and documents attached hereto.

{03607180.1}

7

Case Number: 29CilV19-000030

Name of Document: Plaintiff's Interrogatories and Requests for Production of Documents to Defendant Rema Kolda(First Set)

- Documents supporting the allegation in Paragraph 8 of your Counterclaim that DT-Trak
 wrongfully and without cause threatened, harassed, and/or sued employees that left the
 employment of DT-Trak to prevent the employees from pursuing their consent employment,
 including an identification of each and every employee referenced, and each and every event
 where an employee was "threatened, harassed, and/or sued."

 ANSWER: Katherine Andersen, Melissa Morris, Thelma Hirsch, and Keeley Flynn. See
 answers to other interrogatories herein and documents attached hereto.
- Documents supporting the allegation in Paragraph 9 of your Counterclaim that DT-Trak

 subjected you to conduct intended to keep you from pursuing your chosen profession, including
 the date and a detailed description of each instance of the alleged conduct.

 ANSWER: I was sent letters by the Plaintiff and/or its attorney. The agreement was oppressive.

 My current employer has been contacted. I was sued in this lawsuit. There is no question that
 the Plaintiff does not want me to work in my chosen profession. See answer to other
 interrogatories herein and documents attached hereto.
- 19. Identify all facts, Documents, and Persons with knowledge regarding the facts and Documents supporting the allegation in Paragraph 10 of your Counterclaim that DT-Trak made "wrongful demands," including a particular identification of each allegedly wrongful demand.

 ANSWER: See answers to other interrogatories herein and documents attached hereto.

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8

Case Number: 29CiIV19-000030

Name of Document: Plaintiff's Interrogatories and Requests for Production of Documents to Defendant Rema Kolda(First Set)

20. Identify all facts, Documents, and Persons with knowledge regarding the facts and Documents supporting the allegation in Paragraph 10 of your Counterclaim that DT-Trak knew the employment agreement was supposedly not enforceable.

ANSWER: The agreement speaks for itself in many respects. I find it appalling that the Plaintiff thinks it can keep me from working world wide. The Plaintiff is trying to keep me from working in all respects in my chosen profession. See answers to other interrogatories herein and documents attached hereto.

21. Identify all facts, Documents, and Persons with knowledge regarding the facts and Documents supporting the allegation in Paragraph 11 of your Counterclaim that information regarding DT-Trak's business is well known in the industry including all information you assert is "well known" and whom you allege knows it.

ANSWER: The medical coding industry is very well known and neither the medical code nor the coding system and the manner in which it is done is a trade secret as these areas are very well known to the public. Simply Google "medical coding" or "medical coder" and the profession is described in detail in an variety of formats. Since DT-Trak is in the business of providing medical coding services which utilize a universal code, it cannot claim the medical code as a trade secret nor confidential information. DT-Trak purchased two or three group training sessions for the employees. Before taking the group training there was a contract that the employees had to sign and work a period of time to fulfill the repayment. The Defendant signed the contract and fulfilled the obligation to continue working for DT-Trak and, therefore, the certification/credentials of being a medical coder became the Defendants. In order to stay credentialed as a medial coder there is an annual fee and you must do continuing education. The

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Case Number: 29CitV19-000030 Name of Document: Plaintiff's Interrogatories and Requests for Production of Documents to Defendant Rema Kolda(First Set)

RESPONSE: Objection. This request is not calculated to lead to the discovery of admissible evidence. Further, this request seeks confidential and privileged information and attorney work product..

Dated this 23 day of April, 2020.

Subscribed and sworn to before me this 23 day of April, 2026

My Commission Expires:

AS TO THE OBJECTONS:

THY R. WHALEN

Dated this day of April, 2020.

Whalen Law Office, P.C.

P.O. Box 127

Lake Andes, SD 57356

Telephone: (605)487-7645 whalawtim@cme.coop

(03607180.1)

STATE OF SOUTH DAKOTA) :SS	IN CIRCUIT COURT
COUNTY OF HAND)	THIRD JUDICIAL CIRCUIT
0-	0-0-0-0-0	
DT-TRAK CONSULTING, INC., a Sor Dakota Corporation,	uth ;	29CIV19-000030
Plaintiff,	:	AFFIDAVIT OF
V.	¥	NATALIE BERTSCH
REMA KOLDA, an individual,	•	
Defendant.	:	
0-	0-0-0-0-0	
STATE OF SOUTH DAKOTA):S	S	
COUNTY OF HAND)	~	

Natalie Bertsch, being first duly sworn, states as follows:

- I am the Vice President of Operations & Business Development for Plaintiff, DT-Trak Consulting, Inc. ("DT-Trak"), and I have personal knowledge of the facts stated in this Affidavit.
- DT-Trak is a South Dakota corporation and has its principal place of business in Miller, South Dakota.
- 3. DT-Trak is in the business of providing professional medical coding, data entry, billing, accounts receivable services, and other support services for medical providers throughout the United States.

{04154094.1}

Case Number: 29CIV19-000030 Affidavit of Natalie Bertsch

4. Many of DT-Trak's primary clients are Indian Health Services ("IHS") and other tribal entities. San Carlos Apache Healthcare Corporation is one of those tribal entities.

- 5. DT-Trak currently has contracts with facilities in New Mexico, Arizona, Alaska, Montana, Wyoming, Minnesota, Oregon, Washington, Colorado, South Carolina, South Dakota, California, Rhode Island, Tennessee, Nevada, North Dakota, Idaho, Maine, and Oklahoma. It has had contracts in Utah, Nebraska, Kansas, Texas, Iowa, Illinois, Wisconsin, Michigan, New York, and Alabama, has periodically bid on projects in Hawaii, Florida, and Maryland, and has pending bids out for Oklahoma, North Dakota, South Dakota, California, Washington, Arizona, and New Mexico facilities; as well as on a nationwide federal Veteran's Administration coding project, so DT-Trak does business throughout the United States.
- 6. Rema Kolda was employed with DT-Trak from September 20, 2004, until February 15, 2019, except for a few months in 2016 when she did not work for DT-Trak because she resigned her employment on July 20, 2016.
- 7. As a condition of her employment with DT-Trak, Kolda signed a Non-Compete, Non-Solicitation, Confidentiality, Non-Disclosure, and Non-Use Agreement ("Employment Agreement"), a true and correct copy of which is attached as Exhibit A and is incorporated herein by reference.
- 8. DT-Trak has demanded that Kolda cease her employment with San Carlos pursuant to her obligations under the Employment Agreement.

{04154094.1}

- 2 -

Case Number: 29CIV19-000030 Affidavit of Natalie Bertsch

9. Given the competitive nature of the marketplace in the medical claims management industry, DT-Trak uses non-compete and non-disclosure agreements to protect its business and goodwill.

Dated this 15 day of April, 2021.

Nafalie Bufil Natalie Bertsch

Subscribed and sworn to before me this 15th day of April, 2021.

Notary Public – South Dakota

My commission expires: 4 - 21 - 2026

NOTARY DENTE OF SEAL O

CERTIFICATE OF SERVICE

I hereby certify that on the day of April, 2021, a true and correct copy of the foregoing Affidavit of Natalie Bertsch was electronically filed and served through the Odyssey File and Serve system upon the following individual:

Timothy R. Whalen Whalen Law Office, P.C.

PO Box 127

Lake Andes, SD 57356

Phone: (605) 487-7645

Email: whalawtime@cme.coop
Attorney for Defendant

One of the Attorneys for Plaintiff

{04154094.1}

NON-COMPETE, NON-SOLICITATION, CONFIDENTIALITY, NON-DISCLOSURE, AND NON-USE AGREEMENT

This Non-Compete, Non-Solicitation, Confidentiality, Non-Disclosure, and Non-Use
Agreement (this "Agreement") is made and entered into this 12 day of September,
20, by and between DT-Trak Consulting, Inc., a South Dakota corporation, with an
address of 210 North Broadway, Miller, South Dakota 57362 ("Employer"), and
Rema J. Kolda , an individual ("Employee").

RECITALS

WHEREAS, the business of Employer is of a highly specialized nature and its work for its customers requires it to divulge to Employee certain of Employer's trade secrets, confidential information, and processes; and

WHEREAS, Employee acknowledges and agrees that Employer will provide and make available to Employee specialized training and skills; and

WHEREAS, Employee will have access to Employer's trade secrets, confidential information, processes, and customers; and

WHEREAS, Employee acknowledges and agrees that Employer has a legitimate and vital interest in protection of its trade secrets, confidential information, processes, and customers; and

WHEREAS, Employer would not, absent Employee's acceptance of this Agreement, employ Employee or continue to employ Employee; and

WHEREAS, Employee acknowledges and agrees that acceptance of this Agreement by Employee is a condition precedent to employment or continued employment by Employer.

NOW, THEREFORE, in consideration of Employee being employed by Employer and other good and valuable consideration, the receipt and sufficiency of which is acknowledged by Employer and Employee, the parties agree as follows:

- 1. <u>Definitions</u>. As used in this Agreement, the following terms shall have the meanings set forth in this Section 1.
 - 1.1. "Business" or "Business of Employer" shall mean professional medical coding, data entry, third-party billing and accounts receivable services and related activities for healthcare service providers including, but not limited to, the following services:

Non-Compete, Non-Solicitation, Confidentiality, Non-Disclosure, and Non-Use Agreement
. Page 1 of 7

EXHIBIT A

Professional medical coding; Electronic Health Record Services (EHR); Electronic Data Entry (any database or software); Error Report Management and Completion; Third Party Billing, all payer sources; Accounts Receivable; Posting; Collections (120+ days, etc.); Quality Assurance of Revenue Generation Cycle; Comprehensive Revenue Generation Services; Compliance Auditing HIPAA, etc.; Data Integrity Audits, entire revenue generation cycle; Provider and Staff Education; Patient Registration; Staff & Program Development/Evaluation Criteria Development; Comprehensive Consultative Services for Healthcare Administrative, Financial, HIM and BO Functions; Revenue Enhancement Auditing; Development and Implementation of Work Flow Processes Relating to Revenue Generation Cycle; Planning, Implementing and Facilitation of Training/Workshops; Feasibility Studies for or Development of Revenue Generation Cycle or Development; Internal Controls Policy Evaluation, Implementation and Management; "Special Projects"- Analysis and Development of Various Health an Revenue Generation Studies; Financial Projections for Healthcare Facilities; Cost Analysis Studies for Healthcare Facilities; Chargemaster Audit, Implementation and Utilization.

- (1.2) "Business Area" shall mean and include each state within the United States of America, including Alaska and Hawaii. The Business Area is so defined because, and Employee so agrees, that the market for the Business is highly specialized and that Employer engages in the Business with and for numerous entities that are located within and throughout the United States.
- 1.3. "Competing Business" shall mean any individual, corporation, partnership, limited partnership, limited liability company, association, trust (business or otherwise), institution, foundation, pool, plan or other entity or organization (other than Employer) that engages or proposes to engage in the Business of Employer.
- 1.4. "Confidential Information" shall mean any information or data concerning the Business of Employer that is not generally known and that is proprietary to Employer or that any party is obligated to treat as proprietary, including without limitation: information or material of Employer relating to trade secrets, inventions, improvements, discoveries, "know-how," technological developments, or unpublished writings or works of authorship, or to the materials, apparatus, processes, formulae, plans or methods used in the development, provision, or marketing of Employer's products or services; and information that when received is marked as "proprietary," "private," or "confidential." Any information that Employer reasonably considers as confidential or proprietary, or that Employer treats as confidential or proprietary, will be presumed to be Confidential Information without regard as to whether Employer originally produced or created such information and regardless of how Employer obtained such information.

Non-Compete, Non-Solicitation, Confidentiality, Non-Disclosure, and Non-Use Agreement Page 2 of 7

EXHIBIT A

- 2. Non-Competition. At all times during which Employee is employed by Employer and during the period commencing on the date of the termination of Employee's employment with Employer and ending two years after such date, Employee agrees that Employee will not, anywhere in the Business Area, engage, directly or indirectly, in any capacity whatsoever, whether as an officer, director, stockholder, owner, proprietor, partner, member, co-owner, investor, employee, trustee, manager, consultant, independent contractor, co-venturer, lender, financier, agent, representative or otherwise, in a Competing Business, or otherwise hold any interest in a Competing Business.
- 3. Non-Solicitation of Employer's Employees and Consultants. At all times during which Employee is employed by Employer and during the period commencing on the date of the termination of Employee's employment with Employer and ending five years after such date, Employee may not directly or indirectly solicit, request, cause or induce any person who, at any time during the foregoing time period, is an employee, agent, or representative of or a consultant to Employer to leave the employ of or otherwise terminate that person's relationship with Employer.
- 4. <u>Non-Solicitation of Customers and Other Persons and Entities</u>. At all times during which Employee is employed by Employer and during the period commencing on the date of the termination of Employee's employment with Employer and ending five years after such date, Employee may not, directly or indirectly:
 - 4.1. solicit, induce or knowingly attempt to induce any current or prospective customer, partner, reseller, distributor, client or supplier of Employer to cease doing business in whole or in part with Employer; or
 - 4.2. knowingly attempt to limit, undermine, disrupt or interfere with any business engagement or relationship relating to the Business existing between Employer on the one hand, and any third party on the other hand.

As used in this Section 4, "current" customers, partners, clients, and suppliers includes persons or entities doing business with Employer during all times which Employee is employed by Employer and during the period commencing on the date of the termination of Employee's employment with Employer and ending five years after such date. "Prospective" customers, partners, clients, and suppliers include any and all persons or entities that engage the services of an outside person or entity for the performance of services similar to the Business of Employer.

5. <u>Confidential Information; Non-Disclosure and Non-Use of Confidential Information.</u> Employee agrees that due to the nature of Employee's association with Employer, Employee will possess trade secrets and other confidential and proprietary information (including the identity of customers, partners, resellers, distributors, clients and suppliers) relating to the Business of Employer. Employee acknowledges that such information is of extreme importance to the Business and the goodwill of Employer and that disclosure of such confidential information to others or the unauthorized use of such information by others would cause

Non-Compete, Non-Solicitation, Confidentiality, Non-Disclosure, and Non-Use Agreement Page 3 of 7

EXHIBIT A

substantial loss and harm to Employer, including, but not limited to, significant financial loss and the loss of goodwill and other intangible assets.

- 5.1. Protection of Confidential Information. Employee may not, directly or indirectly, at all times during which Employee is employed by Employer and during the period commencing on the date of the termination of Employee's employment with Employer and ending five years after such date, use Confidential Information in any fashion or manner or disclose Confidential Information to any person not authorized by Employer to receive it, except that Employee may disclose Confidential Information to any governmental or regulatory authority to which he is subject, but only pursuant to subpoena or court order. However, in such instance, Employee shall provide notice to Employer of any such disclosure, within three days of Employee's receipt of such subpoena or court order, and Employee shall allow Employer to defend against, and take such defense to final judgment or determination, prior to any disclosure of Confidential Information by Employee.
- 5.2. Return of Confidential Information. On the date of termination of Employee's employment with Employer, or sooner if requested by Employer, Employee will promptly turn over to the Employer all documents, records, electronically stored information, and any compositions, articles, devices, apparatus, computers, hand held devices, cellular phones, hard drives, flash drives, and other items that disclose, describe, contain, store, or embody Confidential Information, including all copies, reproductions, and specimens of the Confidential Information in Employee's possession or control, regardless of who prepared them.
- 6. Restrictions Reasonable and Product of Negotiation. Employee represents and agrees that Employee has had the opportunity to be fully advised by legal counsel of Employee's own choosing in connection with this Agreement, and Employee agrees to be fully bound by the restrictive covenants and the other agreements contained in this Agreement. Accordingly, Employee agrees that it is the intent and spirit of the parties that the restrictive covenants and the other agreements contained herein shall be valid and enforceable in all respects.
- Remedies. Employee acknowledges and agrees that compliance with the covenants and restrictions set forth in this Agreement is necessary to protect Employer's Business, goodwill, contacts, trade secrets, and Confidential Information and that a breach shall irreparably and continually damage Employer for which money damages might be inadequate. Consequently, if Employee breaches or threatens to breach any of the covenants or promises set forth in this Agreement, Employer shall be entitled, without the necessity of posting a bond or other similar security or without an actual showing of irreparable harm, to preliminary and permanent injunction to prevent the continuation of Employee's breach or threatened breach of the covenants and promises set forth in this Agreement. In addition to injunctive relief, Employer is entitled to recover liquidated damages from Employee for breaches of the covenants and promises set forth in this Agreement in the amount of \$5,000.00 per incident of breach or the actual damages proven by Employer, whichever amount is greater. Regardless of the remedy or

Non-Compete, Non-Solicitation, Confidentiality, Non-Disclosure, and Non-Use Agreement
Page 4 of 7

EXHIBIT A

damages being pursued, Employer is also entitled to recover from Employee all attorneys' fees and costs incurred in enforcing this Agreement and pursuit of any and all remedies and/or damages hereunder. Nothing in this Agreement shall be construed to prohibit Employer from pursuing any other remedy, whether at law, in equity, or otherwise.

8. <u>Miscellaneous</u>.

- 8.1. <u>Survival</u>. All of the provisions of this Agreement, including, but not limited to Section 1 through and including Section 7, as well as any other provisions related to and/or necessary to enforce the provisions of Section 1 through and including Section 7 shall survive the termination of this Agreement and the termination of Employee's employment by Employer.
- 8.2. At-Will Employment: Termination. Nothing in this Agreement is intended to provide nor shall this Agreement provide Employee with any contractual rights to employment for any period of time. Employee and Employer acknowledge and agree that the employment relationship between Employer and Employee is strictly "at-will." This means that either Employee or Employer may, at any time, for any or no reason, with or without notice, terminate the employment relationship between Employee and Employer, except that Section 1 through and including Section 7 and any other provisions of this Agreement necessary to enforce such post-termination rights and obligations shall survive termination of Employee's employment by Employer and shall survive the termination of this Agreement.
- 8.3. <u>Reformation</u>. In entering into this Agreement, the parties intend that it fully comply with the requirements of SDCL § 53-9-11 in all respects including, but not limited to, geographic and temporal restrictions. To the extent that this Agreement is found to not comply with SDCL § 53-9-11 by a court of competent jurisdiction, then the parties agree that this Agreement shall be enforced to the fullest extent possible within the bounds of SDCL § 53-9-11.
- 8.4. Governing Law. This Agreement, including its validity, interpretation and enforcement, and the rights and obligations of the parties hereunder, shall be governed by the laws of the State of South Dakota (without giving effect to the conflicts of laws provisions thereof). Employee consents to the exclusive jurisdiction and venue of, and expressly consents to be sued in, the appropriate state and federal courts sitting in South Dakota, regardless of the Employee's existing or future residences, with respect to any action, suit, or proceeding arising out of or in connection with this Agreement.
- 8.5. Costs and Fees. Employee shall reimburse and pay to Employer all of Employer's actual costs and fees (including, but not limited to, attorneys' fees) incurred by Employer in any suit arising out of, in connection with, or to enforce any terms of this Agreement.

Non-Compete, Non-Solicitation, Confidentiality, Non-Disclosure, and Non-Use Agreement Page 5 of 7

EXHIBIT A

- 8.6. <u>Severability</u>. In the event that any one or more of the provisions contained herein is held invalid, illegal or unenforceable in any respect for any reason in any jurisdiction, the validity, legality and enforceability of any such provision in every other respect and of the remaining provisions hereof shall not be in any way impaired or affected, it being intended that each of the parties' rights and privileges shall be enforceable to the fullest extent permitted by all applicable laws, and any such invalidity, illegality and unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.
- 8.7. <u>Successors and Assigns</u>. This Agreement and all covenants and agreements set forth herein shall inure to the benefit of the successors and assigns of Employer.
- 8.8. <u>Descriptive Headings</u>. The headings of the sections and paragraphs of this Agreement have been inserted for convenience of reference only and shall not be deemed to be part of this Agreement.
- 8.9. <u>Amendment: Assignment.</u> This Agreement may not be amended except by an instrument in writing signed by the parties hereto. This Agreement and any rights hereunder, may be assigned by Employer.
- 8.10. Entire Agreement. Except as to any later amendment hereto that complies with Section 8.9, this Agreement is complete, and all promises, representations, understandings, warranties and agreements with reference to the subject matter hereof, and all inducements to the making of this Agreement relied upon by the parties hereto, have been expressed herein. This Agreement supersedes any prior discussion, negotiations, and agreements, whether oral or written, between the parties with respect to the subject matter hereof.
- 8.11. <u>Counterparts</u>. This Agreement may be executed in any number of counterparts and by the parties hereto on separate counterparts, each of which when so executed and delivered shall be an original, but all of which together shall constitute one and the same instrument.

(signature page follows)

Non-Compete, Non-Solicitation, Confidentiality, Non-Disclosure, and Non-Use Agreement Page 6 of 7

EXHIBIT A

Employer

DT-Trak Consulting, Inc.

Employee

Rema J. Kolda

Rema (Signature)

Print Name)

Non-Compete, Non-Solicitation, Confidentiality, Non-Disclosure, and Non-Use Agreement Page 7 of 7

EXHIBIT A

1	STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
2	COUNTY OF HAND	: SS THIRD JUDICIAL CIRCUIT
3		
4	DT TRAK CONSULTING INC.,) File # 29 CIV 19-30
5	Plaintiff,)) TRANSCRIPT OF
6	-vs-) SUMMARY JUDGMENT HEARING
7	REMA KOLDA,	
8	Defendant.	COPY
9		
10	mb - Hananah	Before le Kent A. Shelton
11		t Court Judge
12		ounty Courthouse
13		South Dakota
14	Jun	e 14, 2021
15		
16	APPEARANCES:	
17	For the Plaintiff:	
18		Attorney at Law PO Box 5027 Sianu Falla South Dakota 57117
19		Sioux Falls, South Dakota 57117
20	For the Defendant:	Timothy R. Whalen Attorney at Law PO Box 127
21		Lake Andes, South Dakota 57356
22	* * * * * * * * * * * * *	* * * * * * * * * * * * * * *
23		Marie H. Fawcett Bales Official Court Reporter
24		450 Third Street SW Huron, South Dakota 57350
25		naton, boach banoca o.coo

1	<u>I N D E X</u>	
2		
3	ORAL ARGUMENT ON THE MOTIONS:	
4	BY MR. MOREHEAD 4,28,37	
5	BY MR. WHALEN 14,32	
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7	RULING BY THE COURT 38	
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1	(Whereupon, the following proceedings were held at 3:01	
2	p.m.)	
3	THE COURT: This is DT-Trak Consulting versus Rema Kolda.	
4	The parties are present along with their attorneys.	
5	Would the attorneys note their appearance for the record,	
6	starting with the plaintiff, please?	
7	MR. MOREHEAD: Yes, thank you. Sander Morehead appearing	
8	for the plaintiff DT-Trak Consulting with it's principal from	
9	my client, Natalie Bertsch.	
10	MR. WHALEN: Thank you. Timothy Whalen, an attorney from	
11	Lake Andes, South Dakota, appearing for Rema Kolda. Rema is	
12	present.	
13	And I have with me an intern for the summer, Mason	
14	Juracek.	
15	And Mason is going to have to the spell that last name	
16	for you, Marie. I won't be able to spell that.	
17	THE COURT: Go ahead and spell that for me, please.	
18	SUMMER INTERN: J-U-R-A-C-E-K.	
19	THE COURT: Okay. In this matter, we have cross summary	
20	judgments motions filed. The first motion that was filed was	
21	on behalf of the plaintiff, a motion for summary judgment on	
22	count two, so partial summary judgment.	
23	And then subsequently, the defense has filed a motion for	
24	summary judgment on the remainder of the matter.	
25	Both parties have submitted their undisputed facts, which	

1 I, of, course, find interesting because if they are undisputed 2 facts, what are we doing? And everybody has their own version 3 of what those facts are. 4 But what I would like to do is truthfully I believe that 5 both motions for summary judgment need to be heard at the same 6 time. 7 I'm going to start with the plaintiff on your motion for 8 summary judgment, on count two. I will let Mr. Whalen respond to that. And then also at that time, state his motion for 9 10 summary judgment. 11 And then Mr. Morehead, I will allow you to respond to his 12 motion for summary judgment. And we will go until everybody 13 has said whatever they need to say. And then I'll see what I 14 think. 15 So with that being said -- and Mr. Morehead, I can stay 16 seated. You don't have to stand up --17 MR. MOREHEAD: Do you mind if I stand? THE COURT: You may. Some people are more comfortable 18 19 standing. I'm okay with that. 20 But if you would like to go ahead regarding your motion 21 for summary judgment, you may. 22 MR. MOREHEAD: Thank you, Your Honor. 23 May it please the Court and counsel. 24 Your Honor, as you noted, the motions have been filed.

The parties have filed cross motions for summary judgment on

25

count two of DT-Trak's Complaint. The count that relates to the non-compete provision of the employment agreement that's attached to the Complaint.

As we pointed out in our summary judgment briefing,
DT-Trak is only seeking one relief as it were. It's not
trying to pile on, say, an injunction for this, an additional
junction for this, and etc. DT-Trak is satisfied with
obtaining the two-year non-compete injunction that it is
seeking under the employment agreement.

And also that the injunction be limited to what we pointed out in our brief, in that Miss Kolda be enjoined from further working for San Carlos, her current employer.

As the second point, whether there are any confidential -- is any confidential information trade secrets at issue in this case? Is at issue on DT-Trak's motion? DT-Trak's motion is solely on the provisions of the contract that don't require that. And also under SDCL 53-9-11, which, as a matter of public policy, makes those contracts enforceable as long as they comply with the statute.

And that statute doesn't include any requirement of that type of information.

As for the summary judgment motion itself, DT-Trak believes there are two main issues that the parties teed up on the non-compete agreements. Both of them are legal.

The first issue that DT-Trak has brought is a combination

of statutory interpretations under 53-9-11. And the plain unambiguous terms of the employment agreement.

I don't believe either party has asserted that the statute is ambiguous or that the contract is ambiguous. And I don't believe that the parties really disputed the material fact, which is, I think everybody agrees on what the scope of DT-Trak business is. It's laid out in the contract. No parties disputed that.

I don't think there's any dispute about what Miss Kolda is doing today. She has testified and responded that she is, in fact, providing coding and other services as to San Carlos. One of DT-Trak's former clients.

And so the issue is a legal one. Those facts are undisputed. The question is how does the unambiguous statute and unambiguous contract apply to those facts. And the answer is DT-Trak is entitled to summary judgment.

SDCL 53-9-11 does not speak in terms of working for an employer's competitor. SDCL 53-9-11 simply says that a non-compete agreement can include the requirement that an employee not engage directly or indirectly in the same business as that of the employer.

The contract itself goes on to say the same thing. It's co-extensive with SDCL 53-9-11. It says Miss Kolda will not engage in a competing business; and will not engage in the same business or profession as that of the employer.

Importantly, the term competing business is defined by the agreement. Both by the statute and by the agreement. The agreement specifically says that a competing business is defined only to include performing services that are the same business or profession as DT-Trak. Specifically, quote, will not engage directly or indirectly in any capacity whatsoever, including as an individual in a competing business.

Competing business contains the term competing, but goes on to say that competing business is any -- is defined to include any individual that, quote, engages or proposing to engage in the business of the employer.

And finally business of employer is another defined term that includes and means, quote, professional medical coding, data entry, third party billing, and other services.

When all of these provisions are read together, which South Dakota case law says has to be the case, all the provisions have to be given meaning. When read together, this means Ms. Kolda, when she signed that agreement agreed, I will not in the future engage in any capacity, directly, indirectly, in a competing business defined as the business of DT-Trak.

Just like the statute SDCL 53-9-11 defines the situation, i.e., directly or indirectly the business of employer.

And there's no dispute that Miss Kolda is doing that today. She is today providing at least medical coding

services to San Carlos. There's also no dispute that DT-Trak provides medical coding and other services, but certainly medical coding services to various clients. And provided those same services to San Carlos.

So under the plain terms of the agreement, and the statute, Miss Kolda is, in fact, directly engaged in providing the same services to San Carlos that DT-Trak provides to San Carlos.

At risk of drifting a little bit into the other argument -- the primary argument that's been raised against this is twofold. Miss Kolda argues, well, the agreement talks about a competing business. And just focuses on the word competitor and says that's good enough. DT-Trak isn't really a competitor of San Carlos and so she's off the hook.

However, as I just pointed out, walking through the agreement, when the actual definition of competing business, business of employer, and the fact that she's agreed she will not engage in either is applied, Miss Kolda's argument ignores the plain meaning the statute and ignores the plain meaning of the agreement.

The statute doesn't say work for a direct competitor. The agreement doesn't say work for a direct competitor. In fact, the statute and agreement both talk about directly or indirectly engage in the same or similar business as that of the employer.

The other argument that's been raised at least based on a review of the response to DT-Trak's statement of facts is that the agreement is an unconscionable contract of adhesion.

We pointed out to the Court that under South Dakota Law, whether a contract is a contract of adhesion, whether it's unconscionable is an issue of law for the Court. It's an issue of law that doesn't get submitted to the jury.

And in fact, we pointed out multiple cases in the employment context where either South Dakota courts -- state courts or South Dakota federal courts, Judge Shreier, Judge Piersol, Judge Lange, all applying South Dakota Law, have at an early initial stage in a case, even at the pleadings stage, been willing to address the issue of unconscionability or contract of adhesion.

And in that context, they have addressed what the case law talks about is either procedural unconscionability, the contract of adhesion idea, and substantive unconscionability, i.e. the actual subject matter of the contract.

In all three of those cases that we cited for the Court, the plaintiff made essentially the same argument that Miss Kolda is making here. Well, this contract was presented to me on a take it or leave it basis. I had to either agree to it or I wouldn't have a job. All of those types of statements. But as we pointed out, even assuming all of those facts to be true, under the case law we cited, that is not enough to show

procedural unconscionability or an improper contract of adhesion. And all three of those cases the Judges, in their opinions, all said the employee isn't without an option. The employee can say if I'm going to have to sign this, to have a job, then I don't want to. I will get a different job.

And it's important to remember it's not disputed that it was DT-Trak that came to Miss Kolda asking her to come back.

Not the other way around.

So no facts in the record, no dispute that Miss Kolda somehow had no other options, or was approaching DT-Trak begging for her job back. The situation was the reverse.

As for substantive unconscionability, SDCL 53-9-11 is the legislature's statement of public policy about what is acceptable. And the case law we cited, including the <u>Central</u> case, says as long as employer complies with a 53-9-11, that's the end of the story. There's no separate reasonableness inquiry.

Finally, there's been some allegation that DT-Trak may or may not have engaged in some sort of wrongful conduct towards Miss Kolda. That's been thrown out there as well. But that again doesn't speak to what happened on the consent that was given at the time the contract was entered.

And here, the three cases that I mentioned earlier, are particularly relevant. Those were all employment cases. And one case, member of the military was called to active duty.

And under federal law, if that occurs, when you return, you're supposed to have a job. You're supposed to get your job back subject to certain exceptions. And the employer didn't. Serious situation.

And the other two there were allegations of discrimination and retaliation.

Even in all of those circumstances, the judges said as to the enforceability of this contract, that doesn't change the analysis. They granted it at the pleading stage as a matter of law.

The remainder of my motion has to do with the relief that DT-Trak has requested. DT-Trak is seeking a permanent injunction enforcing essentially the agreement employment and saying Miss Kolda may not work for San Carlos for two years from the date of judgment.

Now, Miss Kolda has argued that the geographic scope of employment agreement is too broad. That because it says it's nationwide and DT-Trak hasn't had a contract -- or doesn't currently have a contract in every single state in the country, it's too broad.

But the South Dakota Supreme Court, as we noted in our brief, has consistently said the appropriate thing to do in that situation, even if we assume their argument is correct for purposes of summary judgment, if we assume that's correct, the proper response from the Court then is to say it will be

interpreted using the blue pencil doctrine that the South

Dakota Supreme Court has used. And limited geographically to
what's considered reasonable under those circumstances then.

And granting Miss Kolda, every single benefit of the doubt, Miss Kolda does not dispute DT-Trak is still doing business in Arizona where San Carlos is located. Also doesn't dispute DT-Trak is doing business in South Dakota where Miss Kolda is located. And doesn't dispute that San Carlos was until not long before Miss Kolda started working for San Carlos, DT-Trak's client.

So regardless of whether Miss Kolda could prove that in some abstract case the geographic scope of the agreement would be too broad, here when DT-Trak is only asking for a injunction saying, Miss Kolda, you cannot work for San Carlos any longer. And for another period of two years that issue is moot.

Finally, the last argument we pointed out, I don't believe Miss Kolda has disputed -- at least not in any of the briefing -- Judge Sogn has applied the same rationale as in other cases from other courts saying the two years runs from the date of the entry of the judgment, not from the date of the departure. The rationale being the employer, in this case DT-Trak, is entitled to the benefit of its bargain. What a bargain for two years of Miss Kolda not engaging in the same business as DT-Trak, which again DT-Trak business providing

various services including coding to medical providers, which is exactly what Miss Kolda is doing today. She's providing coding medical services to a medical provider.

Finally, Your Honor, as for the weighing of the various factor on an injunction, we pointed out the courts have almost uniformly held that irreparable harm is properly inferred from a violation of an employment contract. And also have uniformly enforced contracts acknowledging irreparable harm and the appropriateness of an injunction.

South Dakota statute on the grounds for permanent relief speak for the disjunctive of three different things that are applicable here. Number one, the idea that pecuniary damages won't be enough. Number two, if it's going to be difficult to ascertain damages. And number three, multiple proceedings. All of those are applicable here.

And it remains undisputed San Carlos alone, one former DT-Trak client has now undisputedly hired away three DT-Trak employees. Kathy Andersen, no dispute. And also no dispute that DT-Trak had to give into that if it wanted to keep the contract that it had with San Carlos. Keely Flynn, no dispute. And now, Miss Kolda. Three employees in about a year.

The irreparable harm is clear DT-Trak invests in it's employees. And it's undisputed that one of their clients is hiring those clients away after they have been trained.

So in short, Your Honor, there are no factual disputes.

We agree -- and we welcome the Court drawing them all in Miss

Kolda's favor. But even drawing them all in Miss Kolda's

favor, both the statute and the contract are unambiguous. And
there's no dispute she is engaging in DT-Trak's business.

Thank you.

THE COURT: Question, you're requesting obviously a

permanent injunction to cover everything. But you're saying in the alternative, at least should apply to Arizona and South Dakota.

MR. MOREHEAD: Correct. She should be enjoined from continuing to work for her current employer, which is San Carlos located in Arizona.

There's no dispute DT-Trak is still doing business in Arizona. That hasn't been contravened. In fact, there's no dispute that DT-Trak, either presently or in the recent past, has had contracts in twenty some states. And when you include pending potential contracts, that goes over thirty around the country. All over the country, including in Alaska.

THE COURT: Okay. Thank you.

Mr. Whalen?

MR. WHALEN: Thank you, Your Honor.

DT-Trak doesn't want Rema Kolda to work. Period. That's his argument. That's clearly his argument, not only here today, but from his brief. They don't want her to work in the

profession she trained in, paid for herself, contrary to their assertions. Paid for herself, not paid for by her employer.

They don't want her to work in that profession.

And they're mad at San Carlos. Well sue San Carlos.

Don't sue Rema Kolda. Rema Kolda did not violate her

contract.

And here address this -- I'm going to address both motions at the same time because it's both -- the argument is the same for both.

On the unconscionable issue with the contract, it is -his argument is you don't have to take the job. You don't
like it, don't take the job. Okay. So where is she going to
go work? If she goes to San Carlos, they are going to sue
her. They did, so she can't work there. If she goes to
Avera, another customer, they are going to sue her because
they already showed that they would. If she goes to one or
the other contractors or providers in thirty states, they are
going to sue her because they did.

She's got nowhere else to go. They have designed it so she can only work for them. And they will sue her in she tries to work for someone else. That is the unconscionable aspect of the contract, the adhesion contract she was provided.

That's the difference between the three cases they cite and those other -- actually there's more than three cases, but

that's the difference between the cases that they cite and this case.

She had no other choice but to sign that contract. She knew that there was going to be litigation if she did anything other than what they specifically wanted her to do. And even if she did what they wanted her to do, they ended up suing her anyway. That's the unconscionable aspect of this.

They're mad at San Carlos. They are mad because Kathy
Andersen went to work for them. Didn't sue Kathy. Kathy
Andersen made an affidavit here in this case on behalf of
Keely Flynn. I believe they did sue Keely Flynn, but that
case was resolved primarily because Keely couldn't handle the
litigation.

What they're looking at is an overbearing, oppressive, overreaching position on a contract that is not -- should not be construed in their favor to browbeat their employees to stay there at their work.

Mr. Morehead mentioned a decision by Judge Sogn, but he didn't mention the correct decision. The decision that should have mentioned the decision I would draw the Court's attention to is Farmers Business Network Inc. v. Ron Wulfkuhle, Inari Agriculture Inc. -- Inari, I-N-A-R-I, and Wulfkuhle is W-U-L-F-K-U-H-L-E -- civil case Minnehaha County 20-1325.

In that decision, Judge Sogn references an extensive decision that he wrote addressing the difference between same

and similar businesses. And he made that decision based upon the motion for preliminary injunction.

In that decision, Judge Sogn addressed in detail the distinction between the statutory language contained in SDCL 53-9-9 and SDCL 53-9-11. He drew particular attention to the language at 53-9-9, which is the statute that allows for the prohibition of engaging in business to the company that you sold your company to. It deals with the sale of good will.

And it's important here, because in that statute in 53-9-9, it addresses similar business. It says shall not engage in similar business.

In 53-9-11, it says that, that the employee -- an employer may agree with the employee at the time of the employment or any time after not to engage directly or indirectly in the same business. Not similar, but the same business or profession as that of his employer.

Judge Sogn zeroed in on that and said there's a clear distinction between the two.

For the employee, it's not intended to keep them from working in their chosen profession. It's intended to keep them from engaging in a business that competes with their employer.

Rema does not engage in the business. At all times in this case -- and it's undisputed -- Rema was an employee. She never operated a business. Even while she worked for San

Carlos, she never operated a business that provided medical coding services or any other services to third parties.

That's the plaintiff's business. The plaintiff isn't in the medical coding business. They're a corporation.

It's an example as set forth in Exhibit A, which is attached to my affidavit in this case. DT-Trak is identified as a South Dakota corporation. It is incapable of engaging in medical coding services. It needs employees to do that. So it cannot engage in medical coding business. It provides that service, but Rema doesn't. She's not in the business of providing medical coding services. She's an employee. She doesn't pay Social Security self-employment tax. She doesn't have an EIN number. She doesn't have anything that a business would have. She is an employee of DT-Trak and she's now an employee of San Carlos.

More importantly, San Carlos is not -- you can't bootstrap San Carlos into, say, well, they're the competing business. They are the business that engages in the same business as DT-Trak. And they're using Rema to compete with San Carlos. That is not true factually.

DT-Trak engages in providing third -- services to third parties. San Carlos is a medical hospital that operates a clinic as well. They are not in the business of providing medical coding services to anyone. They do it in-house. They are not a business in the sense that they are not a private

contractor. Rema works for them. She doesn't provide services to anyone else that would be competitive in any respect with DT-Trak.

Mr. Morehead -- Mr. Morehouse (sic) said that you can't focus on the competing aspect of the contract. You must focus on what Rema does. That's also contrary to what Judge Sogn used for analysis in his decision on the difference in the dichotomy of the two statutes that I referred to.

Judge Sogn clearly indicated that in order to analyze a non-compete, you must look at the detriments that you're trying to prohibit to one or the other of the employers or the companies that are supposed by competing with each other. You look at your revenue. What did they lose in revenue? What did DT-Trak lose in revenue by virtue of Rema going to work for San Carlos? Zero. Not a dime.

Because Kathy Andersen verified -- and it's undisputed -- and DT-Trak staff admitted there was no contract with San Carlos when Rema hired on with them. They did not have a contract. San Carlos does not have a contract for services to be provided by the plaintiff at the time Rema hired on with them.

In fact, when Rema did her interview, they had already made the decision that they were no longer going to use the plaintiff for services at all.

Kathy Andersen identified that in her affidavit. She

clearly said that there was no contract in place. And they did not intend to use DT-Trak in the future.

Since they did not intend to use DT-Trak in the future, from the examination required by the South Dakota Supreme
Court of the contract, and what was intended by the parties when they signed the contract, in order to look at the whole of the contract and it's purpose and intent by using the analysis of statutory -- or the contractual interpretation, looking at all the provisions together, not one to the extent -- to the segregation of others, it was clear DT-Trak is trying to protect a competitor. They are trying to keep their employees from competing with them by establishing a business, whether it's a sole proprietorship, an individual, whether it's a corporation, whether it's an LLC, whether it's for -- whether they establish a partnership, they're trying to keep them from engaging in that business of providing medical coding services through -- to other third party individuals.

Their intent was not to keep employees from working for other medical providers, hospitals, clinics. They are not competitors. If they say it was, then they're clearly overreaching and they're violating the law.

Now, Mr. Morehead has argued that the exception, the Zakinski case applies because he says that if an employee leaves employment voluntarily, then they relinquish and can no longer challenge the covenant not to compete on the basis of

reasonableness. That is not true. It's not what the law provides.

The law provides that when you basically establishes a three-part test under the Agreva, A-G-R -- A-G-R-E-V-A, in the Agreva test that says that in order to determine if the contract is an unlawful restraint of trade, you first have to determine whether a trade or profession is involved. We clearly have a profession involved.

Is there a material restraint? Absolutely. They're trying to keep her from working for anyone in the medical industry.

And whether the third exception -- or the third factor is whether statutory exceptions apply. Here, they're arguing that 53-9-11 applies. But it doesn't. And that's how we get to the statutory exceptions and that's how we get to the examination of the contract and geographical limitations.

It's very -- you have to sit back and gather it in and take a minute and say wait a minute. If their geographical limitation is the entire United States, Alaska and Hawaii, where can can she work? She can't. She can't work anywhere. If it's only IHS, well, there are, his in practically every state. If it's only customers that DT has had, well, they got 30 different states that they have been in. Where is she going to work?

There is only a certain amount of places that she can

provide this work. And the law does not permit that. The law says — and this is why the law says what it says — says that when you're dealing with restraining the profession of an employee, you are to narrowly construe that exception. You're to narrowly construe the laws or the contracts that seek to do that.

And the reason is because the public policy behind the exceptions — or the public policy behind restraining an employee is we don't want to take them out off the market. The Supreme Court is not advocating taking employees out of the market. What they're advocating is if you're going to do it, you have to be very circumspect and very limited in the manner in which you try to accomplish.

So because you have to be limited, and because you have to be very narrow in applying the law, you err to the favor of the employee. And when you err to the favor of the employee, you look at Exhibit A, which is attached to my affidavit. And the business or business of the employer meets professional medical coding, data entry, etc., related to activities for health care service providers — used in the plural — health care service providers, including but not limited to the following. And it identifies every possible health care service you can think of, short of the actual medical services. It's overly broad.

And then we look at the business area. I've already

addressed that.

And then we look at the competing business. That means any individual, corporation, partnership, etc., or other entity or organization other than the employer, that engages or proposed to engage in the business of the employer. It goes back to what the business of the employer is. The business of the employer, since it's a corporation, is providing services to third parties.

Rema is not doing that. She is not engaging in the services of the business of the employer. She has no intentions of providing services to third parties. She makes a wage. She's providing services to San Carlos.

Before she hired on, she specifically said do you have a contract with DT-Trak? And they said no. She went the extra yard to find out if there was any potential or possibility that she was violating the contract that she thought applied to her. And in her mind and her circumstances, she looked at it and said no, because I'm not providing services to third parties. I'm doing it in-house.

If the plaintiff wants the Court to blue pencil this contract and make it only to the area of Arizona, that's just a unilateral decision to keep Rema from working. Why not make it Utah? Why Arizona? Why not make it Colorado? Why does it have to be Arizona? Because the next lawsuit is going to be we got an employee in Utah. We need you to make the service

area Utah.

They can't make it after the fact, be where Rema is employed. It's not what the law permits. It has to be the time the contract was entered into. What does the contract provide? It did not provide another service area.

If it doesn't provide an other specified areas. If the account doesn't provide another specified area, and the Court wants to generally create one, then it has to be in some area that is generally accepted under the terms of the contract.

Not specific to keep Rema from working. That's inappropriate.

And if that's the circumstance, then they can't do it because in this electronic age you can provide services from Lake Andes, South Dakota to somebody in California. I can provide legal services over the phone by the internet.

How are we going to decide? Do we make it where the services are provided or do we make it where the employee is located? What's the criteria to narrow that area so that it's a specific area? What's the standard?

We don't have anything and the plaintiff hasn't proposed anything. They just say make it Arizona because that's where Rema is and we want to win the lawsuit. That's all that is.

They don't have a contract with Arizona, with the San Carlos, so how can they make it Arizona? If they want to make it Arizona, exclude San Carlos because San Carlos is not a contractor who provides services to third parties. They are a

hospital.

And it's undisputed that DT-Trak is not a hospital. They are not clinic and it's undisputed they don't treat patients. San Carlos does all three of those. And they don't provide coding services or any other medical services to third parties. They absolutely do not under any stretch of the imagination. No matter how the plaintiff wants to argue, they cannot fit San Carlos into the shoes of a competitor of DT-Trak. It's impossible.

And when you look at all of these things, Your Honor, and when we look at this contract as a whole and not piecemeal it, and give meaning to words in the contract that don't exist because it fits our scenario, then we look at the contract very simply. Business of the employer, it's in the business of providing third -- medical services to third parties. Remais not.

Their business area is overly broad. And they directly address competing businesses. You can't say we want to keep our employees from working for competing businesses and but say competing businesses includes employees. It's completely diametrically opposed. You can't do it because an employee is not a business.

There's no statute. There's no law. And they have cited none that says an employee is a business. They are not.

And when they use the word competing business in the

contract they draw up, then that means a competing business.

And Rema is not engaged in a competing business. Neither is

San Carlos.

So under circumstances they cannot get the relief that they seek.

Not only is the plaintiff seeking to keep Rema from working for past customers or current customers, they also are seeking to keep her from working from any potential customers.

Further exacerbated and exhibits and exemplifies the overreaching on DT-Trak.

How can you retrain a person from working for a medical service provider when you don't even know if DT-Trak is going to have a contract with them in the future. They want to restrain her from working with potential customers. She doesn't know who they are. It's completely unenforceable. It's unfathomable how that could absolutely fall under the terms of the contract.

You can't restrain somebody from doing something that they don't know what it is that could possibly violate the contract. Rema did what was appropriate.

Does DT have a contract with San Carlos? No, they don't.

I'm doing medical coding services -- by the way, Kathy
Andersen said they had to retrain her because -- so DT-Trak
trained her in the medical coding basics, which is not a trade
secret. Anybody can get that training. Once she got to San

Carlos they basically threw away what DT-Trak taught her and retrained her on their system. They are processes. If San Carlos has systems and processes, they differ from DT-Trak, it clearly cannot be a competing business. It can't be the same business as Judge Sogn looked at in the Farmers Business
Network case. They cannot be under any circumstances, the same business.

With that, Your Honor, I think it's clear from the account looking at it as a whole, that DT-Trak is trying to protect their employees from starting a business to compete with them. And they were not directed that as employees.

The fact that employees went and worked for somebody else is like taking a kid who bags groceries for KMart and saying you can't work for another grocery store or any store because you bagged groceries once for us so you're prohibited under your non-compete agreement from working ever again in the grocery business. It's just overly broad.

And for that reason, it should be rendered null and void and Rema should be -- all the claims by the plaintiff should be dismissed.

THE COURT: Do you want to address your motion for summary judgment?

MR. WHALEN: I think I make the same arguments for my motion. Quite frankly, it's the same argument.

THE COURT: Okay. Thank you.

Response?

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MR. MOREHEAD: Thank you, Your Honor.

May it please the Court. To address Mr. Whalen -- Miss Kolda's argument on the trade secret issue. I do want to address that.

I believe -- again, I don't believe the Court needs to reach that if it grants the summary judgment in favor of DT-Trak that it's seeking because DT-Trak isn't seeking additional relief under those claims.

But if the Court would reject DT-Trak's claims under count two, then under counts one and four, DT-Trak still has claims. We've identified for the record and with testimony both from depositions and interrogatory answers what confidential information DT-Trak purports to have, including providing examples of it.

We also briefed the Court on the issue of inevitable disclosure that when a person like Miss Kolda goes to work for the very same client that she, in fact -- DT-Trak was providing services to in the past, it's inevitable that an employee is going to use that information and knowledge that they have.

But more importantly, on the non-compete issue, Your Honor, any person that signs a non-compete and faces a former employer that wants to enforce it, can make the exact same argument that Mr. Whalen is making today. Mr. Whalen and his

client's issue is not with DT-Trak, it's with the South Dakota legislature. The South Dakota legislature has said SDCL 53-9-11, an employer may have a provision and an employment agreement that says employee, you will not directly or indirectly engage in the same business or profession as that of us, of DT-Trak.

The words third parties only doesn't appear anywhere in the statute. The words third parties only doesn't appear in anywhere in the contract. In fact, the contract speaks about the fact that Miss Kolda will not in any capacity, including as an individual, engage in DT-Trak's business. And what's DT-Trak business? It's spelled out in the contract. DT-Trak is in the business of providing various services, including medical coding services, to medical providers.

Miss Kolda today, as an individual, is engaged in that business. She is engaged in that business. And there's nothing about the statute or the contract that contains the additional language Miss Kolda would like to appear there. It doesn't say anything about it has to be for a third party. It's not there.

So when we speak about applying the meaning of the contract, and what the parties intended under South Dakota case law, it isn't this must be it. This must be what people were talking about. Under South Dakota Law, we read and employ only the language of the contract. There's no

allegation this contract is ambiguous. Instead Miss Kolda doesn't like the agreement she made.

The other argument that I keep hearing repeatedly, both in briefing and today. DT-Trak doesn't want to let Miss Kolda work in her profession. They never want to let her work again. It's not true.

We know we can only enforce this contract for two years.

That's all we're asking for.

Incidentally, had Miss Kolda complied with the agreement, those two years would be over by now.

So the reason we're talking about her facing another two years, as the case law we've cited says is appropriate, had she simply abided by the agreement she signed, she would not be in this predicament. It's a situation of her choosing.

Regarding the objection to limiting it to San Carlos, it's interesting. That's actually DT-Trak doing the opposite of being overbearing and overreaching and saying please enter an injunction saying she can't work for San Carlos any more and have it last for two years.

As for the argument that that's not possible, we've cited multiple cases that say that's exactly what courts in South Dakota are supposed to do. If there's a perception in summary judgment that there should be some narrowing, that's what the Court is suppose.

As for the esoteric abstract questions Mr. Whalen has,

there's no dispute about what states DT-Trak continues to do business in. So there's no problem where Miss Kolda doesn't know where that is.

THE COURT: Didn't you say though -- somebody said they do business in up to 30 states?

MR. MOREHEAD: That's correct.

THE COURT: So you would like me, this Court, to enter an injunction that she can't compete with them by doing what she's doing in 30 states?

MR. MOREHEAD: That's not what we're the Court to do.
We're asking the Court to simply say there's no dispute that
the agreement geographically is appropriate in this instance
because DT-Trak did business there with that very clients and
is still doing business in Arizona. Not disputed.

We appreciate the fact that Miss Kolda could go to work a year and a half from now and there could be a different set of facts. We're not asking the Court to prospectively predict what that situation would be.

THE COURT: Okay.

MR. MOREHEAD: Finally, regarding the harm that's spoken of when we talk about an injunction, a permanent injunction, Miss Kolda wants to limit the potential harm to did you lose a contract or not.

Well, we know from the case law and from the facts that haven't been disputed DT-Trak isn't just worried about losing

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non-compete in that case?

business. They're faced with potentially losing employees to these entities like San Carlos that hires them away. And it's reasonable for DT-Trak to protect its business in that situation as well. Otherwise it could potentially face the process of the hiring now and retraining new employees on the issue of irreparable harm. So in conclusion, Your Honor, DT-Trak is simply asking the Court to enforce the agreement Rema Kolda signed. And enforce it for the period of time that she signed. And enforce it with regard to an entity that undisputedly was within the geographic area that's covered by the employment agreement. Thank you, Your Honor. MR. WHALEN: If I may, Your Honor? THE COURT: You may. I'm going to have a question for you first, Mr. Whalen. And I'm going change gears just a little bit. If we have a physical therapy company that hires people, trains them for physical therapy, and then that physical therapist -- and they had a contract, say, with a hospital to provide physical therapy. If that hospital then hires away the employee that does the physical therapy for the physical therapy company, they're working now for the hospital. Are you saying that that, that contract doesn't apply in

MR. WHALEN: If there was a non-compete -- that the physical therapist signed a non-compete?

THE COURT: Right.

MR. WHALEN: In that circumstance, number one, it's a licensed operator. So he's going to be governed by a different set of circumstances.

Number two, it depends on what the services are. If the physical therapist was hired at the physical therapy facility, let's say he was there and all he did was bring people in and do an initial examination and did no physical therapy because he doesn't have the experience. If he goes to a hospital, they cannot prohibit him from working as a physical therapist because he didn't engage in that business. He was an employee.

THE COURT: Okay.

MR. WHALEN: Similar circumstances along that line -- and this may enlighten the Court of where my answer is coming from. If we look at Exhibit A, which is the contract, if we look at paragraph 1.1 -- I'm not going to read it all. I'm just going to direct the Court's attention to it -- you're going to want to read 1.1; and then you're going to want to read very carefully by 1.2; and then you're going to want to read very carefully 1.3 because these are the three provisions Mr. Morehead and I have argued about.

Nowhere in any one of those provisions is the word

employee. Nowhere does any of those provisions say that Rema Kolda can't work as an employee. Absolutely not in there.

Now, what's interesting is when they define things under 1.1, they said they identified professional services and they referred as they said before to health care service providers. In 1.2 they identified the geographical area. And in 1.3 they were very detailed and very specific instead of saying employee, they said an individual. Very first reference. Competing business shall mean any individual, corporation, partnership, etc., nowhere in that paragraph does it say employee.

Well, it's clear by -- it doesn't say employee because they never intended to keep employees from DT-Trak to going and doing work that -- for another hospital doing medical coding. They wanted to keep them from opening up a competing business against DT-Trak because an individual, as we know, can operate if they're operating as -- just Rema Kolda, she operates as a sole proprietor.

So there's no reason to include employee because employee wasn't contemplated by the contract and the parties. It meant individuals who are sole proprietors, corporations, partnerships, limited partnerships, limited liability companies, associations, trusts, institutions, foundations, pool, plan or other entity -- not employee -- or organization that engages or proposed to engage in the business -- not the

services -- the business of the employer.

Now, Mr. Morehead wants to make a distinction between individual or the individual means an employee, but when it comes to business and services, he wants to use them separate and distinct — or interchangeably, I should say. He wants to use them interchangeably. He wants to say business is a service. That's his argument, but that isn't how the contract is written.

The contract clearly addresses business or business of employer. It doesn't say service or services and business of employer. And again, that argument is bolstered by the fact the heading of 1.3 is competing business, not services. And it directly starts with individuals, not employees.

To me, Your Honor, that is very clear from the plain language of the contract that employees were not to be included because they never intended.

Now, after the fact, when their employees are leaving and going to work for hospitals, they're mad. But that doesn't give them the right to unilaterally change the intent of the contract. And all of a sudden they said the contract means something that it didn't mean when it was signed by the parties.

So if you mean employee, and you are using language that's all encompassing, I think you better say employees because if you didn't, it's clear you never intended to

include that in the contract.

Now, Mr. Morehead indicates that could there possibly be another set of circumstances or a different set of facts that might bring Rema back into this Court if she were to work for another facility in Utah or Colorado or some other place. She's a medical coder. There are no set of facts that can avoid the DT-Trak from seeing her again. Absolutely not.

DT-Trak has made it very clear in it's pleadings and the arguments, they're mad at losing employees. I understand that, but that isn't what their contract gives them a right to do, to sue those employees for leaving. If you're mad at it, change your contract. It's not a legislative problem. It's your own contract. Change your terms of your contract. Put the word employee in it. Simple fix.

Or sue San Carlos or sue the people that are supposedly taking your employees. They are not suing them because they can't prove what they think is happening. And all of their argument in their brief, if you will note, it centers around and they make repeated references to they're losing other employees, the other employers are taking their employees.

They are not taking them. They are leaving because they don't want to work at DT-Trak and they are looking for other work in their profession.

So if you really wanted to limit Rema from working with another hospital, or not even another but a hospital, then you

should have said employee. You didn't.

And again, that fits into the niche of the narrow construction that is required by the statute, by the case law that clearly says that we're not going to put those employees through the ringer every time they want to try to go and work at another business that is the same, not similar, but same business as that of their employer.

And the McKie Ford Lincoln case is very clear on that,
2018 SD 14. And it's very, very clear. The law is undisputed
that it is unlawful to restrain the exercise of a lawful
profession. And any contract to that extent is void, unless
it fits with one of the exceptions or one of the niches that
have been carved out by the statutory exceptions.

And DT-Trak cannot simply meet -- they cannot meet those exceptions.

When you narrowly construe the contract, as the Court requires -- as the law requires, you can't just lump Rema in -- throw her in when they didn't put the word employee in there.

THE COURT: Would you like to respond?

MR. MOREHEAD: Your Honor, we're arguing about the words at this point. I run the risk and don't want anybody to say we're creating an issue of fact. I'm going to limit it to the words of the contract.

Again, I keep hearing Miss Kolda and her counsel talk

1 about words that either should or ought to be there, but the 2 word individual isn't listed as individual. It's a business. 3 It's part of a long list. 4 Is Miss Kolda an individual? Yes, she is. Is she 5 engaged in the same thing that DT-Trak engaged in? Yes, she did. 6 7 We are at a point where Miss Kolda is arguing that the 8 business of the employer should not properly be analyzed with 9 references to the services that the employer provides. 10 the argument. 11 Well, I'm sorry, but the contract says what the business 12 of employer is. And it's the services. 13 Under Mr. Whalen's formulation of the issue, if Miss 14 Kolda went to work as an employee for a company just like 15 DT-Trak, the absurd result would be that it wouldn't cover. 16 That's not what the parties intended. 17 What the parties intended is what the words say. And 18 that's what the word say. 19 We'd ask the Court to enforce. 20 THE COURT: Thank you. 21 I've reviewed the motions, the briefs by both parties. 22 listened to argument. At this time, I'm going to deny the defendant's motion --23 sorry, I'm going to deny the motion for summary judgment on 24

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both sides.

I think there is enough information here to turn this to a jury; therefore, I'm denying both sets of motions.

We have a pretrial motions will be due by June 18th, which is only four days to file motions in limine and any other pretrial motions.

We have a pretrial conference scheduled for June 30th at 3:00 p.m. And then I believe the trial is to begin August 18th and we have that set for three days.

MR. MOREHEAD: I believe so.

THE COURT: Does the parties believe we can get it tried in three days?

MR. MOREHEAD: Your Honor, could I visit with the Court briefly about the schedule in light of what's -- I'll have a request at the end. And that will be my client would want to know what the issues of fact are that we need to try on everything.

And the second part would be the Court's noted that we have deadlines coming up briefly. I haven't talked to my client, my sense is my client may want to appeal the legal issue that the Court's ruled on.

Maybe I should talk to her about that.

I guess I would welcome the Court's direction on that.

If I send the signal that we're looking at appealing, that the denial of a request for an injunction, which I think is appealable of rights. It might be more efficient again with

all due respect -- I understand the Court's ruled the way it has, but with all due respect, we're probably looking at appeal.

The question I have is whether it will be more efficient to do that first as opposed to try it and then have that legal issue come all the way back potentially.

THE COURT: So you're looking at possibly an intermediate appeal on that issue?

MR. MOREHEAD: Just on the issue of count two.

THE COURT: Right.

MR. WHALEN: If I may, Your Honor?

I'm completely flexible on this schedule. I have no problems if we want -- if there's a motion in limine, I know what the issue are. And I think between counsel, we know if we're going to have issues on evidence and what we need to keep out.

So as far as filing deadline of June 18th, I don't have any problems. We have a pretrial on June 30th. If he wants to take until June 20th, as long as the Court's okay -- and Mr. Morehead has not given me any trouble about any deadlines or late filings or anything. We've been very good with each other. I'm not worried about that.

If there's some issue that we got to get before you so we don't have any error at trial, I think both parties are good with that.

THE COURT: I would agree with that. I'd rather -- any issues be settled before trial, rather than so I'm going to give you an opportunity to speak to your client on how she would like to proceed. And obviously with your advice.

And then -- so I'm not going -- I guess at this time I'm not going to hold the parties with what I'm hearing is they are both agreeing that pretrial motions be filed by the 18th. Is only four days. And there might be some decision-making to do before that. So I'm not going to hold the parties to that deadline.

We do have a pretrial conference for June 30th. And that's still a month and a half away from trial at that time. I think we could have that pretrial conference. And if we need to set another date for something to be heard on a motion in limine or that kind of thing, we can do that at that time.

MR. WHALEN: I'm fine with that.

THE COURT: That will give you plenty of time, Mr.

Morehead, to speak to your client and decide what you're going to do.

MR. MOREHEAD: May I?

THE COURT: Absolutely.

MR. MOREHEAD: In that regard, Your Honor, is that something where if my client would decide, hey, we would like to explore the possibility of petitioning, we'll have to look at whether it's of right or intermediate, that legal issue, is

that something we should bring to the Court by a motion or something we should talk about and bring by an e-mail? What would you prefer?

THE COURT: I think the two of you should discuss that.

And if you agree that this would be the type of route you want to go, I would just as soon that decision is made before we go to trial. Whether it would be by the Supreme Court, if they are going to take it up, because they could deny your request for the intermediate appeal. And if they do, then we could try and whatever happens happens.

But at least we will give you two time to talk regarding whatever you're going to do. And then if it's going to be appealed in the meantime, allow that to happen. Let the Supreme Court decide if they are going to take it up.

I have another one that's going the same thing at this time.

That will make our -- it will make our lives a lot easier then. Rather than try it, come back at a later date and retry it again if they decide otherwise.

MR. WHALEN: I think counsel can e-mail and visit and include you when we kind of resolve our preliminary discussions.

MR. MOREHEAD: I'm comfortable with that, Your Honor.

THE COURT: I agree.

Okay. Anything further?

1	MR. MOREHEAD: Yes, I would for the record just like to
2	know what the issues are so that I can have those
3	conversations with Mr. Whalen about what the Court is setting
4	forth as the issues of fact that remain for trial.
5	THE COURT: I think you guys can discuss that. And if
6	you have need some direction after you've discussed it, I can
7	give that at a later time.
8	Thank you.
9	(Whereupon, the proceedings adjourned at 4:05 p.m.)
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1	STATE OF SOUTH DAKOTA) : SS CERTIFICATE
2	COUNTY OF BEADLE)
3	
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5	I, the undersigned, a Notary Public and Registered
6	Shorthand Reporter of the State of South Dakota, do hereby
7	certify that I acted as the Official Court Reporter at the
8	hearing in the above-entitled matter at the time and place
9	indicated.
10	That I took in shorthand all of the proceedings had at
11	the said time and place and that said shorthand notes were
12	reduced to typewriting, and that the foregoing typewritten
13	pages are a full and complete transcript of the shorthand
14	notes so taken.
15	WITNESS MY HAND AND SEAL THIS DAY of November,
16	2021.
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19	Warre H-Farrett
20	Marie H. Fawcett Official Court Reporter
21	Third Judicial Circuit
22	¥
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South Dakota Codified Laws

Title 53. Contracts

Chapter 53-9. Unlawful Contracts (Refs & Annos)

SDCL § 53-9-8

53-9-8. Contracts in restraint of trade void--Exceptions

Currentness

Any contract restraining exercise of a lawful profession, trade, or business is void to that extent, except as provided by §§ 53-9-9 to 53-9-12, inclusive.

Credits

Source: CivC 1877, § 959; CL 1887, § 3583; RCivC 1903, § 1277; RC 1919, § 898; SDC 1939, § 10.0706; SL 2005, ch 254, § 1.

Notes of Decisions (30)

S D C L \S 53-9-8, SD ST \S 53-9-8

Current through 2021 1st Special Session, Exec. Order 2021-05 and Supreme Court Rule 21-12

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53-9-9. Sale of good will--Seller's agreement with buyer to refrain..., SD ST § 53-9-9

South Dakota Codified Laws

Title 53. Contracts

Chapter 53-9. Unlawful Contracts (Refs & Annos)

SDCL § 53-9-9

53-9-9. Sale of good will--Seller's agreement with buyer to refrain from carrying on similar business--Validity

Currentness

Any person who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or other specified area, as long as the buyer or person deriving title to the good will from the seller carries on a like business within the specified geographical area.

Credits

Source: SDC 1939, § 10.0706 (1); SL 1992, ch 60, § 2; SL 1997, ch 274, § 1.

Notes of Decisions (22)

S D C L § 53-9-9, SD ST § 53-9-9

Current through 2021 1st Special Session, Exec. Order 2021-05 and Supreme Court Rule 21-12

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South Dakota Codified Laws

Title 53. Contracts

Chapter 53-9. Unlawful Contracts (Refs & Annos)

SDCL § 53-9-11

53-9-11. Employment contract--Limitation on competition

Effective: July 1, 2021

Currentness

Except as otherwise provided in § 53-9-11.1, an employee may agree with an employer at the time of employment or at any time during employment not to engage directly or indirectly in the same business or profession as that of the employer for any period not exceeding two years from the date of termination of the agreement and not to solicit existing customers of the employer within a specified county, first- or second-class municipality, or other specified area for any period not exceeding two years from the date of termination of the agreement, if the employer continues to carry on a like business therein.

Credits

Source: SL 1929, ch 88; SDC 1939, § 10.0706 (3); SL 1984, ch 318; SL 2021, ch 205, § 1.

Notes of Decisions (60)

S D C L § 53-9-11, SD ST § 53-9-11

Current through 2021 1st Special Session, Exec. Order 2021-05 and Supreme Court Rule 21-12

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APPELLEE'S BRIEF

DT-TRAK CONSULTING, INC.,
 Plaintiff/Appellant,

vs.

REMA KOLDA,
Defendant/Appellee.

DOCKET #29726

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
HAND COUNTY, SOUTH DAKOTA

HONORABLE KENT A. SHELTON Presiding Circuit Judge

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ORDER GRANTING PETITION FOR ALLOWANCE OF APPEAL FROM INTERMEDIATE ORDER FILED AUGUST 20, 2021

TABLE OF CONTENTS

	<u>Page</u>
Table of Cases and Authorities	ii
Preliminary Statement	1
Jurisdictional Statement	2
Statement of the Legal Issue	2
Statement of the Case	3
Statement of the Facts	4
Argument	4
A. Standard of Review and Standard for Summary Judgment	4
ISSUE 1: Did the Circuit Court err in failing to find as a matter of law that the noncompete provision of a Non-Compete, Non-solicitation, Confidentiality, Non-Disclosure, and Non-Use Agreement ("Employment Agreement") between DT-Trak and Kolda barred Kolda's Employment with Kolda's current employer, San Carlos Apache Healthcare Corporation ("San Carlos") for a period of two years after entry of an injunction to that effect?	4
B. Interpretation of the Agreement	5
1. Governing Law	5
2. Language of the Agreement	7
3. Blue-penciling the Geographical Limitations	12
C. Injunctive Relief and Damages	14
1. Damage, Irreparable Harm, and Inadequate Remedy	16
2. Rema did not act in Bad Faith	18
3. Balancing the Equities	19
Conclusion	19
Request for Oral Argument	20
Certificate of Compliance	20
Certificate of Service	20

TABLE OF CASES AND AUTHORITIES

so	OUTH DAKOTA SUPREME COURT CASES:	<u>Page</u>
1.	Aqreva, LLC v. Eide Bailly, LLP, 2020 S.D. 59, 950 N.W.2d 774	2,6
2.	Buisker v. Thuringer, 2002 S.D. 81, 648 N.W.2d 817	9
3.	Communications Tech. Sys., Inc. v. Densmore, 1998 S.D. 87, 583 N.W.2d 125	19
2.	Franklin v. Forever Venture, Inc., 2005 S.D. 53, 696 N.W.2d 545	12,13
8.	Lindskov v. Lindskov, 2011 S.D. 34, 800 N.W.2d 715	19
7.	McDowell v. Sapienza, 2018 S.D. 1, 906 N.W.2d 399	16
10.	Mckie Ford Lincoln, Inc. v. Scott Hanna & Gateway Auto., LLC, 2018 S.D. 14, 907 N.W.2d 795	2,6,10
11.	Poeppel v. Lester, 2013 S.D. 17, 827 N.W.2d 580	2,5,6,7
12.	Raven Industries, Inc. v. Lee, 2010 S.D. 49, 783 N.W.2d 844	15
12.	Simpson v. C& R Supply, Inc., 1999 S.D. 117, 598 N.W.2d 914	12,13
12.	Spiska Engineering, Inc. v. SPM Thermo-Shield, Inc., 2004 S.D. 44, 678 N.W.2d 904	18
12.	Wyman v. Bruckner, 2018 S.D. 17, ¶9, 908 N.W. 2d 170	4
13.	Ziegler Furniture & Funeral Home, Inc. v. Cicmanec, 2006 S.D. 6, 709 N.W.2d 350	2,6,7
ST	ATE STATUTES:	
1.	SDCL 21-8-14	3,15
2.	SDCL 53-9-8	3,6
3.	SDCL 53-9-11	3,6,12

PRELIMINARY STATEMENT

This Court granted cross petitions seeking intermediate appeals filed by the parties hereto and entered independent orders, each of which are entitled "Order Granting Petition for Allowance of Appeal from Intermediate Order", on August 20, 2021, in each appellate case. This Court also entered its Order Consolidating Appeals on August 20, 2021. Appellee/Appellant Rema Kolda (Rema), timely filed and served the Appellant's Brief in Appellate Docket #29725 and said brief advances arguments which are relevant herein and rebut the arguments made by Appellant/Appellee DT-Trak Consulting, Inc. (DT-Trak) in its Appellant's Brief in this appeal. Consequently, Rema will not restate in full the arguments made in the Appellant's Brief in Appellate Docket #29725, but will only submit additional arguments in response to the Appellant's Brief herein. Further, Rema hereby incorporates by reference the entirety of the Appellant's Brief in Appellate Docket #29725 in support of her arguments in the Appellee's Brief in this case. Appropriate notations of the specific incorporation of the Appellant's Brief in Appellate Docket #29725 will be made throughout this brief when necessary.

As in the Appellant's Brief in Appellate Docket #29725, the Appellee/Appellant Rema Kolda shall be referred to herein as "Rema." The Appellant/Appellee DT-Trak Consulting, Inc. shall be referred to herein as "DT-Trak." References to the Register of Actions shall be by "RA" followed by the title of the document, if applicable, and the page number thereof. References to the deposition exhibits shall be by "Depo. Exh." followed by the exhibit number or letter. Since there was no trial in this matter, references to the record to support factual matters shall be to the depositions, affidavits, other discovery, and pleadings. The deposition excerpts and other discovery supporting the record are found in the Affidavit of Timothy R. Whalen and the Second Affidavit of

Timothy R. Whalen, both of which are filed of record herein. *RA*, *pp.* 210, 392.

Additional deposition excerpts, if any, are contained in the Appendix to the Appellant's Brief in Appellate Docket #29725. References to the depositions shall be by the identity of the party deposed followed by "Depo." and the page numbers of the deposition.

References to DT-Trak's Complaint shall be by "Comp." followed by the paragraph number, references to Rema's Answer and Counterclaim shall be by "Ans." followed by the paragraph number, and References to DT-Trak's Reply to Counterclaim shall be by "Reply" followed by the paragraph number. References to the affidavits filed in the summary judgment proceeding shall be by "Affidavit" followed by the identity of the party making the affidavit, and the paragraph number of the affidavit.

JURISDICTIONAL STATEMENT

Rema hereby incorporates by reference the entirety of the Jurisdictional Statement set forth in the Appellant's Brief in Appellate Docket #29725.

STATEMENT OF THE LEGAL ISSUE

ISSUE 1: DID THE CIRCUIT COURT ERR IN FAILING TO FIND AS A MATTER OF LAW THAT THE NONCOMPETE PROVISION OF A NONCOMPETE, NON-SOLICITATION, CONFIDENTIALITY, NON-DISCLOSRRE, AND NON-USE AGREEMENT ("EMPLOYMENT AGREEMENT") BETWEEN DT-TRAK AND KOLDA BARRED KOLDA'S EMPLOYMENT WITH KOLDA'S CURRENT EMPLOYER, SAN CARLOS APACHE HEALTHCARE CORPORATION ("SAN CARLOS") FOR A PERIOD OF TWO YEARS AFTER ENTRY OF AN INJUNCTION TO THAT EFFECT?

Trial court holding: No.

Relevant court cases as to this brief:

- 1. Agreva, LLC v. Eide Bailly, LLP, 2020 S.D. 59, 950 N.W.2d 774
- 2. Poeppel v. Lester, 2013 S.D. 17, 827 N.W.2d 580
- 3. Ziegler Furniture & Funeral Home, Inc., v. Cicmanec, 2006 S.D. 6, 709 N.W.2d 350
- 4. Mckie Ford Lincoln, Inc. v. Scott Hanna & Gateway Auto., LLC, 2018 S.D. 14, 907 N.W.2d 795.

Relevant statutes or authority:

- 1. SDCL 21-8-14
- 2. SDCL 53-9-8
- 3. SDCL 53-9-11

STATEMENT OF THE CASE

Rema hereby incorporates by reference the entirety of the Statement of the Case set forth in the Appellant's Brief in Appellate Docket #29725. As applicable to this appeal, DT-Trak moved for partial summary judgment on Count II of its complaint only, seeking a judicial determination that Rema was prohibited from working for San Carlos Apache Healthcare Corporation (San Carlos) or any other "competing business" as defined by the Non-Compete, Non-Solicitation, Confidentiality, Non-Disclosure, and Non-Use Agreement (Agreement) and for damages for the alleged breach of the non-compete covenant. RA, p. 71. Rema resisted DT-Trak's partial motion for summary judgment, and moved for summary judgment on all of DT-Trak's claims. RA, p. 202. Both parties assert that the determination of the motions for summary judgment will fully adjudicate the claims herein, with the exception of Rema's barratry claim which was not part of any of the summary judgment proceedings. RA, p. 21. The trial court heard the motions for summary judgment and denied both parties' motions and entered its order accordingly. RA, p. 657. After cross petitions for intermediate appeal were made by the parties, this Court granted same and entered its Order Granting Petition for Allowance of Appeal from Intermediate Order on both petitions on August 20, 2021. RA, pp. 669, 671. DT-Trak appeals the trial court order denying summary judgment on its motion for partial summary judgment as to Count II of its Complaint. Rema, in the companion case to this matter (Appellate Docket #29725), appealed the denial of her motion for summary judgment.

STATEMENT OF THE FACTS

The majority of the material facts in this case are undisputed; however, DT-Trak asserts in the Statement of Facts portion of its brief certain facts that are not accurate or which are disputed by Rema. Rema, however, verily believes that the inaccuracies or disputed facts are not significant to the resolution of the issue on appeal herein.

Consequently, Rema hereby incorporates by reference the entirety of the Statement of Facts set forth in the Appellant's Brief in Appellate Docket #29725.

ARGUMENT

A. Standard of Review and Standard for Summary Judgment.

Rema fully addressed the "Standard of Review" and the "Standard for Summary Judgment" in the Appellant's Brief in Appellate Docket #29725 filed in the companion case hereto. Consequently, Rema hereby incorporates by reference the entirety of the "Standard of Review" and "Standard for Summary Judgment" argument set forth in the Appellant's Brief in Appellate Docket #29725.

ISSUE 1: DID THE CIRCUIT COURT ERR IN FAILING TO FIND AS A MATTER OF LAW THAT THE NONCOMPETE PROVISION OF A NONCOMPETE, NON-SOLICITATION, CONFIDENTIALITY, NON-DISCLOSRRE, AND NON-USE AGREEMENT ("EMPLOIYMENT AGREEMENT") BETWEEN DT-TRAK AND KOLDA BARRED KOLDA'S EMPLOYMENT WITH KOLDA'S CURRENT EMPLOYER, SAN CARLOS APACHE HEALTHCARE CORPORATION ("SAN CARLOS") FOR A PERIOD OF TWO YEARS AFTER ENTRY OF AN INJUNCTION TO THAT EFFECT?

This case centers on the interpretation of the Agreement executed by Rema while she was working for DT-Trak. *Depo. Exh. A and #23*. The law is well settled that cases which involve "... the interpretation of written documents are particularly appropriate for disposition by summary judgment, such interpretation being a legal issue rather than a factual one." (Citations omitted). *Wyman v. Bruckner*, 2018 S.D. 17, ¶9, 908 N.W. 2d

170. This legal principle applies to the case at bar and the trial court was correct in denying DT-Trak's motion for summary judgment; however, the trial court should have granted Rema's motion for summary judgment.

DT-Trak argues that the Agreement is enforceable in all respects as written or as may have been "blue-penciled" by the trial court. This argument is meritless, unsupported by the undisputed facts and the law, and the trial court was correct in denying DT-Trak's motion for summary judgment.

B. Interpretation of the Agreement.

Rema hereby incorporates all arguments set forth in the Appellant's Brief in Appellate Docket #29725 in support of her arguments herein. Further, Rema argues that DT-Trak misinterprets the contractual language, misconstrues the facts, and misapprehends the law governing contracts. DT-Trak asserts that Rema, as an employee, is engaging in a competing business with it and the geographical limitation in the Agreement is appropriately restrictive under the governing statutes. DT-Trak's arguments are meritless.

1. Governing Law.

In support of its argument, DT-Trak centers on the language of the Agreement that defines the business of the employer. DT-Trak attempts to limit the relevant language of the Agreement to the definitional provisions for a "competing business" and the "business of the employer." This is inappropriate and misapprehends the law governing interpretation of contracts.

It is well settled that "... [c]ontract interpretation is a question of law ..." which is reviewed *de novo* by this Court on appeal. *Poeppel v. Lester*, 2013 S.D. 17, ¶16, 827 N.W.2d. 580. Moreover, in order for the Court to properly interpret the Agreement, the

Court "... must give effect to the intention of the contracting parties." Ziegler Furniture & Funeral Home, Inc. v. Cicmanec, 2006 S.D. 6, ¶16, 709 N.W.2d 350. When interpreting a contract, it is the duty of the Court to look "... to the language that the parties used in the contract to determine their intention." *Poeppel*, 2013 S.D. at 17, ¶16. Critical to determining the intentions of the parties is the examination of the "... contract as a whole ..." and giving "... words their plain and ordinary meaning." Id., at ¶16. In the Court's endeavor to interpret contracts to reveal the common intentions of the parties it is paramount that the Court avoid an absurd result and, if the words are plain and ordinary, then the court merely needs to declare the parties' intentions. *Id.*, at ¶16. Furthermore, any agreement that restrains the lawful profession of another is void, unless the agreement falls within the exceptions noted by SDCL 53-9-9 to 53-9-12. SDCL 53-9-8. Non-competition agreements are subject to a further restriction which requires that they be narrowly construed so as to avoid violating the dictates of SDCL 53-9-8. McKie Ford Lincoln, Inc. v. Scott Hanna & Gateway Auto., LLC, 2018 S.D. 14, ¶10, 907 N.W.2d 795. Moreover, the provisions of SDCL 53-9-8 are far reaching in employment circles and clearly apply to the restraint of a lawful profession. Agreva, LLC v. Eide Bailly, LLP, 2020 S.D. 59, ¶25. 950 N.W.2d 774.

The *Aqreva* case establishes a three part test to determine if a restraint of a lawful profession has occurred. *Id.*, at ¶25. The details of the first two parts of the *Aqreva* case are fully discussed in the Appellant's Brief in Appellate Docket #29725 and will not be reiterated here, but are fully incorporated herein by this reference thereto. The key discussion here is the impact of the third *Aqreva* test regarding the application of SDCL 53-9-11. In order to ascertain whether the exception established by SDCL 53-9-11 applies to this case the Court must consider whether Rema is engaging in the same

business or profession as DT-Trak and whether the geographical limitation in the Agreement is appropriate. In order to analyze these issues, the Court must apply the rules of contract interpretation as set forth *supra*.

2. Language of the Agreement.

DT-Trak limits its analysis of this issue to the profession of a medical coder and argues that since DT-Trak provides medical coding services to third parties via a contractual relationship, Rema cannot work as an employee for a hospital doing medical coding in the United States for a period of 2 years from when she terminated her employment with DT-Trak. This analysis is shallow and fails to examine a number of issues, but primarily it fails to focus on the relationship between the parties so as to ascertain the exact intent of the parties when they entered into the Agreement. *Ziegler*, 2006 S.D. at 6, ¶16; *Poeppel*, 2013 S.D. at 17, ¶16. Moreover, DT-Trak focuses on the language in SDCL 53-9-11 instead of the language of the Agreement. While the statutory language is relevant as a base-line, the language of the Agreement is determinative. *Id*.

There is no question that Rema is a medical coder. This is the only work she does and she does it exclusively as an employee for San Carlos. Rema has no customers or clients but works exclusively for San Carlos. Rema has never provided medical coding services to a third party on a contractual basis like DT-Trak does. San Carlos is a hospital and provides services to patients. San Carlos does not now, nor has it ever provided medical coding services to third parties like DT-Trak does. DT-Trak is not a hospital and does not provide services to patients. Medical coding is not the only service DT-Trak provides to its customers. DT-Trak provides a wide variety of services to hospitals and Indian Health Service (IHS) facilities, but always on a contractual basis.

When Rema worked for DT-Trak she provided services for a variety of healthcare facilities. Rema did not work exclusively for any one healthcare facility while employed with DT-Trak, but did work exclusively for DT-Trak. Moreover, Rema does not now, nor has she ever, either as a sole proprietor or as an entity, provided the same services as DT-Trak to facilities in the healthcare field on a contract basis.

It is clear from the language of the Agreement that the parties intended to prohibit Rema from working as an employee with a competitor of DT-Trak, i.e., an independent contractor who provides services to third-parties pursuant to a contractual relationship with said third parties. There is no language in the Agreement that could possibly be construed as prohibiting Rema from working as an employee doing medical coding for San Carlos or any other hospital or IHS facility.

In support of its argument, DT-Trak inappropriately expands the definition of a competing business and business of the employer contained in the Agreement so as to conclude that Rema, as an employee for a hospital, is engaging in the same or similar business as it. This interpretation of the Agreement violates all the rules of contract construction, but most importantly the result of this interpretation is absurd, as it renders Rema entirely unemployable as a medical coder in the United States for a period of 2 years. Moreover, such a construction of the Agreement is overly broad and would not comport with the legal requirement that agreements not to compete be narrowly construed as required by the law.

Additionally, the Agreement clearly identifies an employer-employee relationship between DT-Trak and Rema and establishes the business of DT-Trak as an independent contractor that engages in independent business transactions with third parties.

Moreover, no language in the agreement can be remotely construed as classifying

DT-Trak as a medical coder. DT-Trak, the employer, is a South Dakota corporation. Depo. Exh. A and #23. Consequently, DT-Trak cannot be an employee, but is a business entity that employs individuals to work for it. Rema is identified in the Agreement as an employee of DT-Trak. Clearly, Rema cannot be in the same business as DT-Trak because she worked for DT-Trak and performed the tasks she was assigned by DT-Trak. This language in the Agreement clearly recognizes the employer-employee relationship between the parties and establishes the rights of the parties as well.

Moreover, the essence of the employer-employee relationship is that the employer has complete control over its employees in performing the tasks for the employer. Buisker v. Thuringer, 2002 S.D. 81, ¶12, 648 N.W.2d 817. Unquestionably, DT-Trak controlled Rema's work while she was employed with it. Furthermore, the Agreement identifies the business of DT-Trak as one of a "highly specialized nature" and that it works for independent customers; not as their employees, but as a contractor. Depo. Exh. A and #23. The Agreement asserts that DT-Trak has "... trade secrets, confidential information, processes, and customers ..." Id. Employees do not have intellectual information, such as described in the Agreement, which they can possess independently from and to the exclusion of their employer. DT-Trak conditioned Rema's employment on the execution of the Agreement and strict compliance with same. Unlike employees, independent contractors are not subject to such control by third parties or an employer. Consistent with the other language of the Agreement, the consideration paragraph conditions the employer-employee relationship on the terms of the agreement. *Id.* Consequently, but for DT-Trak being a separate business entity, Rema would not have a job. The language in the Agreement also broadly and extensively defines what DT-Trak's products and services are and what it considered "Confidential Information." *Id.*

The business of DT-Trak as a contractor is recognized in the Agreement in the customer non-solicitation provision where it references DT-Trak's "... customer, partner, reseller, distributor, client or supplier ..." relationships and DT-Trak's "... business engagements or relationship relating to the Business existing between Employer on the one hand, and any third party on the other hand." *Id.* The Agreement goes on to impose restrictions on Rema so as to prohibit her from attempting to or actually interfering with DT-Trak's relationship with "... current customers, partners, clients and suppliers ..." as well as "... prospective customers, partners, clients and suppliers ..." *Id.* Moreover, the Agreement recognizes the legislative impact on the employment relationship by referencing the statutory employment at will relationship in South Dakota. *Id.*

The resolution of the issue regarding the same business or profession of DT-Trak also depends upon the interpretation of the language of the Agreement used to define the business of DT-Trak. As argued *supra*, the law requires that the Agreement be narrowly construed so as to avoid violating SDCL 53-9-8. *McKie*, 2018 S.D. at 14, ¶10. The Agreement defines "Business" or "Business of Employer" as "... professional medical coding, data entry, third-party billing, and accounts receivable services and related activities for healthcare service providers ..." then identifies numerous services. *Depo. Exh. A and #23*. The Agreement further defines a "Competing Business" as any "... individual, corporation, partnership, limited partnership, limited liability company, association, trust (business or otherwise), institution, foundation, pool, plan or other entity or organization that engages or proposes to engage in the Business of Employer." *Id.* The definition of "Business of Employer" limits the defined services DT-Trak performs "for" healthcare providers and not "by" healthcare providers. *Id.*, *§1.1*, *p. 1*. It is obvious that the very services identified in the "Business of Employer" paragraph in

the Agreement are the same services many healthcare providers perform in-house. Moreover, the competing business definition is specific in listing the types of businesses that DT-Trak contends are competing businesses, but does not make any reference to employees of healthcare providers, nor does it specifically mention healthcare providers such as hospitals and IHS facilities. This is clearly so because both employees and healthcare providers were not intended to be competing businesses since they do not provide the subject services to third parties on a contractual basis. The language is specific and is clearly directed at persons or entities who engage in the same services as DT-Trak, i.e., contractual work for third-party healthcare providers. All of the language set forth in the provisions that define the business of DT-Trak address individuals and entities that would typically engage in providing services to healthcare facilities on a contractual basis. If DT-Trak intended to include employees, hospitals, and IHS facilities in the realm of the definition of a competing business in the Agreement, it would have said so, but it did not. Absent such a reference, Rema's work for San Carlos as an employee is not covered by the aforesaid definitions and DT-Trak cannot prevail on its claim. This conclusion is consistent with the governing law as set forth supra. Moreover, this conclusion is consistent with the other language in the Agreement regarding the relationship of the parties as argued *supra*.

In addition, it is undisputed that San Carlos is not a competing business with DT-Trak and was not bound by a contractual relationship with DT-Trak when it hired Rema. Neither of the contractual provisions identified above include healthcare providers or hospitals as entities. The obvious reason is that all hospitals provide the same services as DT-Trak, but they do it in-house, particularly medical coding, and DT-Trak cannot stop these facilities from doing so by a non-compete agreement with its employees. This is

particularly so since the only time a private contractor, such as DT-Trak, is used by a hospital is on a temporary basis to resolve short-term problems. *RA*, *p. 376; Affidavit of Katherine Andersen*, ¶¶8, 14. Once the work provided by the private contractor is completed, the hospital, typically, discontinues using the private contractor and assumes the work in-house. *Id*.

Under the above circumstances, it is impossible to conclude that the language of the Agreement establishes a basis for determining that it was the intentions of the parties to prohibit Rema from working as an employee for San Carlos when the language clearly and unequivocally shows the parties' intentions were to prohibit Rema from working as an independent contractor, or for an independent contractor, in competition with DT-Trak by providing third parties with the same services as DT-Trak. A contrary conclusion is simply absurd and is contrary to the law governing the construction and interpretation of contracts.

3. Blue-penciling the Geographical Limitations.

Rema incorporates by reference the arguments set forth in the Appellant's Brief in Appellate Docket #29725. DT-Trak argues that the nationwide geographical limitations in the Agreement are enforceable as written, but if not, it should be partially enforced so the contract complies with the statutory restrictions of SDCL 53-9-11. See *Franklin v. Forever Venture, Inc.*, 2005 S.D. 53, 696 N.W.2d 545 and *Simpson v. C&R Supply, Inc.*, 1999 S.D. 117, ¶16, 598 N.W.2d 914. This position is untenable based upon the argument *supra* regarding the language of the Agreement and in light of the arguments set forth in the Appellant's Brief in Appellate Docket #29725.

The partial enforcement rule or "blue-pencil rule" advanced by DT-Trak cannot save the overly-broad geographical restrictions in the Agreement. This is so because the blue-pencil rule is not without restrictions and does not allow a Court to re-write contractual provisions without some basis to do so. *Franklin*, 2005 S.D. at 53, ¶15; *Simpson*, 1999 S.D. at 117, ¶16. In short, the court cannot simply create contractual provisions from thin air. In *Simpson* the Court reviewed an agreement for the sale of a business which contained a covenant not to compete, but which had an overly broad geographical limitation. *Id.*, at ¶16. The Court blue-penciled the covenant so that the geographical limitation was restricted to an area which was ascertainable from the specific language of the agreement. *Id.*, at ¶16. The agreement at issue in *Simpson* specifically mentioned Sioux Falls in its geographical limitations, but attempted to identify other areas which would be subject to the non-compete provision by general and overly-broad language. *Id.*, at ¶14. The Court rejected the overly-broad definition, in favor of the specific area identified by the language of the agreement, i.e., the City of Sioux Falls. This was consistent with the existing case law governing covenants not to compete.

The problem with applying the blue-pencil rule to the case at bar is that, unlike *Simpson*, there is no specific language in the Agreement which allows the Court to ascertain an appropriate specified area. The Agreement here simply identifies the continental United States and Alaska and Hawaii. *Depo. Exh. A and #23*. Consequently, the language of the Agreement is so overly-broad that it is impossible for the Court to identify a specific geographical area which will comply with the geographical limitations set forth in SDCL 53-9-11. Quite simply, the Court is unable to identify a specified area as required by the statute when no language gives it a basis to do so. This problem is exacerbated by the fact that the nature of Rema's work is remote and her employer is thousands of miles away in Peridot, Arizona. The problem is further complicated by the

fact that DT-Trak does not work in all states, but the language of the Agreement attempts to prohibit Rema from working with DT-Trak's past and current customers and future, yet unknown, possible customers in the entire United States. Clearly, because of the language of the Agreement, the Court cannot blue-pencil a geographical limitation which is consistent with SDCL 53-9-11 or the Agreement.

DT-Trak further, argues that the trial court should have granted its motion for summary judgment because the relief it seeks is limited in nature, as it only intends to prohibit Rema from working for San Carlos. Essentially, DT-Trak argues that the geographical limitation should be San Carlos at Peridot, Arizona. This argument is disingenuous to say the least. The practical effect of a ruling that DT-Trak is entitled to an injunction prohibiting Rema from working for San Carlos is that Rema also will not be able to work at any medical coding job in the geographical area identified in the Agreement. This is so because the basis for DT-Trak's argument is that Rema is engaging in the same business/competing business, as DT-Trak. If the Court concludes that Rema is competing or engaging in the same business as DT-Trak by working as a medical coder for San Carlos on an employee basis, then she would be doing the same if she worked as a medical coder for any healthcare provider in the geographical area identified in the Agreement. This is not only an inappropriate conclusion based upon the geographical limitation argument *supra*, but also is an absurd result because it prohibits Rema from working anywhere as a medical coder, which is contrary to the spirit and intent of the Agreement and the law.

C. Injunctive Relief and Damages.

DT-Trak is not entitled to a permanent injunction or money damages based upon

Rema's conduct because she has not violated nor breached the terms of the Agreement as

argued *supra*. Moreover, even if the court determines that Rema violated the non-compete provision of the Agreement, the facts and circumstances of this case do not support the issuance of a permanent injunction or the award of damages.

South Dakota law allows permanent injunctions to be issued in specific factual circumstances. *SDCL 21-8-14*. Before the Court may consider whether injunctive relief is appropriate, it must first determine whether the remedy is available to DT-Trak.

Except where otherwise provided by this chapter, a permanent injunction may be granted to prevent the breach of an obligation existing in favor of the applicant:

(1) Where pecuniary compensation would not afford adequate relief;

Permanent injunctions are authorized under the following circumstances:

- (2) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;
- (3) Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or
- (4) Where the obligation arises from a trust.

SDCL 21-8-14; Raven Industries, Inc. v. Lee, 2010 S.D. 49, ¶23, 783 N.W.2d 844. The only two subdivisions of SDCL 21-8-14 that could possibly apply here are (1) or (2). Injunctive relief for DT-Trak under either of these subdivision is not appropriate because if DT-Trak were harmed or damaged in any regard, it could recover its lost profits from either Rema by an independent action, or from San Carlos for hiring Rema. In the alternative, DT-Trak has established its damages from a breach of the Agreement by virtue of the specific language of the Agreement and set those damages at \$5,000. Depo. Exh. A and #23, ¶6. Remedies. Consequently, DT-Trak has already determined what pecuniary compensation would afford it adequate relief. Given the above, DT-Trak is not entitled to injunctive relief here.

If, however, the Court concludes that injunctive relief is available against Rema, then the following additional factors are to be considered in determining whether to

award such relief:

... (1) Did the party to be enjoined cause the damage? (2) Would irreparable harm result without the injunction because of lack of an adequate and complete remedy at law? (3) Is the party to be enjoined acting in bad faith or is the injury-causing behavior an innocent mistake? (4) In balancing the equities, is the hardship to be suffered by the enjoined party disproportionate to the benefit to be gained by the injured party?

McDowell v. Sapienza, 2018 S.D. 1, ¶ 25, 906 N.W.2d 399. DT-Trak cannot provide a factual basis sufficient to satisfy the above factors and, therefore, is not entitled to injunctive relief.

1. Damage, Irreparable Harm, and Inadequate Remedy.

Rema's contractual obligations to DT-Trak are intact and Rema did not breach the Agreement as argued *supra*. Consequently, Rema could not have caused any damage to DT-Trak in any regard, nor could DT-Trak have suffered any irreparable harm that could not have been addressed by other legal actions for damages.

At the time Rema interviewed with San Carlos, she inquired in detail about whether or not San Carlos had an existing contract with DT-Trak, and the representatives from San Carlos assured her that they did not have a contract with DT-Trak. *RA*, *p*. 204, *Defendant's Statement of Undisputed Material Facts*, ¶23; *Rema Kolda Depo.*, *pp*. 141-148; *RA*, *p*. 376, *Affidavit of Katherine Andersen*, ¶¶6-8. In fact, it is undisputed that the contract DT-Trak had with San Carlos had not only expired, but San Carlos has no intentions of entering into another contract in the future with DT-Trak given its substandard work for San Carlos in the past and San Carlos' change in its internal practices. *Id*. Under these circumstances, San Carlos could not be categorized as a current customer of DT-Trak or a possible future customer of it either. Moreover,

DT-Trak is not losing any profits or compensation from San Carlos, as it clearly is not going to do business with DT-Trak again. Absent some possibility of a future business relationship with San Carlos, DT-Trak cannot assert a damage claim.

Moreover, as argued above, if DT-Trak were harmed or damaged in any regard, it could recover its lost profits from either Rema or from San Carlos for hiring Rema providing it could prove a causal nexus. DT-Trak did not sue San Carlos for interfering with its business interests by hiring Rema because it knew it had no claim and was not suffering damages from Rema working for San Carlos. On the other hand, DT-Trak has established its damages from a breach of the Agreement by virtue of the specific language of the Agreement which sets that amount at \$5,000. *Depo. Exh. A and #23, ¶6. Remedies.* Consequently, DT-Trak has already determined what pecuniary compensation would afford it adequate relief. Given the above, DT-Trak is not entitled to injunctive relief here because it has an adequate remedy at law and has not now, nor will it, suffer irreparable harm.

DT-Trak further argues that it will suffer irreparable harm and has no adequate remedy at law by Rema continuing to work for San Carlos because of her skills in medical coding. As part of DT-Trak's argument it asserts that it is solely responsible for Rema's accomplishments, education, and training. This is a specious and arrogant argument. Rema, like all DT-Trak employees, was required to devote five years of her work life to DT-Trak in return for it paying for her education and training. *RA*, *p.* 204, *Defendant's Statement of Undisputed Material Facts*, ¶¶2-4. If Rema would have terminated her employment before serving the five years with DT-Trak, she would have been required to repay DT-Trak for all of the education and training costs it incurred. *Id.*, at 4. Moreover, Rema practiced her skills, developed same, and polished them over a 14

years career with DT-Trak, only to be repaid with a lawsuit when she chose to work for San Carlos. Consequently, DT-Trak was repaid well by Rema during her 14 year career and it and has no claim monetarily or otherwise against Rema for the training or for leaving it to go work for San Carlos.

In light of the above, DT-Trak is simply unable to show it was damaged by Rema's actions or that it suffered any irreparable harm.

2. Rema did not Act in Bad Faith.

Rema did not act in bad faith in any respect in regard to the obligations imposed upon her by the Agreement or in regard to DT-Trak and its business. Bad faith has been defined in the law in a variety of ways and contexts. This Court has held that bad faith is established when one's actions and conduct show an improper reason for obtaining certain results, engaging in schemes, or misrepresenting facts to another to achieve a certain result. Spiska Engineering, Inc. v. SPM Thermo-Shield, Inc., 2004 S.D. 44, ¶8, 678 N.W.2d 904. This Court has held that "... [i]n the context of business transactions ... "bad faith" is the antithesis of good faith and has been defined ... to be when a thing is done dishonestly and not merely negligently." *Id.*, at ¶8. Bad faith necessarily includes fraudulent or deceitful behavior or conduct. *Id.*, at ¶8. Rema did not engage in any behavior or conduct that can be remotely characterized as bad faith. Rema acted prudently and inquired as to a possible conflict with the Agreement and only accepted employment with San Carlos after she was assured that no conflict existed. She did not reveal her actions relative to San Carlos and her new job until she knew for certain she was hired. Once she obtained employment with San Carlos, she did what any employee does when they change jobs, she advised her employer. Although DT-Trak ascribes evil

intent to Rema for seeking and accepting other employment, such accusations are meritless and nothing more than rank speculation and conjecture. *RA*, *p*. 204, *Defendant's Statement of Undisputed Material Facts*, ¶29, 31.

3. Balancing the Equities.

The final factor in the injunctive equation requires that the Court balance the equities between the parties. The question is whether the hardship Rema will suffer by an injunction prohibiting her to work for DT-Trak's past customers, current customers or future, unknown, possible customers is disproportionate to the benefit to be gained by DT-Trak? If an injunction is issued against Rema, she will not be able to work in her chosen profession, one that she learned and polished for 14 years, anywhere in the continental United States or Alaska or Hawaii and will be deprived of earning a living. DT-Trak, on the other hand, will lose no money, nor suffer any financial detriment, and will suffer no loss of business. Moreover, DT-Trak will have been successful in prohibiting Rema from working for San Carlos when DT-Trak does not have a contract with it nor a reasonable expectation of a contract with San Carlos in the future. The scales of injustice and adversity are tipped ever so heavily against Rema and barely waiver in the whisper of wind against DT-Trak. The inequities of such a result are patently obvious, extremely onerous, and clearly contrary to the public policy in South Dakota regarding the enforcement of non-compete agreements and the goal to be achieved by protecting employees and employers in a fair and reasonable manner. Lindskov v. Lindskov, 2011 S.D. 34, 12, 800 N.W.2d 715; Communications Tech. Sys., Inc., v. Densmore, 1998 S.D. 87, 18, 583 N.W.2d 125.

CONCLUSION

The decision of the trial court on this appeal should be affirmed in all respects. In

addition, the trial court's denial of Rema's motion for summary judgment should be reversed and judgment should be entered in favor of Rema dismissing all counts as plead in DT-Trak's Complaint.

REQUEST FOR ORAL ARGUMENT: Rema hereby requests oral argument.

Dated this 25th day of February, 2022.

/S/TIMOTHY R. WHALEN Whalen Law Office, P.C. P.O. Box 127 Lake Andes, SD 57356 Telephone: 605-487-7645 whalawtim@cme.coop Attorney for the Appellee

CERTIFICATE OF COMPLIANCE

Timothy R. Whalen, the attorney for the Appellee, hereby certifies that the Appellee's Brief complies with the type volume limitations provided for in SDCL 15-26A-66(b)(4). The Appellee's Brief contains 30,547 characters and 5,853 words. Further, the undersigned relied upon the word count of the word processing system used to prepare the Appellee's Brief.

Dated this 25th day of February, 2022.

/S/ TIMOTHY R. WHALEN Whalen Law Office, P.C. P.O. Box 127 Lake Andes, SD 57356 Telephone: 605-487-7645 whalawtim@cme.coop Attorney for the Appellee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served two true and correct copies of the

Appellee's Brief on the attorneys for the Appellant at their address as follows: Sander J.

Morehead and Jordan J. Feist, Woods, Fuller, Shultz & Smith, PC, 300 S. Phillips

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jordan.feist@woodsfuller.com and sander.morehead@woodsfuller.com by e-mail and by

depositing same in the United States first class mail, postage prepaid, on the 25th day of

February, 2022, at Lake Andes, South Dakota. Further, the undersigned hereby certifies

that the original and two copies of the above and foregoing Appellee's Brief were mailed

to Shirley Jameson-Fergel, Clerk of the Supreme Court, State Capitol Building, 500 East

Capitol Avenue, Pierre, SD 57501-5070 by depositing same in the United States first

class mail, postage prepaid, on the 25th day of February, 2022. Further, one copy of the

Appellee's Brief was e-mailed to the aforesaid Clerk of the Supreme Court on the 25th day

of February, 2022, at her e-mail address as follows: SCClerkBriefs@ujs.state.sd.us.

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21

THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

Consolidated Appeal Nos. 29725 and 29726

DT-TRAK CONSULTING, INC., a South Dakota Corporation

Plaintiff/Appellant,

v.

REMA KOLDA, an individual,

Defendant/Cross-Appellant.

Cross-Appeals from the Circuit Court
Third Judicial Circuit
Hand County, South Dakota

HONORABLE KENT SHELTON

DT-TRAK CONSULTING, INC.'S REPLY BRIEF IN APPEAL #29726

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	4
CERTIFICATE OF COMPLIANCE	5
CERTIFICATE OF SERVICE	6

TABLE OF AUTHORITIES

Page(s)
Cases
Behrens v. Wedmore, 2005 S.D. 79, 698 N.W.2d 555
Bradley v. Health Coalition, Inc., 687 So.2d 329 (Fla. App. 3rd 1997)
Cain v. Fortis Ins. Co., 2005 S.D. 39, 694 N.W.2d 709
Jensen v. Weyrens, 474 N.W.2d 261 (S.D. 1991)
Stuckey v. Sturgis Pizza Ranch, 2011 S.D. 1, 793 N.W.2d 378
Washel v. Bryant, 770 N.E.2d 902 (Ind. 2002)
Statutes
SDCL 37-29-10
SDCL 37-29-20
SDCL § 15-26A-66(b)(4)
SDCL § 53-9-11
Other Authorities
Restatement (Second) of Contracts § 361

ARGUMENT

After two rounds of briefing in each of these consolidated appeals, most issues have been thoroughly addressed and focused. Kolda and DT-Trak agree the material facts regarding the noncompete provisions of the Employment Agreement are undisputed. They also agree summary judgment is appropriate regarding the legal effect of those provisions. However, Kolda has raised an issue for the first time in the entire case, regarding DT-Trak's entitlement to injunctive relief if it prevails, and continues to assert that the Employment Agreement only prohibits Kolda from working for a business that is exactly the same as DT-Trak, when there is no such limitation in the document. The Court should instead apply the plain language of the contract and enforce it against Kolda by granting a permanent injunction.

1. Kolda has waived her "unconscionability" argument on appeal.

As an initial matter, noted in DT-Trak's opening brief, Kolda did not brief unconscionability to the circuit court, but asserted those kinds of allegations in her responses to DT-Trak's Statement of Undisputed Material Facts. (DT-Trak Opening Brief at 17-18.) DT-Trak has explained why those allegations fail to support an unconscionability defense—a legal issue for the Court. (*Id.* at 18-23.) More important, Kolda has not addressed this issue at all in her appeal, or in this one. Consequently, she has not cited any relevant authority either, thereby waiving the argument. *See Stuckey v. Sturgis Pizza Ranch*, 2011 S.D. 1, ¶ 19 n. 3, 793 N.W.2d 378, 386 n. 3 (citing *Behrens v. Wedmore*, 2005 S.D. 79, ¶ 55, 698 N.W.2d 555, 577). The only issue the Court needs to address is the legal contract interpretation issue the parties have actually briefed.

2. Kolda cannot narrow the scope of the Employment Agreement.

Kolda argues, without reference to specific language in the Employment

Agreement, that its noncompete provisions apply only if Kolda is employed by another

consulting company, like DT-Trak, instead of a medical facility, like San Carlos. In other

words, Kolda should be able to work for any entity that is not the exact same kind of

business as DT-Trak. This is not based on the contract's text; it is a policy argument that

fails under both the relevant statute, SDCL § 53-9-11, and the Employment Agreement

itself.¹

¹ Kolda does not appear to dispute that the Employment Agreement complies with SDCL § 53-9-11. (See Kolda Brief at 7.)

"Business of Employer" means "professional *medical coding*, data entry, third-party billing and accounts receivable services *and related activities for healthcare service providers* including, but not limited to, [p]rofessional medical coding." (*Id.*--Employment Agreement, ¶¶ 1.1, 1.3) (emphasis added). It is undisputed Kolda provides professional medical coding services to San Carlos, a healthcare provider. (S.R. 0449, 0457-58--Morehead Aff. Ex. E--Kolda Depo. at 4:22-23; 141:13-22; 148:2-7.) In short, Kolda is violating the plain language of the Employment Agreement.²

3. Kolda cannot raise her arguments re: injunctive relief for the first time on appeal.

Kolda asserts DT-Trak is not entitled to permanent injunctive relief as a remedy for her breach of the Employment Agreement. DT-Trak has thoroughly briefed why permanent injunctive relief is appropriate. (DT-Trak Opening Brief at 23-30.) Kolda has failed to distinguish DT-Trak's cited cases holding that injunctive relief is ordinarily the appropriate remedy for breach of a noncompete, particularly where, as here, the Employment Agreement states that DT-Trak is entitled to that relief. (*Id.*)

Moreover, Kolda is incorrect that the presence of a liquidated damages provision in the Employment Agreement precludes entry of injunctive relief. *See, e.g., Washel v. Bryant*, 770 N.E.2d 902, 907 (Ind. 2002); *Bradley v. Health Coalition, Inc.*, 687 So.2d 329, 332 (Fla. App. 3rd 1997) (citing Restatement (Second) of Contracts § 361) (stating "an injunction may be granted to enforce a duty even though there is a provision for

² Kolda further argues that the geographic limitation of the Employment Agreement is unenforceable because it effectively prevents her from working as a coder in the United States. DT-Trak has fully addressed these arguments in its opening brief in this consolidated appeal and incorporates its arguments from that brief here. (See DT-Trak Opening Brief in Appeal No. 29726 at pages 10 through 12.)

liquidated damages for breach of that duty")). Indeed, a court that grants equitable relief, such as specific performance, may also award pecuniary compensation. *See, e.g., Jensen v. Weyrens*, 474 N.W.2d 261, 265 (S.D. 1991); *Wiggins v. Shewmake*, 374 N.W.3d 111, 116 (S.D. 1985).

But most importantly, this is the first time in the entire case Kolda has disputed DT-Trak's entitlement to injunctive relief if it prevails. She did not address the issue in resisting DT-Trak's motion for summary judgment, below, or in her brief supporting her own motion for summary judgment. (S.R. 000351-000368 and 000371-000372.) She also did not raise it in the opening brief in her appeal. When an issue is raised for the first time on appeal, as Kolda has done regarding DT-Trak's request for injunctive relief, the Court need not consider it. *See, e.g., Cain v. Fortis Ins. Co.*, 2005 S.D. 39, ¶ 22, 694 N.W.2d 709, 714.

CONCLUSION

Kolda is violating the Employment Agreement by working in a "Competing Business" as the Employment Agreement defines that term. Indeed, she is individually engaged in the same "business of employer" that she was engaged in as an employee of DT-Trak. Therefore, she is directly and indirectly competing against DT-Trak for San Carlos's business, albeit as an employee. Therefore, DT-Trak is entitled to a permanent injunction against Kolda prohibiting her from violating her Employment Agreement. Moreover, DT-Trak should receive the benefit of its bargain with Kolda. She agreed not to compete for two years. Because she has continuously violated her Employment Agreement, the injunction should run for two years from its entry to cover the amount of time she agreed not to compete with DT-Trak.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point) and contains 1,169 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 28th day of March, 2022.

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CERTIFICATE OF SERVICE

I certify that on the 28th day of March, 2022, I sent via email and United States first-class mail, postage prepaid, two true and correct copies of the foregoing Appellant DT-Trak Consulting, Inc.'s Reply Brief to the following individual:

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