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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 XIFIN, INC.,

12 Plaintiff,

13 v.

14 FIREFLY DIAGNOSTICS, INC.,

15 Defendant.

Case No.: 3:17-cv-00742-BEN-KSC

ORDER:

**1) GRANTING PLAINTIFF’S
MOTION TO FILE DOCUMENTS
UNDER SEAL; and**

**2) GRANTING PLAINTIFF’S
MOTION FOR ENTRY OF
DEFAULT JUDGMENT**

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19 Plaintiff brought this breach of contract action against Defendant seeking recovery
20 of damages. Plaintiff now moves for an entry of default judgment against Defendant.
21 Defendant did not respond to Plaintiff’s motion, and has not made an appearance in this
22 case. For the reasons set forth below, Plaintiff’s motions are **GRANTED**.

23 **BACKGROUND**

24 XIFIN, Inc. (“XIFIN”) is a San Diego healthcare information technology company
25 incorporated in California that provides its clients with cloud-based billing services.
26 (Docket No. 1, “Compl.” ¶¶ 5, 7.) Firefly Diagnostics, Inc. (“Firefly”) is a company that
27 provides certain testing and diagnostic goods and services to healthcare providers; it is
28 incorporated and maintains its principal place of business in Ohio. (*Id.* ¶¶ 6, 9.)

1 On June 12, 2015, XIFIN entered into two written contracts with Firefly: (1) the
2 “RPM¹ Contract,” and (2) the “LIS² Contract” (together, the “Contracts”). Pursuant to
3 the RPM Contract, XIFIN provided Firefly with cloud-based laboratory diagnostic billing
4 services and outsourced accounts receivable and billing management services. (*Id.* ¶ 11.)
5 Pursuant to the LIS Contract, XIFIN provided cloud-based laboratory information
6 services to Firefly for pathology services “including, but not limited to, histology
7 workflow management, web-based remote specimen accessioning, barcode-based
8 specimen tracking, integration of digital pathology devices for slide image capturing, and
9 clinical history and case review.” (*Id.* ¶ 119.)

10 Beginning in December 2016, Firefly became delinquent in paying service fees
11 under both contracts. (Declaration of Tammy Lawrence (“Lawrence Decl.”) ¶ 16.)
12 XIFIN advised Firefly’s CEO, Jeff Garshon, on several occasions regarding its
13 delinquent account by both email and teleconference. (*Id.* ¶ 17.) Firefly did not dispute
14 the amount of service fees owed or claim that XIFIN itself breached either contract, and
15 ultimately failed to pay the amounts due. (*Id.* ¶¶ 16-17.) On December 13, 2016, XIFIN
16 provided notice of Firefly’s material breach of both contracts. (*Id.* ¶ 18.) On February
17 14, 2017, XIFIN terminated both contracts because Firefly had still failed to pay the
18 amounts due. (*Id.* ¶ 19.)

19 On April 12, 2017, XIFIN filed this action against Firefly for breach of the
20 Contracts. (Docket No. 1.) On April 26, 2017, XIFIN filed a proof of service, indicating
21 it had properly served Firefly. (Docket No. 4.) When Firefly failed to respond to its
22 Complaint, XIFIN filed a request for entry of default, which the Clerk of Court granted
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25 ¹ RPM is an acronym for Revenue Performance Management system, which is the
26 “proprietary internet-based accounts receivable and billing management system” XIFIN
27 developed to provide its cloud-based billing services. (Compl. ¶ 7.)

28 ² LIS is an acronym for laboratory information system, which is “a separate cloud-
based laboratory information system to manage diagnostic, financial, and clinical
information.” (Compl. ¶ 8.)

1 on July 10, 2017. (Docket No. 6.) XIFIN now moves for default judgment against
2 Firefly.

3 **DISCUSSION**

4 **A. Motion to Seal**

5 XIFIN files a copy of the RPM and LIS contracts requesting they be filed under
6 seal. (Docket No. 7.) “[T]he courts of this country recognize a general right to inspect
7 and copy public records and documents, including judicial records and documents.”
8 *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978). “Unless a particular court
9 record is one ‘traditionally kept secret,’ a ‘strong presumption in favor of access’ is the
10 starting point.” *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir.
11 2006) (citing *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir.
12 2003)). A party seeking to seal a judicial record bears the burden of overcoming the
13 strong presumption of access. *Foltz*, 331 F.3d at 1135. Since the contracts that XIFIN
14 requests to file under seal are “more than tangentially related to the merits of the case,”
15 XIFIN must show “compelling reasons” for the request to seal. *Ctr. for Auto Safety v.*
16 *Chrysler Grp., LLC*, 809 F.3d 1092, 1096-98 (9th Cir. 2016).

17 XIFIN asserts both contracts “contain commercially sensitive business information
18 including . . . Plaintiff’s pricing structure for the rendition of services under the contracts
19 and proprietary protocols and processes.” (Docket No. 9.) Counsel for XIFIN explains
20 that “[p]ublic release of this information would harm . . . XIFIN, if those terms were to be
21 obtained by either current or future clients or competitors in the same market as XIFIN.”
22 (Declaration of John D. Hershberger in Support of Motion to Seal, Docket No. 7-2 ¶ 3.)
23 The Court finds the potential harm to XIFIN’s competitive standing constitutes
24 “compelling reasons,” and therefore **GRANTS** Plaintiff’s Motion to Seal. *See Nixon*,
25 435 U.S. at 598.

26 **B. Motion for Default Judgment**

27 Federal Rule of Civil Procedure 55(b)(2) provides for the entry of default
28 judgment by the court. “The district court’s decision whether to enter a default judgment

1 is a discretionary one.” *Microsoft Corp. v. Ricketts*, No. C 06-06712 WHA, 2007 WL
2 1520965, at *1 (N.D. Cal. May 24, 2007) (quoting *Aldabe v. Aldabe*, 616 F.2d 1089,
3 1092 (9th Cir. 1980)). A district court considers the following factors:

4 (1) the possibility of prejudice to plaintiff, (2) the merits of
5 plaintiff’s substantive claim, (3) the sufficiency of the
6 complaint, (4) the sum of money at stake in the action, (5) the
7 possibility of a dispute concerning the material facts, (6)
8 whether the default was due to excusable neglect, and (7) the
strong policy underlying the Federal Rules of Civil Procedure
favoring decisions on the merits.

9 *Microsoft Corp.*, 2007 WL 1520965, at *1-2 (quoting *Eitel v. McCool*, 782 F.2d 1470,
10 1471-72 (9th Cir. 1986)).

11 In determining the merits of a motion for default judgment “well-pleaded factual
12 allegations are taken as true, except as to the amount of damages.” *Id.* at *2 (citing *Fair*
13 *Hous. Of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002)). The Court has considered
14 the *Eitel* factors and finds these factors favor entry of default against Firefly.

15 1. Possibility of Prejudice to Plaintiff

16 XIFIN claims Firefly used its services without paying amounts due under the
17 Contracts. Firefly has refused to participate in these proceedings. If a default judgment
18 is not entered, XIFIN will suffer prejudice because it will be without other recourse for
19 recovery. *See Philip Morris USA, Inc. v. Castworld Prods., Inc.*, 219 F.R.D. 494, 499
20 (C.D. Cal. 2003) (finding that without a default judgment, plaintiff would have no other
21 recourse and suffer prejudice). Therefore, this factor weighs in favor of granting default
22 judgment against Firefly.

23 2. Merits of Plaintiff’s Claim & Sufficiency of Complaint

24 The second and third *Eitel* factors look to the merits of the plaintiff’s substantive
25 claim, and the sufficiency of the complaint. *Eitel*, 782 F.2d at 1471-72. The Ninth
26 Circuit has suggested that these two factors require that a plaintiff “state a claim on which
27 the [plaintiff] may recover.” *Kloeping v. Fireman’s Fund*, No. C 94-2684 TEH, 1996
28 WL 75314, at *2 (N.D. Cal. Feb. 13, 1996) (citing *Danning v. Lavine*, 572 F.2d 1386,

1 1388 (9th Cir. 1978)). In its complaint, XIFIN asserts two breach of contract claims, one
2 for the RPM Contract and one for the LIS Contract. XIFIN attached a copy of each
3 contract, and alleges that it fully performed on the contracts, that Firefly failed to
4 perform, and it was damaged as a result. Therefore, XIFIN alleges sufficient allegations
5 in the Complaint, and the allegations appear to have merit. *See Reichert v. Gen. Ins. Co.*
6 *of Am.*, 68 Cal. 2d 822, 830 (1968) (elements of breach of contract include: existence of a
7 contract, plaintiff's performance, defendant's breach, and resulting damages to the
8 plaintiff). Thus, these two factors also favor entry of default judgment.

9 3. Amount of Money at Stake

10 Under the fourth *Eitel* factor, a court considers the amount of money at stake in
11 relation to the seriousness of a party's conduct. *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F.
12 Supp. 2d 1172, 1176-77 (C.D. Cal. 2002). Here, Plaintiff seeks an award of
13 \$696,132.01³ in damages for breach of the RPM Contract, and \$195,190.13⁴ for breach of
14 the LIS Contract. The amount requested is supported by the evidence and proportionate
15 to the harm caused by Firefly's purported breach of the contracts. Accordingly, this
16 factor weighs in favor of granting default judgment.

17 4. Possibility of Dispute Over Material Facts

18 Firefly has not filed an answer or responded to XIFIN's Complaint, or filed an
19 opposition or responded to the instant motion or XIFIN's motion for the clerk's entry of
20 default judgment. As a result, no dispute concerning material facts has arisen. Therefore,
21 this factor also weighs in favor of granting default judgment against Firefly.

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25 ³ This amount consists of \$256,758.94 in service fees, \$19,373.07 in finance
26 charges, and \$420,000 in Minimum Service Fees pursuant to the RPM Contract.
(Lawrence Decl. ¶ 35.)

27 ⁴ This amount consists of \$83,862.50 in service fees, \$6,327.63 in finance charges,
28 and \$105,000 in accelerated Subscription Fees, pursuant to the LIS Contract. (Lawrence
Decl. ¶ 46.)

1 5. Whether Default was Due to Excusable Neglect

2 A court may consider whether there are circumstances surrounding a party's failure
3 to respond constitutes excusable neglect. *See Eitel*, 782 F.2d at 1472. However, a court
4 may find excusable neglect to be lacking where a defendant was properly served with the
5 complaint and notice of default judgment. *See Shanghai Automation Instrument Co. v.*
6 *Kuei*, 194 F. Supp. 2d 995, 1005 (N.D. Cal. 2001). Here, the possibility of excusable
7 neglect is remote. Firefly was properly served with the Complaint, the motion for clerk's
8 default judgment, the Clerk of the Court's entry of default, and the instant motion for this
9 Court's entry of default judgment. (Docket Nos. 4, 5-6, 9). Yet Firefly failed to answer
10 the Complaint and did not oppose the above-referenced motions or object to the Clerk of
11 the Court's entry of default. Accordingly, this factor also weighs in favor of granting
12 default judgment against Firefly.

13 6. Policy Favoring Decisions on the Merits

14 The policy favoring resolution of the case on the merits always weighs against
15 default judgment. In this case, however, the other *Eitel* factors outweigh this general
16 policy because of Firefly's "failure to answer Plaintiff's [c]omplaint makes decision on
17 the merits impractical, if not impossible." *PepsiCo*, 238 F. Supp. 2d at 1177.

18 In sum, other than the policy of deciding cases on the merits, the totality of the
19 *Eitel* factors weigh in favor of default judgment against Firefly. Therefore, Plaintiff's
20 motion for default judgment is **GRANTED**.

21 **C. Damages**

22 XIFIN seeks damages due under the RPM and LIS Contracts. Under Rule 8(a)(3),
23 a plaintiff's demand for relief must be specific, and he "must 'prove up' the amount of
24 damages." *Philip Morris USA Inc. v. Banh*, No. CV 03-4043 GAF (PJWx), 2005 WL
25 5758392, at *6 (C.D. Cal. Jan. 14, 2005); *Elektra Entmn't Grp., Inc. v. Bryant*, No. CV
26 03-6371GAF(JTLX), 2004 WL 783123, at *5 (C.D. Cal. Feb. 13, 2004) ("Plaintiffs must
27 'prove up' the amount of damages that they are claiming."). Rule 54(c) limits the relief
28 that can be sought in a motion for entry of default judgment to that identified in the

1 complaint. Fed. R. Civ. P. 54(c) (“A default judgment must not differ in kind from, or
2 exceed in amount, what is demanded in the pleadings.”). *See also PepsiCo*, 238 F. Supp.
3 2d at 1174 (stating that a default judgment “shall not be different in kind from or exceed
4 in amount that prayed for in the [complaint]”). Also, as noted, a defaulting defendant is
5 not deemed to have admitted facts concerning damages alleged in the complaint. *See id.*
6 at 1177 (“Upon entry of default, all well pleaded facts in the complaint are taken as true,
7 except those relating to damages.”) (citing *TeleVideo Sys.*, 826 F.2d at 917-18).

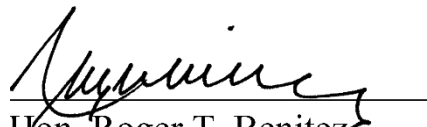
8 XIFIN seeks an award of monetary damages in the amounts of \$696,132.01 for the
9 RPM Contract and \$195,190.13 for the LIS Contract. To support its damages, XIFIN
10 attached copies of the Contracts, the Declaration of XIFIN’s Associate Vice President of
11 Financial Operations, and copies of the invoices reflecting the outstanding balances,
12 which establishes \$256,758.94 in service fees are due under the RPM Contract, and
13 \$83,862.50 in service fees are due under the LIS Contract. (Lawrence Decl. ¶¶ 20-35,
14 36-46.) XIFIN also points to the clauses in the Contracts that allow finance charges in
15 the amount of 1.5% per month on overdue balances, which in this case totals \$19,373.07
16 for the RPM Contract and \$6,327.63 for the LIS Contract. (*Id.*) XIFIN further identifies
17 the clauses in the Contracts that provide for acceleration of minimum service fees, which
18 amount to \$420,000 for the RPM Contract and \$105,000 for the LIS Contract. (*Id.*)
19 Thus, XIFIN has sufficiently proven up the amount of damages it is claiming.

20 CONCLUSION

21 For the foregoing reasons, Plaintiff’s motions to seal and for default judgment are
22 **GRANTED**. The Clerk of Court shall enter judgment in favor of Plaintiff in the amount
23 of \$891,322.14 in total damages.

24 IT IS SO ORDERED.

25 Dated: March 9, 2018

26 
27 Hon. Roger T. Benitez
28 United States District Judge