

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT  
IN THE WESTERN DISTRICT OF WASHINGTON

NIRP PASADENA, PLLC, and  
NIRP SUGAR LAND, PLLC,  
Plaintiffs,

v.

MEDSTREAMING, LLC, a Washington  
limited liability company; WAEL  
ELSEAIDY, an individual; RYAN  
PLASCH, an individual,  
Defendants.

No. 2:17-cv-01607-TSZ

**PLAINTIFFS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

NOTE ON MOTION CALENDAR:

August 3, 2018

**I. INTRODUCTION**

On August 3, 2017, Plaintiffs NIRP Pasadena, PLLC and NIRP Sugar Land, PLLC ("Plaintiffs") filed this lawsuit alleging multiple claims against Defendants. After conducting discovery, it is clear that such discovery exchanged between the parties supports Plaintiffs' claims. Thus, Plaintiff now files this motion for partial summary judgment on its claims.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT -

1  
[2:17-cv-01607 - TSZ]  
4814-4843-9148

## II. STANDARD

Under Federal Rule of Civil Procedure 56, summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56; *see Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011). Upon a showing that there is no genuine issue of material fact as to particular claims or defenses, the court may grant summary judgment in the party's favor upon all or any part thereof. *Sokol v. New United Motor Mfg., Inc.*, No. C 97-4211 SI, 2000 WL 1912724, at \*3 (N.D. Cal. Feb. 29, 2000). If the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 585-87 (1986). The non-moving party must do more than show that there is some metaphysical doubt as to the material facts. *Id.* at 586.

Unanswered requests for admissions may be relied on as a basis for granting summary judgment. *Conlon v. U.S.*, 474 F.3d 616, 621 (9th Cir. 2007).

## III. BACKGROUND FACTS

Plaintiffs are in the business of providing interventional radiology medical services to patients. Interventional radiology is a medical specialty that utilizes image guidance to perform procedures within the human body through small holes, rather than through large incisions as in traditional surgery.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT -

2

[2:17-cv-01607 - TSZ]

4814-4843-9148

2938949-000002  
4814-4843-9148 v5

**CORR CRONIN LLP**  
1001 FOURTH AVENUE, SUITE 3900  
SEATTLE, WASHINGTON 98154  
(206) 292-8800

1 A very vital component in the delivery of care via interventional radiology is  
2 utilizing technology in the form of software to integrate various record and billing  
3 systems, including particular electronic medical records (EMR), PACS integration,  
4 cardiovascular information systems, vascular information system, and clinical data  
5 management. This integration is typically known as workflow applications. The  
6 treating physician needs to have all of a patient's information readily available in order  
7 to provide quality care to the patient.

8 Medstreaming publicly holds itself as a company that develops, markets, sells,  
9 installs and supports specialty-based workflow applications software to medical  
10 providers for different medical specialties, including Cardiovascular, Vascular and  
11 Cardiology. Medstreaming does not dispute this.

12 In early February of 2016, NIRP Physician, Dr. Andrew Martin, met Ryan Plasch  
13 at the 28th International Symposium on Endovascular Therapy at the Diplomat Hotel in  
14 Hollywood, Florida. Dr. Martin spent roughly two hours with Mr. Plasch over the  
15 course of the five-day meeting listening to him describe the capabilities of  
16 Medstreaming software. Plasch promised that the software would be a tool which  
17 would amplify the efficiency of the staff and allow NIRP to see and understand  
18 information about the lab. He expounded on the ability of the software inventory  
19 tracking capability. Another capability that Mr. Plasch touted as the ability to move the  
20 date and generate maps and reports regarding physician referrals and procedures.

21 PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT -

22 3

[2:17-cv-01607 - TSZ]

4814-4843-9148

1 On or about February 2016, Medstreaming demonstrated the software for  
2 Plaintiffs at Plaintiffs' offices. The presentation was conducted by Joseph Mazzola,  
3 Medstreaming's Southern U.S. Sales Manager. As demonstrated, the software  
4 functioned fully and Mazzola represented that it would meet Plaintiffs' integrated  
5 workflow requirements, including PACS reporting, the information systems and  
6 clinical data management. Plaintiffs relied on such representations in entering an  
7 agreement with Medstreaming.

8 During the demonstration, Medstreaming demonstrated and represented that  
9 its product would perform autocoding of CPT codes, integrate seamlessly with  
10 peripherals, and take the place of Plaintiffs' then computer system. During the  
11 demonstration, Medstreaming represented that its software would report nurse's notes,  
12 drug logs, and full reports of patient procedures, including angio procedures, would  
13 integrate with Plaintiffs' Electronic Medical Records (EMR) reporting system, would  
14 integrate all billing and scheduling, and would allow all data and reports to be printed.  
15 ("Services"). These promises were false.

16 Prior to entering into the Agreement, Medstreaming, through Mr. Mazzola and  
17 others, made representations to Plaintiffs. Medstreaming represented that its software  
18 was fully functional, ready for installation, and would provide the Services.  
19 Medstreaming assured Plaintiffs that its software would provide information  
20 templates for each medical procedure, including but not limited to peripheral

21 PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT -

22 4

[2:17-cv-01607 - TSZ]

4814-4843-9148

2938949-000002  
4814-4843-9148 v5

**CORR CRONIN LLP**  
1001 FOURTH AVENUE, SUITE 3900  
SEATTLE, WASHINGTON 98154  
(206) 292-8800

1 intervention, venous intervention, and dialysis access procedures. For each of Plaintiffs'  
2 interventional procedures performed on its patients, Medstreaming promised to  
3 provide templates to report the information. Those promises were false.

4 Prior to entering into the Agreement, Medstreaming represented to Plaintiffs  
5 that its software would immediately export clinical data to Plaintiffs' Electronic Medical  
6 Record (EMR) system, with attached ICD and CPT codes so that Plaintiffs could  
7 proceed with billing on the same day as the procedure. That promise was false.

8 In 2016, Defendant Medstreaming proposed a contractual relationship which  
9 included, without limitation, the sample and/or model demonstrated by Medstreaming  
10 to Plaintiffs, a Software License Agreement Terms and Conditions, with attached  
11 Exhibits, a written Proposal for Endovascular Data Management system and a financial  
12 arrangement through Balboa Capital, LLC (collectively "Agreement"). See Hood Dec.  
13 **Exhibit A-4.** The Agreement provided that Medstreaming will "deliver and install the  
14 [software] at Customer's facility." *Id.*

15 The software completely failed when Plaintiffs first attempted to use it and  
16 thereafter. The software was not ready to go live, and was still in rudimentary  
17 development stages. Despite several attempts to get Defendants to resolve issues,  
18 Defendants failed to resolve a single issue, leaving Plaintiffs with a nonfunctional  
19 system. Defendants breached the Agreement by failing to perform as promised under  
20 the Agreement.

21 PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT -

22 5

[2:17-cv-01607 - TSZ]

4814-4843-9148

2938949-000002  
4814-4843-9148 v5

**CORR CRONIN LLP**  
1001 FOURTH AVENUE, SUITE 3900  
SEATTLE, WASHINGTON 98154  
(206) 292-8800

1 Plaintiffs justifiably relied on the misrepresentations of Medstreaming, such that  
2 Plaintiffs agreed to enter into the Agreement and enter into a Payment Agreement with  
3 Balboa. It was Medstreaming that introduced Plaintiffs to Balboa and Defendants admit  
4 they received a benefit from Plaintiffs entering such agreement with Balboa.

5 Pursuant to the Agreement, on February 28, 2017, Plaintiffs notified  
6 Medstreaming in writing of defects and breaches and demanded that Medstreaming  
7 cure. The letter made a demand to Medstreaming to cure its breach of the Software  
8 License Agreement and the Technical Assistance Services Agreement within 30 days  
9 from the date of the letter, pursuant to the terms of the Agreement. Admittedly,  
10 Defendants did not cure the defects.

11 Plaintiffs suffered damages as a direct and proximate cause of Medstreaming's  
12 breach of its contractual obligations and violations of the Washington Consumer  
13 Protection Act. Likewise, Plaintiffs have suffered damages as a direct and proximate  
14 cause of Balboa's refusal to suspend or terminate payments based on Medstreaming's  
15 non-performance.

#### 16 IV. ARGUMENT

##### 17 A. Defendants' Responses to Plaintiffs' Requests for Admissions are Deemed 18 Admitted.

19 On May 11, 2018, Plaintiffs served Defendants, by hand delivery, Requests for  
20 Admissions. *See Hood Dec.* Defendants failed to timely answer the Requests for  
21 Admissions, and therefore they are automatically deemed admitted. *See Hood Dec.*

22 PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT -

6  
[2:17-cv-01607 - TSZ]  
4814-4843-9148

1 Federal Rule of Civil Procedure 36(a) states that a matter is deemed admitted  
2 “unless, within 30 days after service of the request... the party to whom the request is  
3 directed serves upon the party requesting the admission a written answer or objection  
4 addressed to the matter, signed by the party or by the party’s attorney.” *Conlon v. U.S.*,  
5 474 F.3d 616, 621 (9th Cir. 2007); FED. R. CIV. P. 36(a). Unanswered requests for  
6 admissions may be relied on as a basis for granting summary judgment. *Conlon*, 474  
7 F.3d at 621.

8 Defendants failed to properly serve Plaintiffs with their responses to Request for  
9 Admissions. Specifically, Defendants served the responses late and did not serve them  
10 pursuant to the Federal Rules of Civil Procedure. Plaintiffs served their Request for  
11 Admissions via hand delivery on May 11, 2018, making Defendants’ responses due 30  
12 days after, which fell on a Sunday, so they were due Monday June 11, 2018. FED. R. CIV.  
13 P. 6(a)(1)(C); FED. R. CIV. P. 36(a)(3); *see* Hood Dec. **Exhibit A-1**.

14 Defendants served their responses via email a day late. *See* Hood Dec. **Exhibit**  
15 **A-2**. Plaintiffs’ counsel is in the central time zone and the email reflects such time zone,  
16 which is two hours ahead of the western time zone. The email is dated June 12, 2018  
17 2:00AM, which is June 12, 2018 12:00AM western time. Further, even if the responses  
18 were not late, which they were, service was not proper because it was via email.  
19 Federal Rule of Civil Procedure 5(b) provides for the permissible methods of service.  
20 Rule 5(b) does not expressly provide for service via email, but does state that service

21 PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT -

22 7

[2:17-cv-01607 - TSZ]

4814-4843-9148

2938949-000002  
4814-4843-9148 v5

**CORR CRONIN LLP**  
1001 FOURTH AVENUE, SUITE 3900  
SEATTLE, WASHINGTON 98154  
(206) 292-8800

1 may be by electronic means *if the person consented in writing*. FED. R. CIV. P. 5(b)(2)  
2 (emphasis added). Plaintiffs have never consented to service by electronic means in this  
3 case. *See* Hood Dec. Further, Plaintiffs previously objected to such service by email in  
4 their responses to Defendants' discovery requests. *See* Hood Dec. **Exhibit A-3**. Thus,  
5 not only did Plaintiffs not consent, Defendants were on notice of the complete opposite,  
6 that Plaintiffs objected to such service. Despite these facts, the only method of service  
7 attempted by Defendants was via email, which is insufficient. Thus, Plaintiffs Requests  
8 for Admissions are deemed admitted.

9  
10 **B. Plaintiffs are Entitled to Summary Judgment on their Recovery of Licensed  
Payments and Breach of Contract Claims.**

11 Defendants have admitted that the software did not perform as promised. *See*  
12 Hood Dec. **Exhibit A-2**. Additionally, Defendants have no evidence of any defense to  
13 Plaintiffs' claim for recovery of license payments, breach of contract, or alternative  
14 unjust enrichment. It is undisputed Plaintiffs entered into a license software agreement  
15 with Defendants. It is further undisputed that Defendants software did not perform as  
16 promised. *See* Hood Dec. **Exhibit A-2**. It is undisputed that there was an agreement  
17 between the parties. It is further undisputed that Defendants had a duty to perform  
18 under the agreement and Defendants admit they did not perform as promised.

19 Therefore, Defendants breached the software agreement as a matter of law and  
20 Plaintiffs are entitled to damages. As set forth in Plaintiffs' Responses to Defendants'

21 PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT -

22 8

[2:17-cv-01607 - TSZ]

4814-4843-9148

2938949-000002  
4814-4843-9148 v5

**CORR CRONIN LLP**  
1001 FOURTH AVENUE, SUITE 3900  
SEATTLE, WASHINGTON 98154  
(206) 292-8800



1 Interrogatories, Plaintiffs are damaged in the amount no less than \$543,431.00, plus  
2 attorneys' fees. See Hood Dec. **Exhibit A-3**, Plaintiffs Responses to Defendants'  
3 Interrogatories.

4 Thus, Plaintiffs are entitled to summary judgment on their Recovery of License  
5 Payments, breach of contract, and alternative unjust enrichment claims as a matter of  
6 law.

7 **C. Alternatively, Plaintiffs are Entitled to Summary Judgment on Elements of their**  
8 **Breach of Contract Claims.**

9 A necessary element to Plaintiffs' breach of contract claim is that Defendants'  
10 breached a duty under the contract. *Fid. & Deposit Co. of Maryland v. Dally*, 148 Wn.  
11 App. 739, 745, 201 P.3d 1040, 1044. Defendants admit the software did not perform as  
12 promised. Hood Dec. **Exhibit A-2**. Further, Defendants admit that they did not resolve  
13 the issues with the software that Plaintiffs gave them notice of, and admit they did  
14 respond to Plaintiffs notice of issues with the software, which are breaches of the  
15 Agreement and Exhibit B to the Agreement. Hood Dec. **Exhibit A-2 and Exhibit A-4**.  
16 Therefore, Plaintiffs are entitled to this element of their breach of contract claim.

17 **V. CONCLUSION**

18 For the reasons set forth herein, Plaintiffs are entitled to summary judgment on  
19 their breach of contract claims or alternative unjust enrichment claim. Alternatively,  
20 Plaintiffs are entitled to summary judgment on Defendants' failure to perform their  
21 duty under the contract.

22 PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT -

9  
[2:17-cv-01607 - TSZ]  
4814-4843-9148

1 Dated this 12th day of July, 2018.

2 By: s/Lawrence R. Cock  
3 Lawrence R. Cock, WSBA No. 20326  
4 CORR CRONIN LLP  
5 1001 Fourth Avenue, Suite 3900  
6 Seattle, Washington 98154  
7 (206) 292-8800 phone  
8 Email: lrc@corrchronin.com

9 s/ Lori Hood  
10 Lori Hood *admitted pro hac vice*  
11 Attorney for Plaintiffs  
12 1301 McKinney Street, Suite 3700  
13 Houston, TX 77010  
14 Tel: (713) 650-9700  
15 Fax: (713) 650-9701  
16 lhood@bakerdonelson.com

17 *Attorneys for Plaintiffs*

18  
19  
20  
21 PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT -  
22 10  
[2:17-cv-01607 - TSZ]  
4814-4843-9148

2938949-000002  
4814-4843-9148 v5

**CORR CRONIN LLP**  
1001 FOURTH AVENUE, SUITE 3900  
SEATTLE, WASHINGTON 98154  
(206) 292-8800

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

**CERTIFICATE OF SERVICE**

I hereby certify that on July 12, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all recipients of ECF electronic notices in this action.

I declare under the penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington on July 12, 2018.

*s/ Lori Hood*  
\_\_\_\_\_  
Lori Hood *admitted pro hac vice*  
*Attorney for Plaintiffs*

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT -  
11  
[2:17-cv-01607 - TSZ]  
4814-4843-9148