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**IN THE UNITED STATES DISTRICT COURT**

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**FOR THE DISTRICT OF ARIZONA**

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Jane Doe,

No. CV-17-01991-PHX-GMS (JZB)

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Plaintiff,

**ORDER**

10

v.

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United States of America, et al.,

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Defendants.

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Pending before the Court is Plaintiff’s Motion for Default Judgment against Defendants James R. Toadvine, Jr. and Vicki Lynn Toadvine. (Doc. 39.) The Court will grant the Motion as to Mr. Toadvine, but deny it as to Mrs. Toadvine.

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**I. Background.**

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On June 23, 2017, Plaintiff Jane Doe, who is represented by counsel, initiated this matter by filing a Complaint naming United States of America, Edward Mendoza, Vanessa Mendoza, James R. Toadvine, Jr., and Vicki Lynn Toadvine as Defendants. (Doc. 1.) On July 10, 2017, the Court screened the Complaint, ordered Defendants to answer the Complaint, and ordered Plaintiff to either obtain a waiver of service of the summons or complete service of the Summons and Complaint on a Defendant within 90 days of the filing of the Complaint. (Doc. 11.)

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On September 19, 2017, Proofs of Service were filed with the Court as to Defendants James R. Toadvine, Jr. and Vicki Lynn Toadvine (“Defendants”). (Docs. 26, 27.) To date, Defendants have not appeared or challenged Plaintiff’s allegations. On October 19, 2017, Plaintiff filed a Request for Entry of Default against Defendants James

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1 R. Toadvine and Vicki Lynn Toadvine. (Doc. 34.) Plaintiff’s request is on the basis that  
2 the record in this case demonstrates there has been a failure by Defendants to plead or  
3 otherwise defend as provided by Rule 55(a) of the Federal Rules of Civil Procedure. (*Id.*)  
4 On October 20, 2017, the Clerk of Court entered default against Defendants James R.  
5 Toadvine and Vicki Lynn Toadvine. (Doc. 36.) On November 7, 2017, Plaintiff filed her  
6 first Motion for Default Judgment against the Toadvine Defendants. (Doc. 39.)

7 On December 6, 2017, the Court issued an order directing Plaintiff to file  
8 supplemental briefing regarding her Motion for Default Judgment “address[ing] the *Eitel*  
9 factors as they pertain to Plaintiff’s request for default judgment against Defendant[s].”  
10 (Doc. 45.) On December 20, 2017, Plaintiff filed her supplemental brief. (Doc. 55.)

11 **II. Legal Standard.**

12 Once a party’s default has been entered, the district court has discretion to grant  
13 default judgment against that party. *See* Fed. R. Civ. P. 55(b)(2); *Aldabe v. Aldabe*, 616  
14 F.2d 1089, 1092 (9th Cir. 1980). “When entry of judgment is sought against a party who  
15 has failed to plead or otherwise defend, a district court has an affirmative duty to look  
16 into its jurisdiction over both the subject matter and the parties.” *In re Tuli*, 172 F.3d 707,  
17 712 (9th Cir. 1999). Once jurisdiction is satisfied, the court must determine whether  
18 default is judgment is proper under the *Eitel* factors (detailed below). *See Eitel v.*  
19 *McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). In applying the *Eitel* factors, “the  
20 factual allegations of the complaint, except those relating to the amount of damages, will  
21 be taken as true.” *Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977).

22 **III. Analysis.**

23 The Court concludes that it has both subject matter and personal jurisdiction in  
24 this action. The Court further concludes that, under the *Eitel* factors, entry of default  
25 judgment is warranted against Mr. Toadvine, but not Mrs. Toadvine. Accordingly, the  
26 Court will enter default judgment against the Mr. Toadvine in favor of Plaintiff, and  
27 dismiss Mrs. Toadvine from the action.

28 **A. Jurisdiction.**

1           The Court is satisfied that it has subject matter jurisdiction over this action.  
2 Plaintiff brings this action under 28 U.S.C. § 1331. United States district courts “have  
3 original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of  
4 the United States. 28 U.S.C. § 1331. Here, Plaintiff asserts that Defendant James  
5 Toadvine committed sexual abuse in violation of 18 U.S.C. § 2243(b), by engaging in  
6 sexual acts with Plaintiff, who was under the custodial, supervisory, and/or disciplinary  
7 authority of Defendant United States. (Doc. 1, ¶ 22.)

8           The Court is satisfied that it has personal jurisdiction over Defendants because,  
9 “[a]t all times material to this Complaint, [the Toadvine Defendants] were residents of  
10 Maricopa County in the State of Arizona and Defendant [James] Toadvine was acting for  
11 and on behalf of his marital community with Vicki Lynn Toadvine.” (Doc. 1, ¶ 5.)  
12 Defendant James Toadvine is currently an inmate with the Federal Bureau of Prisons.  
13 (*Id.*) Because jurisdiction is proper, and the Clerk of Court has entered Defendants’  
14 default (doc. 36), the Court will next consider whether default judgment is proper under  
15 the *Eitel* factors.

16           **B.     The Eitel Factors.**

17           When deciding whether to grant default judgment, a court should consider the  
18 following factors: (1) the possibility of prejudice to the plaintiff; (2) the merits of  
19 plaintiff’s substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at  
20 stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether  
21 the default was due to excusable neglect; and (7) the strong policy underlying the Federal  
22 Rules of Civil Procedure favoring decisions on the merits. *Eitel*, 782 F.2d at 1471-72. In  
23 applying the *Eitel* factors, “the factual allegations of the complaint, except those relating  
24 to damages, will be taken as true.” *Geddes*, 559 F.2d at 560. As explained below, the  
25 Court finds that the factors weigh in favor of finding default judgment against Defendant  
26 James R. Toadvine, Jr.

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28           **1.     Possible Prejudice to Plaintiff.**

1           The first *Eitel* factor considers the possibility of prejudice to Plaintiff if the Court  
2 does not enter a default judgment. *Eitel*, 782 F.2d at 1471. Here, Plaintiff served the  
3 Toadvine Defendants on August 11, 2017. (Docs. 26, 27.) The Toadvine Defendants have  
4 not appeared or responded to Plaintiff’s allegations, and Plaintiff has no alternative  
5 means by which to resolve its claims in the Complaint. Therefore, this factor weighs in  
6 favor of entering a default judgment because the possibility is high that Plaintiff will be  
7 prejudiced if one is not entered.

8                           **2. Merits of Plaintiff’s Claims and Sufficiency of the Complaint.**

9           Considering the relationship between the second and third *Eitel* factors, the Court  
10 considers the merits of Plaintiff’s substantive claims and the sufficiency of the Complaint  
11 together. *See Eitel*, 782 F.2d at 1471. The Ninth Circuit Court of Appeals has suggested  
12 that, when combined, these factors require a plaintiff to “state a claim on which the  
13 plaintiff may recover.” *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1175  
14 (citation omitted).

15           Here, Plaintiff’s Complaint includes allegations that Defendant James Toadvine  
16 committed sexual abuse in violation of 18 U.S.C. § 2243(b), by engaging in sexual acts  
17 with Plaintiff, who was under the custodial, supervisory, and/or disciplinary authority of  
18 Defendant United States. (Doc. 1, ¶ 22.) Plaintiff further alleges that Defendant James  
19 Toadvine was criminally charged in connection with his illegal actions, admitted his  
20 guilt, and was adjudicated as guilty of sexual abuse. (*Id.*, ¶ 23; *see also United States v.*  
21 *Toadvine*, 2:15-cr-01535-PHX-DJH, Docket #31 (August 18, 2016).) In her Complaint,  
22 Plaintiff sets forth three claims against the Toadvine Defendants: (1) a *Bivens* action; (2)  
23 a negligence claim; and (3) a claim for negligent and intentional infliction of emotional  
24 distress. (Doc. 1.)

25                           **i. Count I – Violation of Plaintiff’s Constitutional Rights.**

26           “A complaint ‘sufficiently sets forth the elements of a *Bivens* claim by alleging a  
27 violation of . . . constitutional rights by agents acting under the color of federal law.’”  
28 *West v. City of Mesa*, 128 F. Supp. 3d 1233, 1240 (D. Ariz. 2015) (quoting *Morgan v.*

1 *United States*, 323 F.3d 776, 780 (9th Cir. 2003)). To maintain an action under *Bivens*, a  
2 plaintiff must also show that there is no “alternative, existing process for protecting the  
3 plaintiff’s interests.” *W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1120 (9th  
4 Cir. 2009).

5 The Eighth Amendment protects inmates from sexual abuse at the hands of prison  
6 guards. The Ninth Circuit has stated:

7 Where guards themselves are responsible for the rape and sexual abuse of  
8 inmates, qualified immunity offers *no* shield. *See Mathie v. Fries*, 935  
9 F. Supp. 1284, 1301 (E.D.N.Y. 1996) (denying qualified immunity to  
10 director of prison security because “any reasonable prison Director of  
11 Security knew that to try to force unwanted and prohibited sexual acts on a  
12 powerless inmate is objectively unreasonable and in violation of the  
13 inmates rights”); *Women Prisoners of the Dist. of Columbia Dept. of*  
14 *Corrections*, 877 F. Supp. 634, 665 (D.D.C. 1994) (“Rape, coerced  
15 sodomy, unsolicited touching of women prisoners’ vaginas, breasts and  
buttocks by prison employees are ‘simply not part of the penalty that  
criminal offenders pay for their offenses against society’”) (quoting  
*Farmer*, 511 U.S. at 834, 114 S. Ct. 1970), *aff’d in part and vacated in*  
*part*, 93 F.3d 910 (D.C. Cir. 1996). In the simplest and most absolute of  
terms, the Eighth Amendment right of prisoners to be free from sexual  
abuse was unquestionably clearly established prior to the time of this  
alleged assault, and no reasonable prison guard could possibly have  
believed otherwise.

16 *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000).

17 Here, Plaintiff alleges “that Defendant James Toadvine’s sexual assaults against  
18 the Plaintiff amount to a deprivation and violation of Plaintiff’s constitutional rights,  
19 including but not limited to a deprivation and violation of Plaintiff’s Eighth Amendment  
20 right to be free from cruel and unusual punishment.” (Doc. 55 at 4 (citing Doc. 1, ¶¶ 29-  
21 38).) Plaintiff further alleges that “Defendant’s violations of Plaintiff’s constitutional  
22 rights are compensable under *Bivens*[.]” (*Id.*) The Court agrees, and finds that Plaintiff  
23 has set forth a viable *Bivens* claim against Defendant James R. Toadvine, Jr.

24 **ii. Count II – Negligence.**

25 An inmate may bring an action under the Federal Tort Claims Act (“FTCA”) to  
26 recover damages for negligence of a federal prison guard. *See Triestman v. Fed. Bureau*  
27 *of Prisons*, 470 F.3d 471, 476 (2d Cir. 2006) (“The negligent guard theory is a theory of  
28 liability under the FTCA over which the district court clearly has subject matter

1 jurisdiction.”). An inmate may also bring an action under the FTCA “to recover damages  
2 from the United States Government for personal injuries sustained during confinement in  
3 a federal prison, by reason of the negligence of a government employee.” *United States v.*  
4 *Muniz*, 374 U.S. 150, 150 (1963).

5 A negligence claim requires proof of four elements: “(1) a duty requiring the  
6 defendant to conform to a certain standard of care; (2) a breach by the defendant of that  
7 standard; (3) a causal connection between the defendant’s conduct and the resulting  
8 injury; and (4) actual damages.” *Sanders v. Alger*, 394 P.3d 1083, 1085 (2017), quoting  
9 *Gipson v. Kasey*, 150 P.3d 228 (2007). A gross-negligence claim additionally requires a  
10 showing of “[g]ross, willful, or wanton conduct.” *Armenta v. City of Casa Grande*, 71  
11 P.3d 359, 364 (Ariz. Ct. App. 2003), quoting *Williams v. Thude*, 885 P.2d 1096, 1104  
12 (Ariz. Ct. App. 1994).

13 Here, Defendant James R. Toadvine, Jr. owed a duty of care to Plaintiff and those  
14 similarly situated, of “safekeeping, care . . . [and] protection.” *See* 18 U.S.C. § 4042(a)(2)  
15 and (3); (Doc. 1, ¶ 48). Pursuant to 18 U.S.C. § 2243(b), Defendant James Toadvine, as a  
16 correctional officer/guard, was statutorily precluded from sexually assaulting an inmate,  
17 such as the Plaintiff. Defendant James Toadvine owed duties to Plaintiff to exercise the  
18 requisite standard of care and skill ordinarily exercised by similar correctional facilities,  
19 institutions, agencies, guards, and correctional officers to detect, deter, and prevent  
20 sexually abusive behavior and to take reasonable care to control those in their employ. *Id.*

21 Here, Defendant James Toadvine fell below the standard of care and was negligent  
22 by engaging in sexual acts with the Plaintiff and failing to safeguard, care, and protect  
23 Plaintiff, who was under Defendant’s custody, care, and control. The Court finds that  
24 Plaintiff has set forth a viable claim of Negligence against Defendant James R. Toadvine,  
25 Jr.

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28 **iii. Count III – Assault and Battery.**

1 For an assault and battery claim, as it applies to Defendant James Toadvine,  
2 Plaintiff must show that Defendant James Toadvine intentionally and unlawfully placed  
3 Plaintiff in reasonable apprehension of imminent physical injury and intentionally made  
4 offensive physical contact on Plaintiff’s person without her consent. *See Lewis v. Dirt*  
5 *Sports LLC*, 259 F. Supp 1039, 1044 (D. Ariz. 2017).

6 To succeed on a battery claim, Arizona law requires a plaintiff to prove  
7 “that the defendant intentionally engaged ‘in an act that results in harmful  
8 or offensive contact with the person of another.’” *A.G. v. Paradise Valley*  
9 *Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1210 (9th Cir. 2016) (quoting  
10 *Duncan v. Scottsdale Med. Imaging, Ltd.*, 70 P.3d 435, 438 (2003)).  
11 Similarly, to succeed on an assault claim a plaintiff must prove “that the  
12 defendant acted ‘with intent to cause another harmful or offensive contact  
13 or apprehension thereof, and the other person apprehend[ed] imminent  
14 contact.’” *Id.* (quoting *Garcia v. United States*, 826 F.2d 806, 809 n.9 (9th  
15 Cir. 1987)). “The two claims are the same except that assault does not  
16 require the offensive touching or contact.”

17 (*Id.*)

18 Here, Defendant James Toadvine was criminally charged in connection with his  
19 sexual abuse of the Plaintiff, admitted guilt, and was adjudicated as guilty of “Abusive  
20 Sexual Contact with a Ward.” *See United States v. Toadvine*, 2:15-cr-01535-PHX-DJH.  
21 Defendant Toadvine admitted he intentionally and unlawfully placed Plaintiff in  
22 reasonable apprehension of imminent physical injury and intentionally made offensive  
23 physical contact on Plaintiff’s person without her consent. As a result, Defendant  
24 Toadvine is liable for assault and battery against the Plaintiff.

25 **iv. Count IV – Negligent and/or Intentional Infliction of**  
26 **Emotional Distress.**

27 Finally, Plaintiff’s claim for negligent and intentional infliction of emotional  
28 distress is predicated on an action or inaction that inflicts emotional distress on another  
by one’s negligent or intentional conduct.

With regard to the tort of intentional infliction of emotional distress, “[t]he three  
required elements are: *first*, the conduct by the defendant must be ‘extreme’ and  
‘outrageous’; *second*, the defendant must either intend to cause emotional distress or  
recklessly disregard the near certainty that such distress will result from his conduct; and

1 *third*, severe emotional distress must indeed occur as a result of the defendant’s conduct.”  
2 *Ford v. Revlon, Inc.*, 734 P.2d 580, 585 (Ariz. 1987) (italics in original). “Whether the  
3 conduct is ‘extreme and outrageous’ enough to state a claim of relief is a question for the  
4 court.” *Id.* (citing *Cluff v. Farmers Ins. Exchange*, 460 P.2d 666, 668 (Ariz. Ct. App.  
5 1969)).

6 Here, as to his criminal conduct against the Plaintiff, Defendant Toadvine  
7 admitted guilt of “Abusive Sexual Contact with a Ward.” See *United States v. Toadvine*,  
8 2:15-cr-01535-PHX-DJH. “A sexual assault on an inmate by a guard – regardless of the  
9 gender of the guard or of the prisoner – is deeply ‘offensive to human dignity.’” *Schwenk*  
10 *v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000) (citing *Farmer v. Brennan*, 511 U.S.  
11 825, 834 (1994)). Thus Defendant James Toadvine’s abusive sexual contacts against the  
12 Plaintiff were extreme and outrageous and they violated Plaintiff’s basic human and  
13 constitutional rights. As a result of his actions, Plaintiff suffered, and continues to suffer,  
14 severe and permanent injuries, mental anguish, embarrassment, humiliation, distress, and  
15 damages.

### 16 **3. Amount of Money at Stake.**

17 Under the fourth *Eitel* factor, “the court must consider the amount of money at  
18 stake in relation to the seriousness of [the] [d]efendant’s conduct.” *PepsiCo, Inc.*, 238 F.  
19 Supp. 2d at 1177. “If the sum of money at stake is completely disproportionate or  
20 inappropriate, default judgment is disfavored.” *Gemmel v. Systemhouse, Inc.*, No. CIV  
21 04-198-TUC-CKJ, 2008 WL 65604, at \*4 (D. Ariz. Jan. 3, 2008).

22 Here, Plaintiff alleges that from approximately January of 2015 through April 2,  
23 2015, Defendant James Toadvine assaulted Plaintiff on several occasions while she was  
24 incarcerated. (Doc. 1, ¶ 17.) Further, Plaintiff alleges that Defendant Toadvine  
25 “inappropriately intimidated, coerced, victimized, and assaulted the Plaintiff by, among  
26 other things, forcibly kissing her, touching her buttocks, putting his hands underneath  
27 Plaintiff’s clothes and panties, [i]nserting his finger into the Plaintiff’s vagina, . . . [and]  
28 also forced Plaintiff’s hand to touch his erect penis.” (Doc. 55 at 8 (citing Doc. 1, ¶ 17).)



1 Plaintiff also asserts that Defendant Toadvine represented to Plaintiff that he would  
2 follow her upon her release from prison custody. (*Id.*) Taking Plaintiff’s allegations as  
3 true, there is no dispute that she suffered acts that are deeply offensive to human dignity.  
4 *Schwenk*, 204 F.3d at 1197.

5 Plaintiff alleges that she “has suffered and continues to suffer severe psychological  
6 injuries as a result of Defendants’ acts and omissions.” (Doc. 55 at 9; *see also* Doc. 39-1  
7 at 2.) Specifically, Plaintiff alleges that “[s]he has experienced, and continues to  
8 experience sleep loss, anxiety, fear, depression, humiliation, and fright[,]” she  
9 “experiences fear and anxiety on a routine basis[,]” and she “is constantly reminded of  
10 the torture she experienced, which has negatively impacted her life and quality of living.”  
11 (*Id.*) Plaintiff “has been receiving counseling therapy since moving back to Oregon after  
12 her release in May of 2015, and she will need constant and on-going therapy for an  
13 indefinite amount of time in the future.” (Doc. 55 at 9; Doc. 55-4.)

14 As a result of Defendant James Toadvine’s culpable acts, Plaintiff is entitled to  
15 damages. Here, Plaintiff is seeking default judgment against the Toadvine Defendants in  
16 the amount of \$10,000,000.00. (Doc. 39; Doc. 55.) Plaintiff argues that this amount is not  
17 excessive, given the crimes alleged. (Doc. 55.) Plaintiff provides the following argument:

18 In *Johnson v. Pankratz*, 2 P.3d 1266, 1269 (Ariz. Ct. App. 2000), which  
19 was a case involving sexual assault, the Court stated “[t]he traditional rule  
20 for battery cases is that general damages or presumed damages of a  
21 substantial amount can be recovered merely upon showing that the tort was  
22 committed at all.” The Court in *Johnson* also noted that “[e]ven when a  
23 touching is ‘entirely harmless but offensive, [that] contact entitles the  
24 plaintiff to vindication of the legal right by an award of nominal damages  
25 and . . . to compensation for the resulting mental disturbance, such as fright  
26 revulsion or humiliation.” (*Id.*) Further, given Defendant James Toadvine’s  
27 malicious intent and acts of sexually assaulting Plaintiff, Plaintiff is entitled  
28 to an award of punitive damages. As these cases illustrate, a battery  
entitling a plaintiff to compensatory damages may also entitle her to  
punitive damages. (*Id.* (“In Arizona, if malice is express or may be implied  
from the nature of the acts and the circumstances, punitive damages are  
possible.”).)

(*Id.* at 9-10.)

Plaintiff adds that she “has been completely traumatized by what has happened to  
her, and placing a value on Plaintiff’s damages can be difficult.” (*Id.* at 10.) Plaintiff

1 attaches “several examples of awards and settlements involving sexual assaults by guards  
2 against inmates.” (Doc. 55, Ex. E.) The results of these cases reveal a range of awards  
3 and settlements inmates who were sexually abused while incarcerated, which include  
4 awards and settlements of \$15.4 million, \$11.5 million, \$10 million, \$6.7 million, \$3.38  
5 million, \$1.5 million, \$1.2 million, and \$1 million. There was also an award of \$100  
6 million for 500 inmates.

7 Plaintiff asserts that her “situation is more severe than the cases in the articles, as  
8 she was repeatedly raped over several months, and she was subjected to various means of  
9 assault,” mentioned above. (Doc. 55 at 10.) Plaintiff also asserts that Defendant James  
10 Toadvine “traumatized [her] by telling her that he would follow her upon her release  
11 from custody.” (*Id.*)

12 The Court finds the cases attached to Plaintiff’s Motion to be only mildly  
13 instructive. Plaintiff does not include citations to the cases described in her attachment.  
14 Nor does Plaintiff include information about those cases beyond the attached news  
15 articles describing them. However, Plaintiff does provide psychological and medical  
16 billing records to show that she is seeking counseling for her injuries. (Doc. 55-4 at 1-28  
17 (Ex. D).) Further, at least one court in this district has awarded a similar amount to a  
18 victim who was assaulted while at a prison. *Rode v. Credio*, No. CV-14-02354-PHX-  
19 SRB, 2016 WL 5109866, at \*1 (D. Ariz. Sept. 20, 2016) (awarding \$10 million in  
20 damages to a plaintiff prison employee that was violently assaulted by an inmate).

21 The Court finds it is clear that Plaintiff has suffered and continues to suffer severe  
22 psychological injuries as a result of Defendants’ horrific acts. Plaintiff alleges that she  
23 has experienced, and continues to experience sleep loss, anxiety, fear, depression,  
24 humiliation, and fright. Further, the severity of her injuries has impacted her relationship  
25 with her son and family members as well as other people. She experiences fear and  
26 anxiety on a routine basis. She is constantly reminded of the torture she experienced,  
27 which has negatively impacted her life and quality of living. These allegations are  
28 supported by the medical records provided to the Court.

1           Given the circumstances, Plaintiff’s requested default judgment award of  
2 \$10,000,000.00 is not overly excessive, and does not weigh against awarding default  
3 judgment.

4                           **4. Possibility of Dispute Concerning Material Facts.**

5           The fifth *Eitel* factor considers the possibility of dispute concerning the material  
6 facts. *Eitel*, 782 F.2d at 1471-72. Here, there is very little possibility of dispute  
7 concerning the material facts. Defendants have not made any effort to challenge  
8 Plaintiff’s Complaint or otherwise appear in this case, despite having been personally  
9 served with process in this action. Therefore, this factor weighs in favor of entering  
10 default judgment.

11                           **5. Whether Default Was Due to Excusable Neglect.**

12           The sixth *Eitel* factor considers whether the default was due to excusable neglect.  
13 *Eitel*, 782 F.2d at 1472. Here, there is no evidence that Defendants failure to appear, or  
14 otherwise defend, was the result of excusable neglect. Plaintiff personally served the  
15 Defendants James and Vicki Toadvine on August 11, 2017 (docs. 26-27), and the time  
16 elapsed since then is substantial. Therefore, this factor weighs in favor of entering default  
17 judgment.

18                           **6. Policy Disfavoring Default Judgment.**

19           Under the seventh *Eitel* factor, a court considers the policy that, whenever  
20 possible, cases should be tried on the merits. *Eitel*, 782 F.2d at 1472. The existence of  
21 Rule 55(b) of the Federal Rules of Civil Procedure, however, indicates that the preference  
22 for resolving cases on the merits is not absolute. *PepsiCo, Inc.*, 238 F. Supp. 2d at 1177.  
23 Since Defendants have neither appeared nor responded in this action, deciding the case  
24 on the merits is “impractical,” if not impossible. *See id.* Thus, the seventh *Eitel* factor  
25 does not preclude the entry of default judgment. On balance, the Court finds that the *Eitel*  
26 factors weigh in favor of entering default judgment against Defendant James R.  
27 Toadvine.

28                           **C. Defendant Vicki Lynn Toadvine.**

1 Plaintiff has failed to state a claim against Defendant Vicki Lynn Toadvine. Under  
2 Arizona law, each spouse has equal control and rights over the community property and  
3 equal power to bind the marital community. Ariz. Rev. S. § 25-214(B). Accordingly,  
4 each spouse may contract debts for the benefit of the marital community, and a lawsuit  
5 seeking payment of such debts out of the marital property must sue both spouses jointly.  
6 *Id.* § 25-215(D). “The Arizona rule is that the community is liable for the intentional torts  
7 of either spouse if the tortious act was committed with the intent to benefit the  
8 community, regardless of whether in fact the community receives any benefit.” *Selby v.*  
9 *Savard*, 655 P.2d 342, 349 (Ariz. 1982). “The controlling question, in determining  
10 liability of the marital community for the tort of the spouse, is whether the tort is  
11 calculated to be, is done for, or results in a benefit to the community or is committed in  
12 the prosecution of community business.” *Howe v. Haught*, 462 P.2d 395, 397 (Ariz. Ct.  
13 App., 1969). With respect to intentional torts, “the community is not liable for one  
14 spouse’s malicious acts unless it is specifically shown that the other spouse consented to  
15 the act or that the community benefited from it.” *Selby*, 655 P.2d at 349.

16 Under Rule 8, a pleading must contain a “short and plain statement of the claim  
17 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added).  
18 While Rule 8 does not demand detailed factual allegations, “it demands more than an  
19 unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S.  
20 662, 678 (2009). To survive a motion to dismiss, a complaint must state a claim that is  
21 “plausible on its face.” *Iqbal*, 556 U.S. at 678. “A claim has facial plausibility when the  
22 plaintiff pleads factual content that allows the court to draw the reasonable inference that  
23 the defendant is liable for the misconduct alleged.” *Id.*

24 In this case, Plaintiff’s sole allegation regarding Defendant Vicki Toadvine is that,  
25 at all relevant times, James R. Toadvine, Jr. was “acting for and on behalf of his marital  
26 community with Vicki Lynn Toadvine.” (Doc. 1, ¶ 5.) This bald assertion does not satisfy  
27 Rule 8 pleading standards for stating a claim against Defendant or against the Toadvines’  
28 marital community. To state a claim against a marital community, a plaintiff must plead

1 sufficient facts, taken as true, to show that the alleged tortious conduct was either  
2 calculated to be, was performed for, or resulted in a benefit to the marital community.  
3 *Howe*, 462 P.2d at 397. “Threadbare recitals of the elements of a cause of action,  
4 supported by mere conclusory statements, do not suffice.” *Id.* Merely alleging that James  
5 Toadvine “acted for and on behalf of his marital community” does not make this  
6 showing.

7 The Court considered a nearly identical issue in this case, involving co-Defendants  
8 Vanessa Mendoza and Edward Mendoza. There, Defendant Vanessa Mendoza responded  
9 to Plaintiff’s Complaint by filing a motion to dismiss, arguing that Mr. Mendoza’s  
10 actions were not taken in furtherance of the martial community. (Doc. 44.) On April 2,  
11 2018, the Court issued an Order granting Defendant Mendoza’s Motion. (Doc. 63.) The  
12 analysis in this instance is virtually identical. Plaintiff has failed to plead sufficient facts  
13 to establish that Mr. Toadvine’s actions were taken on behalf of his marital community  
14 with Mrs. Toadvine. Accordingly, the Court will decline to enter default judgment  
15 against Mrs. Toadvine, and will dismiss her from this action.

16 **D. Damages.**

17 Having found that entry of default judgment against Defendant James R.  
18 Toadvine, Jr. is proper here, the next issue for the Court to consider is that of damages. In  
19 contrast to other allegations in the Complaint, allegations pertaining to damages are not  
20 taken as true. *See TeleVideo Sys., Inc. v. Heidenhal*, 826 F.2d 915, 917-18 (9th Cir.  
21 1987). As a result, “[p]laintiff is required to prove all damages sought in the complaint.”  
22 *Philip Morris USA, Inc. v. Castworld Prods., Inc.*, 219 F.R.D. 494, 498 (C.D. Cal. 2003).  
23 “The plaintiff is required to provide evidence of its damages, and the damages sought  
24 must not be different in kind or amount from those set forth in the complaint.” Fed. R.  
25 Civ. P. 54(c); *Amini Innovation Corp. v. KTY Int’l Mktg.*, 768 F. Supp. 2d 1049, 1054  
26 (C.D. Cal. 2011). “In determining damages, a court can rely on declarations submitted by  
27 the plaintiff[.]” *Philip Morris USA, Inc.*, 219 F.R.D. at 498.

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1           If the Court determines that the allegations in the complaint establish liability, it  
2 must next determine the amount and character of relief to award. *HTS, Inc. v. Boley*, 954  
3 F. Supp. 2d 927, 947 (D. Ariz. 2013); *James v. Frame*, 6 F.3d 307, 310 (9th Cir. 1993) (a  
4 district court has “wide latitude” and discretion in determining the amount of damages to  
5 award upon default judgment). Un-liquidated and punitive damage require “proving up”  
6 at an evidentiary hearing or through other means. *HTS, Inc.*, 954 F. Supp. 2d at 948. “If []  
7 cause is properly alleged in the complaint, it is admitted upon default. Injury is  
8 established and plaintiff need prove only that the compensation sought relates to the  
9 damages that naturally flow from the injuries pled.” *Black & Decker, Inc. v. All Spares,*  
10 *Inc.*, No. CV-09-2126-PHX-MHM, 2010 U.S. Dist. LEXIS 87334, \*3 (D. Ariz. Aug. 3,  
11 2010) (citing *Philip Morris USA, Inc. v. Castworld Products, Inc.* 219 F.R.D. 494, 498  
12 (C.D. Cal. 2003)).

13           Plaintiff requests \$10,000,000 in damages, but does not identify what portion of  
14 that sum is compensatory and what portion is punitive. In her Complaint, Plaintiff alleges  
15 she was subjected to assaults by Defendant Toadvine on multiple occasions over a period  
16 of months. (See Doc. 1, ¶ 17 (alleging that from January of 2015 through April 2, 2015,  
17 Defendant James Toadvine assaulted Plaintiff on several occasions while she was  
18 incarcerated, during which time he “inappropriately intimidated, coerced, victimized, and  
19 assaulted the Plaintiff by, among other things, forcibly kissing her, touching her buttocks,  
20 putting his hands underneath Plaintiff’s clothes and panties, []inserting his finger into the  
21 Plaintiff’s vagina, . . . [and] also forced Plaintiff’s hand to touch his erect penis.”).)

22           In support of her damages claim, Plaintiff alleges that she “has suffered and  
23 continues to suffer severe psychological injuries as a result of Defendants’ acts and  
24 omissions.” (Doc. 55 at 9; see also Doc. 39-1 at 2.) Specifically, Plaintiff alleges that  
25 while incarcerated, Defendant Toadvine “verbally demanded sexual favors and verbally  
26 harassed the Plaintiff,” and she “feared retaliation and further abuse if she resisted or  
27 reported Defendant[] Toadvine.” (Doc. 1, ¶¶ 19-20.) Since being released from prison  
28 custody, “[s]he has experienced, and continues to experience sleep loss, anxiety, fear,

1 depression, humiliation, and fright[,]” she “experiences fear and anxiety on a routine  
2 basis[,]” and she “is constantly reminded of the torture she experienced, which has  
3 negatively impacted her life and quality of living.” (Doc. 55 at 9; *see also* Doc. 39-1  
4 at 2.) Plaintiff “has been receiving counseling therapy since moving back to Oregon after  
5 her release in May of 2015, and she will need constant and on-going therapy for an  
6 indefinite amount of time in the future.” (Doc. 55 at 9; Doc. 55-4.)

7 In light of this evidence, the Court is satisfied that Plaintiff has sufficiently proven  
8 up \$2,500,000 in damages. Plaintiff has established extreme suffering, anxiety, and  
9 physical and emotional pain that are reasonably probable to be experienced in the future  
10 as a result of the injuries Defendant caused her.

11 The Court finds that Plaintiff has also proved \$1,250,000 in punitive damages. The  
12 purposes of punitive damages are to punish a defendant and to deter similar acts in the  
13 future. *Olson v. Walker*, 781 P.2d 1015, 1018 (Ariz. Ct. App. 1989). Further, punitive  
14 damages for tort claims in Arizona are awarded only where the evidence is clear and  
15 convincing that the Defendant acted with an “evil mind.” *Id.* “An evil mind is found  
16 where the defendant intended to injure the plaintiff, or where the defendant, not intending  
17 to cause injury, ‘consciously pursued a course of conduct knowing that it created a  
18 substantial risk of significant harm to others.’” (quoting *Rawlings v. Apodaca*, 726 P.2d  
19 565, 578 (Ariz. 1986)).

20 A category of relevant evidence in assessing the reasonableness of the amount of a  
21 punitive damage award includes: “the nature of the defendant's conduct, including the  
22 reprehensibility of the conduct and the severity of the harm likely to result, as well as the  
23 harm that has occurred, from the defendant's conduct.” *Hawkins v. Allstate Ins. Co.*, 733  
24 P.2d 1073, 1080 (Ariz. 1987) (citations omitted). “The more reprehensible the act and the  
25 more severe the resulting harm, the greater the award of punitive damages that is  
26 reasonable under the circumstances.” *Id.*<sup>3</sup>

27 Punitive damage awards also have constitutional limits. “A grossly excessive  
28 punitive damage award violates the Due Process Clause of the Fourteenth Amendment to

1 the United States Constitution because the defendant did not have ‘fair notice’ of its  
2 exposure to the extent of punishment that could be imposed.” *Hudgins v. Southwest*  
3 *Airlines, Co.*, 212 P.3d 810, 827 (Ariz. Ct. App. 2009) (citing *BMW of N. AM., Inc. v.*  
4 *Gore*, 517 U.S. 559, 489 (1996)). Relevant guideposts for determining the  
5 constitutionality of a punitive damage award include “the degree of reprehensibility of  
6 the defendant's misconduct, [and] the ratio between compensatory and punitive  
7 damages.” *Id.* at 490. The reprehensibility of Defendant's conduct is “[p]erhaps the most  
8 important indicium of the reasonableness of a punitive damages award.” *BMW*, 517 U.S.  
9 at 575. “Acts of violence or threats of bodily harm . . . [are] the most reprehensible.”  
10 *Hudgins*, 212 P.3d at 490 (quoting *Florez v. Delbovo*, 939 F. Supp. 1341, 1348-49 (N.D.  
11 111. 1996)). Finally, with regard to the ratio between compensatory and punitive  
12 damages, the Supreme Court has held that “single-digit multipliers are more likely to  
13 comport with due process.” *Id.* at 491.

14 Here, as detailed above, Plaintiff suffered numerous assaults over a prolonged  
15 timeframe by Defendant. Defendant was Plaintiff’s Corrections Officer, and Plaintiff was  
16 unable to escape his advances. Plaintiff feared retaliation and further abuse if she resisted  
17 Defendant’s attacks, or reported his actions. (Doc. 1, ¶ 20.) Defendant Toadvine was  
18 criminally charged in connection with his illegal actions, admitted his guilt, and was  
19 adjudicated as guilty of sexual abuse. *See United States v. Toadvine*, 2:15-cr-01535-PHX-  
20 DJH. Based on these facts, this Court finds that an award of punitive damages is  
21 appropriate.

22 Defendant was aware of the risk of harm from his intentional, violent conduct.  
23 *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (in assessing the  
24 degree of reprehensibility of a defendant's conduct, courts consider whether “the harm  
25 caused was physical as opposed to economic; the tortious conduct evinced an  
26 indifference to or a reckless disregard of the health or safety of others; the target of the  
27 conduct had financial vulnerability; the conduct involved repeated incidents or was an  
28 isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or



1 mere accident.”). Finally, the Court finds that the 1 to 0.5 ratio of compensatory to  
2 punitive damages is reasonable and comports with due process in this case. *See Rode*,  
3 2016 WL 5109866, at \*1.

4 For the reasons above, the Court finds that Plaintiff has proven up \$3,750,000 of  
5 her requested award of damages.

6 **IV. Conclusion.**

7 Because the Court has subject matter jurisdiction over this action and personal  
8 jurisdiction over Defendants James R. Toadvine, Jr., the application of the *Eitel* factors  
9 weighs in favor of the entry of default judgment against James R. Toadvine, Jr., and  
10 Plaintiff has sufficiently proven up her damages, the Court will grant Plaintiff's Motion  
11 for Default Judgment against James R. Toadvine, Jr.

12 Because Plaintiff has failed to plead sufficient facts to state a claim against  
13 Defendant Vicki Lynn Toadvine, the Court will deny the Motion for Default Judgment  
14 against her.

15 **IT IS ORDERED:**

16 1. The reference to the Magistrate Judge is withdrawn as to Plaintiff's Motion  
17 for Default Judgment (doc. 39) only, and the Motion is **granted in part** as provided in  
18 this Order.

19 2. The Clerk of Court is directed to enter judgment accordingly, and award  
20 damages in the amount of \$3,750,000.00, plus post-judgment interests, to Plaintiff, and  
21 against Defendant James R. Toadvine, Jr.

22 3. Defendant Vicki Lynn Toadvine is dismissed, without prejudice, from this  
23 action.

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4. This action is not to be terminated, as Plaintiff's remaining claims are still pending against the other Defendants.

Dated this 30th day of May, 2018.

  
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Honorable G. Murray Snow  
United States District Judge