

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

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.

Case No.: 17-cv-01607-TSZ

**DEFENDANTS’ OPPOSITION TO  
PLAINTIFFS’ MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

**NOTE ON MOTION CALENDAR:  
August 3, 2018**

**I. INTRODUCTION**

Plaintiffs are urging the Court to grant them partial summary judgment because Defendants’ responses to Plaintiffs’ Requests for Admissions (“RFAs”) were received, at most, one minute late; and, thus, the Court must allegedly deem Plaintiffs’ RFAs admitted. To characterize this as a waste of judicial resources is an understatement. Plaintiffs’ position, *raised for the first time in this motion*, is an instance of egregious discovery gamesmanship, which should be rejected out of hand by this Court.

1           There is no mystery as to why Plaintiffs resort to this tactic. Plaintiffs have submitted no  
2 evidence that Defendants breached any agreement or acted wrongfully, and they have no desire  
3 to engage in any substantive discovery to prove their allegations or to allow scrutiny into their  
4 own role in and reasons for the termination of the parties' engagement. Indeed, Plaintiffs and  
5 their agents have produced no documents to date and have stonewalled efforts to engage in fact-  
6 based inquiry of their claims. Far from proving any wrongdoing, Plaintiffs' motion is, thus, most  
7 notable for showcasing how little Plaintiffs in fact have to show to support their allegations.  
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9           In sum, the Court should summarily deny Plaintiffs' motion. Moreover, given that  
10 Plaintiffs concede the validity of the software licensing agreements, as they must, the Court  
11 should, pursuant to Rule 56(f), narrow Plaintiffs' claims and damage theories in accordance with  
12 the software licensing agreements' terms and the relief sought in Defendants' pending motion  
13 for partial summary judgment (Dkt. 32).  
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## 15                           **II.     RELEVANT FACTUAL BACKGROUND**

### 16                   **A. About Medstreaming**

17           Headquartered in Redmond, Washington, Medstreaming is a provider of healthcare IT  
18 solutions. Since its founding in 2006, the company has provided customizable, specialty-based  
19 workflow applications for more than 20 different clinical specialties, including but not limited  
20 to cardiology, women's health, and surgery. Dkt. 23-2 at 2-3; de Vries Decl., ¶ 2. Medstreaming  
21 licenses its software to medical providers and, in exchange, the providers pay a license fee  
22 directly to Medstreaming or arrange for financing through an independent third-party financier.  
23 Mr. Elseaidy is the company's Chief Executive Officer, and Mr. Plasch is its Vice President of  
24 Sales and Business Development. Dkt. 34 at 1, Dkt. 1-1 at 2.  
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**B. The Complaint**

1           **B. The Complaint**  
2           The Complaint involves claims arising from two software licensing agreements. *See*  
3 *generally* Dkt. 1-1. In or about March and August 2016, NIRP Pasadena and NIRP Sugar Land  
4 (collectively, “NIRP” or “Plaintiffs”), two affiliated outpatient vascular treatment centers,  
5 entered into separate software license agreements with Medstreaming. *See Ex. A* (NIRP  
6 Pasadena agreement, as signed by Donna Looser, NIRP Chief Operating Officer, on April 5,  
7 2016); *Ex. B* (NIRP Sugar Land agreement, as signed by Dr. Andrew Gomes, as NIRP’s  
8 “Manager” or Chief Executive Officer, on September 2, 2016).<sup>1</sup> (The April 5, 2016 agreement  
9 and the September 2, 2018 agreement are collectively referenced as the “Licensing  
10 Agreements.”).

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12           To pay for the licenses, NIRP secured funding from Balboa Capital Corporation  
13 (“Balboa”). *Ex. C* (“Balboa Financing Agreement”). At the time, Dr. Andrew Gomes, Dr. Ajay  
14 Choudhri, and Dr. Andrew Martin were the principals of NIRP. *Id.*

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16           At its core, the Complaint alleges that Medstreaming breached certain warranties to NIRP  
17 under the Licensing Agreements and that Medstreaming’s software did not function as  
18 represented. *See* Dkt. 1-1 at 12-16. NIRP further claims that Medstreaming induced NIRP to  
19 enter into a financing agreement with Balboa. *Id.* at 10. The Complaint does not name Balboa  
20 as a defendant, but seeks to rescind Balboa’s Financing Agreement. *Id.* at 18.  
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26 <sup>1</sup> Exhibits A-C to this Opposition are attached to the de Vries Declaration, as submitted herewith. Exhibits D-G are attached to the Cassubhai Declaration, as submitted herewith.

1           **C. Defendants’ Answer and Denials to Liability Admissions**

2           Defendants deny all liability, including, as relevant to this motion, under Plaintiffs’  
3 claims of breach of warranty and unjust enrichment claims. *See, e.g.*, Dkt. 1-7 at 89-105  
4 (Defendants’ Answer dated October 30, 2017); **Ex. D** (Defendants’ Responses to Plaintiffs’  
5 Requests for Admissions dated June 11, 2018); *see also generally* de Vries Decl., ¶¶ 4-5.  
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7           Specifically with respect to the RFAs, Defendants responded on the day the responses  
8 were due, *i.e.*, on June 11, 2018. *See* Ex. D at 5; *see also* Dkt. 30 at 7. In notable part, as in their  
9 Answer to the Complaint, Defendants (i) **denied** that they “did not resolve the issues with  
10 Medstreaming’s software for which Plaintiffs sent complaints to you;” (ii) **denied** that they “did  
11 not adequately responds to Plaintiffs’ notice of issues with Medstreaming software; and  
12 (iii) **denied** that the “software did not perform as promised.” Ex. D at 2-4 (RFA Nos. 1, 4, 6).  
13

14           To the extent the time-stamp in Plaintiffs’ Seattle-based counsel’s email account shows  
15 12:00 a.m. on June 12, 2018—as opposed to a minute earlier on June 11, 2018—as the time the  
16 responses were delivered, Defendants’ counsel re-attests that the responses were emailed on June  
17 11, 2018, well in advance of midnight. Cassubhai Decl., ¶ 2.  
18

19           With respect to service, Defendants raised through counsel the topic of e-service very  
20 early in the case. *Id.*, ¶ 4. Setting aside any oversight in not thereafter obtaining *written*  
21 authorization, Defendants have routinely provided discovery responses and requests via email.  
22 *Id.* Although Plaintiffs seemingly embedded a sole “General Objection” concerning e-service of,  
23 specifically, Defendants’ First Set of Interrogatories and Requests for Production of Documents  
24 in their responses to the same (Dkt. 30 at 8), at no point, until the instant motion, have Plaintiffs  
25 ever noted that they deemed Defendants’ responses to Plaintiffs’ multiple sets of discovery  
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1 requests, including RFAs, as invalid. Cassubhai Decl., ¶ 4. Nor have Plaintiffs ever claimed that  
2 receiving an email copy, as opposed to hard copy, of the responses—or receiving the copy at  
3 12:00 a.m., as opposed to a minute earlier—prejudiced them. *Id.* Plaintiffs’ counsel has also  
4 never attempted to meet-and-confer on the issue to allow Defendants an opportunity to cure any  
5 technical defect. *Id.* Having said that, Defendants’ counsel has now provided Plaintiffs’ counsel  
6 with hard copies of the responses. *Id.*, ¶ 5.

8 Ironically, in accordance with Defendants’ practice, even Plaintiffs have served papers  
9 electronically in this case without an accompanying hard copy. *Id.*, ¶ 6. For example, after failing  
10 to serve Initial Disclosures by the Court-ordered deadline of January 5, 2018 (Dkt. 16), Plaintiffs  
11 delivered, after multiple prompts from Plaintiffs, their Initial Disclosures on or about March 22,  
12 2018, *by facsimile. Id.*; **Ex. E.**

#### 14 **D. The Software Licensing Agreements Govern the Dispute**

15 Setting aside any dispute over technical defects in service of RFA responses, *on the*  
16 *merits*, the Licensing Agreements govern the parties’ relationship and inform the outcome of this  
17 dispute. Among other things, the Licensing Agreements provide terms and conditions  
18 concerning NIRP’s responsibilities (¶ 2.2), Medstreaming’s warranties and representations and  
19 disclaimers thereto (¶¶ 3.2-3.3), and Medstreaming’s liability limitations (¶¶ 2.3.2, 3.4, 5.3). *See*  
20 *Exs. A-B.* The Licensing Agreements also provide for a “cure” process upon written notification  
21 of any alleged material breach (¶ 4.2). *Id.*

23 For example, with respect to:

24 Customer Responsibilities: Section 2.2 of the Licensing Agreements sets forth, among  
25 other things, that the customer must procure, at its expense, the computer infrastructure necessary  
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1 to utilize Medstreaming's software. Under the terms, Medstreaming *shall not be responsible for*  
2 *any delays in implementation caused by* a customer's failure to provide the requisite  
3 infrastructure, customization orders, or customers' failure to make available and assign its clinical,  
4 operational, and administrative human resources necessary to carry out successful  
5 implementation. Exs. A-B at 4 (¶ 2.3.2).

7 Disclaimer of Representations and Warranties: Section 3 of the Licensing Agreements  
8 lists the warranties, including, significantly, the express or implied warranties, conditions or  
9 representations to which Medstreaming did not assent and thereby explicitly disclaimed.  
10 Specifically, the Licensing Agreements stated:

11 3.2 Medstreaming warrants that the services provided hereunder shall be performed  
12 in a professional and workmanlike manner by adequately trained and experienced  
13 personnel.

14 3.3 Other than as expressly set forth above, Medstreaming *does not make any*  
15 *express or implied warranties, conditions or representations* to the Customer, any  
16 of its affiliates or any other party with respect to the Licensed Program, services of  
17 any products, documentation, or any other services or works of authorship provided  
18 hereunder or otherwise regarding this License Agreement, *any implied warranty*  
19 *or condition of merchantability, no infringement, or fitness for a particular*  
20 *purpose are expressly excluded and disclaimed. . . .*

21 Exs. A-B at 5 (emphasis added).

22 Limitations of Liability. In addition to the other limiting language, Section 3 expressly  
23 limited Medstreaming's liability to only those amounts of fees actually paid by customer. The  
24 terms stated:

25 **LIMITATION OF LIABILITY. MEDSTREAMING'S LIABILITY TO**  
26 **CUSTOMER FOR ANY LOSSES OR INDIRECT DAMAGES, IN CONTRACT,**  
**TORT OR OTHERWISE, ARISING OUT OF THE SUBJECT MATTER OF**  
**THIS LICENSE AGREEMENT SHALL BE LIMITED TO THOSE ACTUAL**  
**AND DIRECT DAMAGES WHICH ARE REASONABLY INCURRED BY**  
**CUSTOMER AND SHALL NOT EXCEED THE TOTAL AMOUNT OF ALL**

1       **FEES PAID BY CUSTOMER UNDER THIS LICENSE AGREEMENT.**  
2       MEDSTREAMING WILL NOT BE LIABLE FOR: SPECIAL, PUNITIVE,  
3       INDIRECT, INCIDENTAL, EXEMPLARY OR CONSEQUENTIAL  
4       DAMAGES . . . IN ANY WAY ARISING FROM OR RELATING TO THIS  
5       LICENSE AGREEMENT.

6       *Id.* (caps in original, bold emphasis added).

7       By their terms, the Licensing Agreements’ terms and conditions are the “**complete** and  
8       **exclusive** statement of Medstreaming’s obligations and responsibilities to Customer and  
9       supersede[d] any other proposal, representation, or other communication oral written or  
10      otherwise by or on behalf of Medstreaming relating to the subject matter thereof.” Exs. A-B at  
11      7 (¶ 5.8) (emphasis added).

#### 12       **E. Plaintiffs’ Lack of Evidence**

13      Contrary to NIRP’s claims, Medstreaming’s customized software at issue was functional  
14      in all material respects. de Vries Decl., ¶ 5. Instead, any allegations concerning defects in  
15      functionality are based on NIRP’s fundamental misunderstanding of how the software operated  
16      (e.g., confusing “enhancements” or customizations to the software with the software’s  
17      functionality or the cause or relevance of “bugs,” which are inherent in any software), as well as  
18      NIRP’s failure to fully understand or retain information from training concerning how to work  
19      with the software or to make available resources necessary to carry out more timely  
20      implementation of the software. *Id.* And, to the extent NIRP raised any material issues,  
21      Medstreaming timely addressed those issues. *Id.*

22      Moreover, by all accounts, NIRP never intended to allow Medstreaming a full  
23      opportunity to resolve its issues. de Vries Decl., ¶ 6. NIRP did not provide Medstreaming with  
24      an adequate “cure” notice as required under the Licensing Agreements to cure any alleged issues  
25      26

1 concerning the software, but instead retained an attorney to, as of February 2017, negotiate a  
2 termination of the engagement. *Id.* Prior to February 2017, NIRP and Medstreaming had  
3 regularly convened on pre-scheduled conference calls through the course of the engagement,  
4 where various issues as they came up were addressed and dealt with. *Id.*

5  
6 Even so, after NIRP had indicated that it was terminating the engagement, Medstreaming  
7 devoted significant hours to ensure that NIRP's concerns, regardless of materiality or merit, were  
8 heard. de Vries Decl., ¶ 7. Between March and May 2017, Medstreaming committed multiple  
9 personnel from various levels of the company to attend several conference calls with NIRP. *Id.*  
10 During these calls, it became clear that NIRP was not being fully sincere in its reasons for  
11 wanting to terminate the engagement. *Id.* As Medstreaming addressed issues one-by-one, NIRP,  
12 namely through its Chief Executive Officer Dr. Andrew Gomes, manufactured new issues and  
13 even misrepresented how NIRP employed the software. *Id.*

14  
15 For example, as one of the reasons for wanting to terminate the engagement, Dr. Gomes  
16 claimed that the software did not have an inventory management feature as allegedly represented  
17 so to allow NIRP to track and re-order supplies, and that this allegedly crippled its operations.  
18 de Vries Decl., ¶ 8. However, upon further inquiry, Dr. Andrew Martin acknowledged (when  
19 Dr. Gomes would not) that NIRP had no use for the inventory management feature because it  
20 obtained supplies via consignment. *Id.* Indeed, NIRP had not contracted for the feature. *Id.*

21  
22 Medstreaming committed substantial time and resources to NIRP in furtherance of their  
23 engagement, including in trying to salvage the relationship at a time when NIRP was clearly  
24 committed to its termination without cause. de Vries Decl., ¶ 9. To be sure, in implementing  
25 any software for a customer like NIRP, the majority of Medstreaming's time and resources is  
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1 committed at the engagement’s front-end. *Id.* It is for that reason that the Licensing Agreements  
2 contained an acknowledgment from NIRP that NIRP’s failure to fulfill its responsibilities under  
3 the agreement, including by prematurely terminating an engagement, would cause  
4 Medstreaming harm. *See* Ex. A at 6 (¶ 5.4). In the case of NIRP, Medstreaming personnel  
5 recorded 1,266 hours during the front-end implementation phase, although the actual number of  
6 hours with unrecorded time is much higher. *de Vries Decl.*, ¶ 9.

#### 8 **F. Incomplete Discovery and Failure to Produce Documents**

9 Although the parties have engaged in certain written discovery, there have been no  
10 depositions, and NIRP and its principals, Dr. Gomes, Dr. Choudhri, and Dr. Martin, have not  
11 produced any documents to date. *Cassubhai Decl.*, ¶ 7. Of particular significance, NIRP and its  
12 principals have not produced their internal communications concerning the facts and  
13 circumstances giving rise to their termination of the software licensing agreements, including  
14 about the software’s alleged defects or about other software programs that NIRP contracted for  
15 in place of Medstreaming’s software—all of which would be material to the resolution of their  
16 dispute. *Id.*<sup>2</sup>

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23 <sup>2</sup> In their May 22, 2018, answers and responses to Defendants’ First Set of Interrogatories and Requests for  
24 Production, Plaintiffs stated in response to various RFPs that they “ha[d] already produced documents.” *See* **Ex. F** at  
25 13-15; **Ex. G** at 13-15; *Cassubhai Decl.*, ¶ 8. However, Defendants have no record of any documents having been  
26 produced by NIRP or its principals, and, as of the filing of this Opposition, Plaintiffs will not even give Defendants  
a clear answer about whether or not documents were in fact produced, as they previously represented, and when.  
Defendants have attempted to confer with Plaintiffs on this issue, along with other issues, to no avail. *Id.* As a  
general matter, Defendants will be filing in short order a motion to amend the case schedule seeking a short extension  
to the discovery period and the trial date. *Id.*, ¶ 8.

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**III. ISSUE PRESENTED**

A. Should the Court deny Plaintiffs’ motion for partial summary judgment on the alleged grounds that their Requests for Admission are deemed admitted, even though, among other things: (i) Plaintiffs admit they received Defendants’ responses denying the Requests, at most, one minute past the 30-day deadline to respond, and do not claim any prejudice by any purported untimeliness; (ii) Plaintiffs have routinely acknowledged or accepted electronic service of documents and, in fact, themselves served document(s) electronically; (iii) Plaintiffs did not email, call, attempt to meet-and-confer, file any motion, or seek other relief to address the purportedly defective service prior to filing the instant dispositive motion; and (iv) public policy favors adjudication on the merits, and, here, Plaintiffs have provided no evidence to support their claims?

B. Given that the parties do not dispute that the Licensing Agreements are valid, pursuant to Rule 56(f), should the Court narrow the Complaint by dismissing all of Plaintiffs’ claims premised on alleged representations or expressed or implied warranties not specifically included in the Licensing Agreements, as well as to, per the terms, limit Plaintiffs’ damage claims to the license fees actually paid?

**IV. EVIDENCE RELIED UPON**

This Opposition relies upon the declarations of Hozaiifa Y. Cassubhai and Evert de Vries, and the exhibits attached thereto; and the pleadings and files herein.

**V. ARGUMENT**

**A. Standard of Review**

Summary judgment is appropriate only “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). In determining

1 whether summary judgment is appropriate, the court must “view the facts in the light most  
2 favorable to the non-moving party and draw reasonable inferences in favor of that party.”  
3 *Scheuring v. Traylor Bros., Inc.*, 476 F.3d 781, 784 (9th Cir. 2007).

4 **B. Plaintiffs’ Requests for Admissions Should Not Be Deemed Admitted**

5 1. Standard

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7 The Federal Rules of Civil Procedure provide that requests are deemed admitted if not  
8 timely answered within 30 days of service. Fed. R. Civ. P. 36(a)(3). However, the Ninth Circuit  
9 “has long recognized the district court’s discretion to permit late responses to requests for  
10 admission.” *Doctors Med. Ctr. of Modesto, Inc. v. Principal Life Ins. Co.*, No. 1:10-cv-00452,  
11 2011 U.S. Dist. LEXIS 26885 at \*6 (E.D. Cal. March 3, 2011), *citing French v. United States*,  
12 416 F. 2d 1149, 1152 (9th Cir. 1963) (“A trial judge has discretion to permit late responses to  
13 requests for admission.”). The Court must “weigh the public policy favoring the disposition of  
14 cases on their merits rather than on technical violations of procedural rules, consider the scope  
15 and purpose of the Federal Rules of Civil Procedure, and assess the particular circumstances  
16 permitted.” *Id.* at \*8.

17  
18 The court may grant relief from an admission allegedly made under Rule 36(a) when:  
19 (i) the presentation of the merits of the action would be subserved, and (ii) the party who obtained  
20 the admission would not be prejudiced by the withdrawal. *See Hadley v. United States*, 45 F.3d  
21 1345, 1348 (9th Cir. 1995). Public policy favoring the disposition of cases on their merits,  
22 “strongly counsels against dismissal of a case or sanctions [on procedural grounds] that are  
23 ultimately case-terminating.” *Doctor’s Med. Ctr.*, 2011 U.S. Dist. LEXIS 26885 at \*9.  
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1                   2. Plaintiffs Received the Responses, At Most, One Minute Past the Deadline

2                   In this instance, Defendants sent the responses to the RFAs on June 11, 2018, the day the  
3 responses were due, and, thus, the responses were not late. *See* Cassubhai Decl., ¶ 2; Ex. D.  
4 Plaintiffs admit the responses were delivered to their counsel’s email inbox by no later than  
5 midnight of June 12, 2018. Dkt. 30 at 7. At most, Defendants’ “untimely” responses to Plaintiffs’  
6 RFAs were delivered one minute passed the 11:59 P.M. deadline of June 11, 2018.<sup>3</sup> Plaintiffs  
7 have cited no case—because none exists—where a court has deemed requests for admissions  
8 admitted under these facts.  
9

10                   To the extent that Plaintiffs claim that they did not agree to electronic service and that  
11 Defendants were required to deliver hard copies of the responses, three points in response:

12                   First, as noted, Defendants’ counsel raised the topic of electronic service with Plaintiffs’  
13 counsel early in this case and, although it appears there was no authorization memorialized in  
14 writing, Defendants have routinely sent Plaintiffs discovery responses by e-mail in this case,  
15 without any email, phone call, request for meet-and-confer or other indication from Plaintiffs that  
16 Defendants’ responses were deemed not served. In fact, Plaintiffs and Defendants have conferred  
17 about discovery-related issues on multiple occasions without Plaintiffs’ counsel ever raising the  
18 issue. That Plaintiffs themselves have served discovery-related papers electronically without  
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23 <sup>3</sup> Plaintiffs have suggested that, because one of its attorneys is in the Central time zone, Defendants’ responses were  
24 actually two hours late (as opposed to one minute late). Dkt. 30 at 7. Plaintiffs’ attempt to ascribe significance to the  
25 time-zone distinction is confounding. Plaintiffs filed this case in a court in the Pacific time-zone and then retained  
26 counsel in this district. Moreover, it is notable that, until the instant motion, Plaintiffs’ Seattle-based counsel,  
Lawrence Cock, has handled virtually all activity in this case on behalf of the Plaintiffs, with limited, if any,  
engagement from Plaintiffs’ Houston-based counsel. Cassubhai Decl., ¶ 3.

1 serving a hard copy underscores the insincerity of Plaintiffs' ask. *See supra* II.C. In any case,  
2 after Plaintiffs filed the instant motion to raise, for the first time, their claim of defective service  
3 regarding the responses to the RFAs, Defendants hand-delivered the June 11, 2018 responses to  
4 Plaintiffs' Seattle-based counsel and separately provided via first-class mail hard copies of the  
5 same to Plaintiffs' Houston-based counsel. *Id.*<sup>4</sup>

6  
7 Second, setting aside issues of waiver or unclean hands, Plaintiffs do not, nor can they  
8 possibly, argue that they were prejudiced by any purported delay in response, as any such  
9 assertion would not pass the laugh test. This alone defeats their motion. *See Kirk v. Richards*,  
10 No. CIV S-10-0373, 2011 U.S. Dist. LEXIS 105883 at \*5 (E.D. Cal. Sept. 19, 2011), *quoting*  
11 *Colon v. United States*, 474 F.3d 616, 621 (9th Cir. 2007) (the party "relying on the deemed  
12 admission has the burden of proving prejudice"); *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir.  
13 1995) (holding that district court "did not abuse its discretion in refusing to consider the requests  
14 for admission as admitted," where they "were filed one day late" because the "late response was  
15 so minimal in time and work on the date for responding slowed by [a] snow storm.").

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<sup>4</sup> Given that Plaintiffs declined to object on service grounds to Defendants' discovery responses when received, and, in fact, acknowledged receipt and subsequently conferred on discovery issues concerning Defendants' responses *without* bringing up the purported lack of service issue, Plaintiffs should be deemed to have waived any defects in service. *See, e.g., E. & J. Gallo Winery v. EnCana Energy Servs.*, No. 03-5412, 2005 U.S. Dist. LEXIS 40141 at \*11 (E.D. Cal. Aug 15, 2005) (finding that as the magistrate judge determined that defense counsel received notice of the deposition by email and did not object to that notice, the judge "correctly concluded that defendant counsel were provided with actual timely notice of the deposition and waived any right to service of notice by any other means by failing to make timely objection."); *Rushing v. Bd. of Supervisors of the Univ. of La. Sys.*, Civ No. 06-623, 2010 U.S. Dist. LEXIS 113243 at \*7 (M.D. La October 25, 2010) (finding that despite the defective service of papers by email, "defendant's subsequent conduct constitutes a waiver of the defective service . . . as counsel for the defendants "did not properly object to the form of service . . ." which "would have given the plaintiff time to cure the defect by mailing notices.").

1           Third, there is no question that the Court’s consideration of Defendants’ actual responses  
2 to the RFAs, in which they denied the RFAs at issue, rather than granting their blanket admission  
3 of threshold disputed issues on a service technicality, serves the determination of the matter on  
4 the merits. *Webb v. Green Tree Servicing, LLC*, No. ELH-11-2105, 2013 U.S. Dist. LEXIS  
5 140205 at \*62 (D. MD Sept 30, 2013) (exercising “discretion not to rely on plaintiff’s deemed  
6 admissions” alleged to have been served four days late, as “no cognizable prejudice inured” from  
7 plaintiff’s late filing” and in light of the “strong policy that cases be decided on the merits.”  
8 (internal citations omitted)). Public policy favoring disposition of cases on the merits is especially  
9 relevant where, as here, Plaintiffs’ motion presents no evidence to support adjudication and where,  
10 as noted, Plaintiffs and their principals have failed to produce any documents, contrary to their  
11 representations otherwise. *See supra* II.F.  
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14           **C. As Evidenced by Defendants’ Responses to Plaintiffs’ Requests for Admission,  
15           There are Unresolved Issues of Material Fact**

16           It is indeed notable that, in a case that largely turns on, according to Plaintiffs’ complaint,  
17 representations and performance of software functionality, Plaintiffs have not submitted any  
18 evidence or even a single party or witness declaration purporting to speak to these issues. By  
19 contrast, Defendants have submitted declarations (with exhibits) reiterating, consistent with their  
20 Answer to the Complaint and RFA responses, that, among other things, the software functioned  
21 as it was represented to function.

22           Moreover, as noted, there are critical questions concerning the circumstances that gave  
23 rise to Plaintiffs’ terminating the contract, including inquiry of their internal communications and  
24 affairs at the time they chose to suddenly escalate and terminate the agreement. Likewise, there  
25 are unanswered questions about whether and to what extent NIRP employed another software  
26 program (and the timing of that employ) and what features that software program had vis-à-vis

1 the features of Medstreaming's software which NIRP has raised concerns about. Plaintiffs are  
2 fully aware that, given the current state of discovery, any introduction of evidence and request for  
3 a merits-based ruling would expose Plaintiffs' and their principals' failure to produce documents  
4 critical to the resolution of these material issues.

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6 **D. Even If It Were Appropriate to Deem the RFAs Admitted There are Still  
Disputed Material Facts Precluding Summary Judgment**

7 Plaintiffs' request for partial summary judgment would fail even if the Court were to  
8 somehow deem the RFAs admitted. For example, even assuming that Plaintiffs were found at  
9 any point to have breached the Licensing Agreements, there would still be open questions  
10 concerning Plaintiffs' own breaches of the Licensing Agreements and role in causing their alleged  
11 loss, injury or damage, including failure to mitigate damages and to take advantage of any  
12 preventive or corrective opportunities provided by Medstreaming.

13 **E. Pursuant to Rule 56(f), the Court Should Narrow Plaintiffs' Contract Claims  
14 and Damage Theories in Accord with the Terms of the Licensing Agreements**

15 Under Rule 56(f), the Court can grant "Judgment Independent of the Motion." "After  
16 giving notice and a reasonable time to respond, the court may: (i) grant summary judgment for a  
17 non-movant." *Id.*; see also *Steele v. Panos Properties LLC*, No. C17-0525-JCC, 2017 WL  
18 2600168, at \*3 (W.D. Wash. June 15, 2017) (granting summary judgment to non-moving party  
19 under Rule 56(f) and finding that moving party was sufficiently put on notice through response  
20 brief and had ample opportunity to respond through reply).

21 Here, already pending before the Court is Defendants' motion for partial summary  
22 judgment, which seeks to dismiss all of Plaintiffs' claims premised on alleged representations or  
23 expressed or implied warranties not specifically included in the Licensing Agreements, as well as  
24 to limit Plaintiffs' damage claims and requests for relief to the license fees actually paid, per the  
25 terms of the Licensing Agreements. (Dkt. 32 at 1-2, 5-6.). In short, Defendants' motion asks the  
26 Court to enforce the terms of the Licensing Agreements, as executed by the parties.

1 Similarly, Plaintiffs' instant motion assumes the validity of the Licensing Agreements. In  
2 no uncertain terms, Plaintiffs state: "It is undisputed Plaintiffs entered into a license software  
3 agreement with Defendants" . . . [and] [i]t is undisputed that there was an agreement between the  
4 parties." Dkt. 30 at 8. Setting aside any questions of breach, which, as addressed, cannot possibly  
5 be resolved on this motion, there is no dispute that the Licensing Agreements are valid and their  
6 terms and conditions are enforceable. As such, the Court may grant Defendants' pending motion  
7 (Dkt. 32) under Rule 56(c) or grant the relief sought in that motion under Rule 56(f).<sup>5</sup>

8  
9 **VI. CONCLUSION**

10 For the reasons set forth above, Defendants respectfully request that the Court deny  
11 Plaintiffs' Motion and grant Defendants the relief provided in the proposed order, pursuant to  
12 Rule 56(f).

13  
14 RESPECTFULLY SUBMITTED this 30th day of July 2018.

15 **SPIRO HARRISON**

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25  
26 <sup>5</sup> By moving to enforce the Licensing Agreements as is, it appears that Plaintiffs are foregoing any claim of fraud-in-  
the-inducement or any other claim premised on the invalidity of the contract.



**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on July 30, 2018, I electronically filed the foregoing document via Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

Dated this 30th day of July 2018

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