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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 United States of America,  
10  
11 Plaintiff,  
12 v.  
13 Today.com Incorporated, et al.,  
14 Defendants.

No. CV-15-00086-PHX-DGC

**ORDER**

15 Plaintiff United States of America seeks entry of a default judgment against  
16 Defendant Today.com, Inc. under Rule 55(b) of the Federal Rules of Civil Procedure.  
17 Doc. 38. Today.com has failed to appear in this case. Defendants Nathan Gwilliam and  
18 Dale Gwilliam object to the entry of default judgment. Docs. 44, 45. The Court will  
19 grant the motion for default judgment.<sup>1</sup>

20 **I. Background.**

21 Today.com was formed in approximately February 1998. *See* Doc. 13, ¶¶ 9-11.  
22 Nathan Gwilliam (“Nathan”) acted as President and Treasurer, and Dale Gwilliam  
23 (“Dale”), who appears to be Nathan’s father, was Secretary and Vice President. *Id.*,  
24 ¶¶ 12-13. The government alleges that Today.com failed to pay-over to the IRS federal  
25 employment taxes it had withheld from employees during the quarters ending  
26 December 31, 1998, March 31, 1999, and June 30, 1999, and also failed to pay the

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28 <sup>1</sup> The issues are fully briefed, and the Court finds that oral argument will not aid in  
the resolution of this matter. *See* LR Civ. 7.2(f); Fed. R. Civ. P. 78(b).

1 employer's share of taxes under the Federal Insurance Contributions Act for these same  
2 quarters. *Id.*, ¶ 51. Today.com also allegedly failed to pay federal unemployment taxes  
3 for the year ending December 31, 1998. Doc. 13, ¶ 51. As of October 15, 2015, the  
4 government had assessed back taxes and penalties of \$291,386.59 against Today.com.  
5 Doc. 38 at 8.

6 The government served Today.com with the complaint and summons in this action  
7 on April 28, 2015. Doc. 18. Today.com did not respond, and the Clerk of the Court  
8 entered a default against Today.com pursuant to Fed. R. Civ. P. 55(a). Doc. 34.

## 9 **II. Legal Standard.**

10 Once the Clerk has entered default, a plaintiff may request entry of a default  
11 judgment. See Fed. R. Civ. P. 55(b). "The district court's decision whether to enter  
12 default judgment is a discretionary one." *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th  
13 Cir. 1980). A court should consider several factors in deciding whether to enter a default  
14 judgment: (1) the possibility of prejudice to the plaintiff, (2) the merits of the plaintiff's  
15 substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in  
16 the action, (5) the possibility of a dispute concerning material facts, (6) whether default  
17 was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of  
18 Civil Procedure favoring decisions on the merits. *Eitel v. McCool*, 782 F.2d 1470, 1471-  
19 72 (9th Cir. 1986).

## 20 **III. Analysis.**

21 The first *Eitel* factor weighs in favor of granting default judgment. Today.com  
22 was served on April 28, 2015. Doc. 18. Today.com has not answered the complaint or  
23 otherwise appeared in this action. If the motion for default judgment is not granted, the  
24 government "will likely be without other recourse for recovery" against Today.com.  
25 *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002).

26 The second and third *Eitel* factors favor default judgment where the complaint  
27 sufficiently states a claim for relief. See *id.* at 1175; *Danning v. Lavine*, 572 F.2d 1386,  
28 1388-89 (9th Cir. 1978). A review of the complaint (Doc. 13), the Court's ruling on the

1 motion to dismiss (Doc. 36), the motion for default judgment (Doc. 38), and the Kittrell  
2 Declaration (Doc. 39) shows that the government has stated a claim for relief against  
3 Today.com.

4 The fourth factor considers the amount of money at stake in relation to the  
5 seriousness of the defendant's conduct. *See PepsiCo, Inc.*, 238 F. Supp. 2d at 1176. The  
6 government seeks \$291,386.59 under 26 U.S.C. §§ 6656(a) and 6651(a)(2). Doc. 38.  
7 The Court finds this request to be appropriate in light of the alleged failure to pay taxes.  
8 This factor favors default judgment.

9 The fifth *Eitel* factor weighs in favor of default judgment. Given the sufficiency  
10 of the complaint and Today.com's default, "no genuine dispute of material facts would  
11 preclude granting [Plaintiff's] motion." *PepsiCo, Inc.*, 238 F. Supp. 2d at 1177; *see*  
12 *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977).

13 The sixth *Eitel* factor favors default judgment. Today.com was properly served  
14 with the summons and complaint. Doc. 18. It therefore is "unlikely that [Today.com's]  
15 failure to answer and the resulting default was the result of excusable neglect." *Gemmel*  
16 *v. Systemhouse, Inc.*, No. CIV 04-187-TUC-CKJ, 2008 WL 65604, at \*5 (D. Ariz. Jan. 3,  
17 2008).

18 As for the seventh factor, it is true that "[c]ases should be decided upon their  
19 merits whenever reasonably possible," *Eitel*, 782 F.2d at 1472, but the mere existence of  
20 Rule 55(b) "indicates that this preference, standing alone, is not dispositive," *PepsiCo,*  
21 *Inc.*, 238 F. Supp. at 1177 (citation omitted). Today.com's failure to respond to the  
22 complaint "makes a decision on the merits impractical, if not impossible." *Id.*

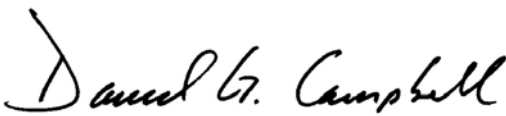
23 Considering the *Eitel* factors as a whole, the Court concludes that entry of default  
24 judgment against Today.com is warranted. Although Nathan and Dale have filed  
25 objections to such a default judgment, they do not represent Today.com and they do not  
26 dispute that Today.com has failed to answer or appear. The Court will not withhold  
27 default judgment on the basis of their objections, but neither does this order decide what  
28 defenses Nathan and Dale may assert in this case.

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**IT IS ORDERED:**

1. Plaintiff's motion for default judgment (Doc. 38) is **granted**.
2. Default judgment is entered in favor of Plaintiff and against Defendant Today.com in the amount of \$291,386.59.

Dated this 17th day of November, 2015.



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David G. Campbell  
United States District Judge