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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Christine Rode,  
Plaintiff,  
v.  
Ron Credio, *et al.*,  
Defendants.

No. CV-14-02354-PHX-SRB  
**REPORT AND  
RECOMMENDATION**

TO THE HONORABLE SUSAN R. BOLTON, UNITED STATES DISTRICT  
JUDGE:

Plaintiff Christine Rode has filed a Motion for Default Judgment and Request for Hearing on Determination of Damages against Defendant Jacob Harvey, pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure. (Doc. 95.) District Judge Susan R. Bolton referred Plaintiff’s Motion to this Court for a damages hearing. (Docs. 96, 97.) On April 18, 2016, the Court held a damages hearing, during which Defendant Harvey indicated he did not want to participate. (Doc. 98.) As discussed below, the Court has subject matter jurisdiction over this matter and personal jurisdiction over Defendant. Further, after review of the factors enumerated in *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986), this Court finds that granting default judgment is appropriate. Finally, this Court finds that Plaintiff has sufficiently proven up the damages she seeks. Therefore, this Court recommends that Plaintiff’s Motion for Default Judgment be granted.

1       **I. Background**

2           On October 7, 2014, Plaintiff filed her Complaint in Arizona state court, alleging  
3 claims pursuant to 42 U.S.C. § 1983 against Defendants Ron Credio, Edwin Lao, John  
4 and/or Jane Doe Captain, John and/or Jane Doe Lieutenant, John and/or Jane Doe  
5 Sargent, and John and/or Jane Doe Corrections Officers, claims for assault and battery,  
6 false imprisonment, and intentional infliction of emotional distress against Defendant  
7 Jacob Harvey, and a claim of negligence against Defendants Corizon Health, Inc. and the  
8 State of Arizona. (Doc. 1, Ex. B, ¶¶ 87-118.) Defendants the State of Arizona, Ron  
9 Credio, and Edwin Lao (“State Defendants”) subsequently removed this case to federal  
10 court pursuant to 28 U.S.C. § 1441(a) and 28 U.S.C. 1331, based on Plaintiff’s 42 U.S.C.  
11 § 1983 claims. (Doc. 1 at 1-2.)

12           On December 1, 2014, Plaintiff filed her First Amended Complaint, adding  
13 specific names to previously unknown Defendants.<sup>1</sup> (Doc. 9.) On January 7, 2015,  
14 Plaintiff filed proof that the initial Complaint and Summons were served on Defendant  
15 Harvey on October 9, 2014. (Doc. 20.) On January 16, 2015, after the Court requested a  
16 status report concerning Defendant Harvey (Doc. 22), Plaintiff filed her Application for  
17 Entry of Default against Defendant Harvey. (Doc. 23.) On January 20, 2015, the Clerk  
18 entered default against Defendant Harvey. (Doc. 25.) The State Defendants filed their  
19 Answer to Plaintiff’s First Amended Complaint on February 26, 2015. (Doc. 32.)

20           On August 13, 2015, Plaintiff filed a Second Amended Complaint. (Doc. 74.)  
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27           <sup>1</sup> The First Amended Complaint added Defendants Dorinda Hayes, Gilberto  
28 Robles, and Phyllis Wiggin to Plaintiff’s § 1983 claims in Count One, added Corizon,  
Inc. and Corizon LLC to her negligence claims in Count Five, and deleted the State from  
her negligence claims in Count Five.

1 Plaintiff's Second Amended Complaint sets forth the following allegations.<sup>2</sup> On January  
2 30, 2014, Plaintiff administered a pre-G.E.D. High School equivalency test to Defendant  
3 Harvey and several other inmates at Arizona State Prison Complex-Eyman ("ASPC-  
4 Eyman"). (Doc. 74 ¶ 24.) Before conducting the test, Plaintiff was given a radio by a  
5 correctional officer and was instructed to radio in if anyone "acted up." (*Id.* ¶ 37.)  
6 Plaintiff was never supervised by a correctional officer in the testing room to ensure her  
7 safety while the inmates completed the test. (*Id.* ¶¶ 41-42.)

8 Defendant Harvey, waiting until he was alone with Plaintiff, asked if he could use  
9 the restroom. (*Id.* ¶¶ 48-52.) Once Plaintiff stood up to unlock the classroom door,  
10 Defendant grabbed her from behind, slammed her to the ground, and began to beat and  
11 stab her. (*Id.* ¶¶ 52-58.) Plaintiff began to bleed profusely from her wounds. (*Id.* ¶ 57.)  
12 Fearing for her life, Plaintiff stopped resisting and Defendant tore off Plaintiff's clothes  
13 and violently raped her. (*Id.* ¶¶ 59-60.) After the attack, Defendant picked up Plaintiff's  
14 radio and requested help. (*Id.* ¶ 62.) However, the radio was not on the correct channel  
15 and none of the officers heard the alert. (*Id.* ¶ 64.) As time passed, and no one came to  
16 Plaintiff's aid, Defendant became agitated and threw the radio against the wall, breaking  
17 it into pieces. (*Id.* ¶ 68.) Plaintiff pleaded with Defendant to allow her to call for help  
18 and, finally, Defendant relented. (*Id.* ¶¶ 69-70.) Once Defendant Harvey was secured,  
19 Plaintiff was given medical attention and taken to a hospital. (*Id.* ¶ 75.) As a result of the  
20 rape and assault, Plaintiff suffered physical injuries and severe and traumatic emotional  
21 distress. (*Id.* ¶ 76.)

22 On August 14, 2015, the State Defendants filed their Answer to the Second  
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24 <sup>2</sup> Rule 5(a)(2) of the Federal Rules of Civil Procedure provides that "[n]o service  
25 is required on a party who is in default for failing to appear. But a pleading that asserts a  
26 new claim for relief against such a party must be served on that party under Rule 4." At  
27 the time Plaintiff filed her Second Amended Complaint, Defendant Harvey had failed to  
28 respond to Plaintiff's original Complaint and was in default. (Doc. 25.) The three claims  
asserted against Defendant Harvey in the original Complaint are identical to the claims  
and allegations asserted against him in the First and Second Amended Complaints.  
(Docs. 9, 74.) Accordingly, pursuant to Rule 5(a)(2) of the Federal Rules of Civil  
Procedure, Plaintiff was not required serve Defendant Harvey with each of the Amended  
Complaints under Rule 4.

1 Amended Complaint. (Doc. 76.) On October 16, 2015, pursuant to the parties'  
2 Stipulation, the Court dismissed Defendants Corizon Health, Inc., Corizon, Inc., and  
3 Corizon, LLC from this action. (Doc. 82.) On December 16, 2015, a Notice of  
4 Settlement was filed by Plaintiff, stating that Plaintiff and the State Defendants had  
5 reached a settlement. (Doc. 87.)

6 On January 11, 2016, the Court dismissed the State Defendants with prejudice,  
7 leaving Defendant Harvey as the only remaining Defendant in the case. (Doc. 92.) On  
8 February 18, 2016, the Court ordered another status report regarding Defendant Harvey  
9 (Doc. 93), and, on February 26, 2016, Plaintiff filed a Report, stating she intended to file  
10 her Motion for Default Judgment against Defendant Harvey and gave notice to the Court  
11 that the judgment against Defendant will likely require a hearing on damages (Doc. 94).  
12 On March 4, 2016, Plaintiff filed her Motion for Default Judgment and Request for  
13 Hearing on Determination of Damages. (Doc. 95.) On March 10, 2016, Judge Bolton  
14 referred Plaintiff's Motion for Default Judgment and Request for Hearing on  
15 Determination of Damages to this Court to conduct a hearing on damages. (Doc. 96.)

16 On April 18, 2016, the Court held a damages hearing. (Doc. 98.) The Court's  
17 staff coordinated with Defendant Harvey's facility to allow him to participate in the  
18 hearing by phone. Initially, Correctional Officer (CO) Anderson, with whom the Court  
19 could clearly communicate, gave Defendant Harvey the phone to participate in the  
20 hearing; however, the Court could only hear mumbling. The Court initiated another  
21 phone call to CO Anderson, during which the Court could again hear CO Anderson  
22 clearly. But, the Court could not hear anything clearly from Defendant Harvey once he  
23 took the phone. The Court initiated a third attempt to connect Defendant Harvey for the  
24 hearing. The Court's staff could again clearly communicate with CO Anderson. CO  
25 Anderson relayed that Defendant Harvey had stated he was "done" with the hearing. CO  
26 Anderson then put Defendant Harvey on the phone, and Harvey stated he could hear the  
27 Court. After the Court determined that Defendant Harvey could hear the Court and  
28 participate in the hearing, the Court proceeded with the hearing. At the conclusion of the

1 hearing, Defendant Harvey stated he had nothing to say to the Court. Therefore, the  
2 Court concludes that Defendant had notice of the hearing and was provided the  
3 opportunity to participate, but voluntarily chose not to do so.

4 During the hearing, the Court ordered Plaintiff to file supplemental briefing,  
5 including analysis of the *Eitel* factors, as well as evidence of damages, on or before May  
6 10, 2016. (Doc. 98.) On May 10, 2016, Plaintiff submitted Supplemental Briefing and  
7 evidence of damages. (Docs. 99, 100.)

## 8 **II. Discussion**

### 9 **a. Jurisdiction**

10 Before considering the merits of Plaintiff's Motion for Default Judgment, the  
11 Court considers whether it has subject matter jurisdiction over this matter and personal  
12 jurisdiction over Defendant. "When entry of judgment is sought against a party who has  
13 failed to plead or otherwise defend, a district court has an affirmative duty to look into its  
14 jurisdiction over both the subject matter and the parties." *In re Tuli*, 172 F.3d 707, 712  
15 (9th Cir. 1999). Plaintiff states that the Court has jurisdiction as stated in the State  
16 Defendants' removal to federal court. (Doc. 1; Doc. 74 ¶ 18.) Although Plaintiff alleges  
17 jurisdiction, this Court must determine whether it has subject matter jurisdiction over the  
18 action and personal jurisdiction over Defendant. *In re Tuli*, 172 F.3d at 712 (stating that  
19 where the Court properly raised, *sua sponte*, the issue of whether it could exercise  
20 personal jurisdiction over Iraq before deciding whether it could enter default judgment  
21 against it in an effort to "avoid ent[ry] [of] a default judgment that can later be  
22 successfully attacked as void"). As detailed below, the Court is satisfied that it has  
23 subject matter jurisdiction over the matter and personal jurisdiction over Defendant.

### 24 **i. Subject Matter Jurisdiction**

25 Plaintiff brought this action, in-part, pursuant to 42 U.S.C. § 1983. (Doc. 74 ¶¶  
26 103-115.) The State Defendants removed this action from State Court to Federal Court  
27 pursuant to 28 U.S.C. § 1331 (Doc. 1 at 1-2), which provides that "[t]he district courts  
28 shall have original jurisdiction of all civil actions arising under the Constitution, laws, or

1 treaties of the United States.” Plaintiff and the State Defendants settled the claims  
2 between them and the Court dismissed the Corizon Defendants. (Doc. 82.) Therefore,  
3 Defendant Harvey is the only remaining Defendant in this case. (Doc. 93.) The Court  
4 must now determine whether it can assert jurisdiction over the claims against Defendant  
5 when there is no longer a federal claim remaining in this litigation and no diversity  
6 jurisdiction exists.

7 Dismissal of federal claims does not automatically deprive district courts of  
8 subject matter jurisdiction over any supplemental claims. *Carlsbad Tec., Inc. v. HIF Bio,*  
9 *Inc.*, 556 U.S. 635, 639 (2009). Pursuant to 28 U.S.C. § 1367(a), “...the district courts  
10 shall have supplemental jurisdiction over all other claims that are so related to claims in  
11 the action within such original jurisdiction that they form part of the same case or  
12 controversy under Article III of the United States Constitution.” “Nonfederal claims are  
13 part of the same case as federal claims when they derive from a common nucleus of  
14 operative fact and are such that a plaintiff would ordinarily be expected to try them in one  
15 judicial proceeding.” *Trs. of Constr. Indus. & Laborers Health & Welfare Trust v. Desert*  
16 *Valley Landscape & Maint., Inc.*, 333 F.3d 923, 925 (9th Cir. 2003) (internal quotations  
17 omitted). Where a district court “dismiss[es] every claim over which it had original  
18 jurisdiction,” it retains “pure[] discretion[]” in deciding whether to exercise supplemental  
19 jurisdiction over the remaining claims. *Carlsbad Tech.*, 556 U.S. at 639; *see Chicago v.*  
20 *Int’l College of Surgeons*, 522 U.S. 156, 173 (1997) (“Depending on a host of factors,  
21 then—including the circumstance of a particular case, the nature of the state law claims,  
22 the character of the governing state law, and the relationship between the state and  
23 federal claims—district courts *may* decline to exercise jurisdiction over supplemental state  
24 law claims”) (emphasis added). Although the decision to decline supplemental  
25 jurisdiction under 28 U.S.C. § 1367(c) is discretionary, it may be an abuse of discretion  
26 to dismiss state claims where factors of judicial economy, convenience, and fairness to  
27 the parties strongly point towards retaining jurisdiction. *Trs. of Constr. Indus.*, 333 F.3d  
28 at 926.

1 Plaintiff's three state-law claims allege that Defendant Harvey's conduct occurred  
2 as a direct result of the State Defendants' violation of 42 U.S.C. § 1983, and their failure  
3 to maintain a safe environment at ASPC-Eyman. (Doc. 74 ¶¶ 104-115, 121, 125, 129.)  
4 Plaintiff's claims against Defendant Harvey arise out of the same case or controversy as  
5 her federal claims, and judicial efficiency will be promoted by hearing the claims in the  
6 present Court. Thus, this Court finds it is appropriate to exercise supplemental  
7 jurisdiction over Plaintiff's state-law claims pursuant to 28 U.S.C. § 1367.

## 8 **ii. Personal Jurisdiction**

9 The Court also concludes that it has personal jurisdiction over Defendant. A court  
10 can assert personal jurisdiction over a defendant by personal service of that defendant or  
11 by means of a defendant's "minimum contacts" with the jurisdiction. *Cripps v. Life Ins.*  
12 *Co. of N. Am.*, 980 F.2d 1261, 1267 (9th Cir. 1992) (quoting *Burnham v. Superior Court*  
13 *of California*, 495 U.S. 604, 620 (1990)). On October 9, 2014, Defendant was personally  
14 served in Arizona, where he resides, with a copy of the summons and Complaint in  
15 accordance with Rule 4(e) of the Federal Rules of Civil Procedure. (Doc. 20-1 at 2.) The  
16 Court is therefore satisfied that it has personal jurisdiction over Defendant.

## 17 **b. Standard for Entry of Default Judgment**

### 18 **i. Rule 55 of the Federal Rules of Civil Procedure**

19 Rule 55(a) of the Federal rules of Civil Procedure provides that "[w]hen a party  
20 against whom a judgment for affirmative relief is sought has failed to plead or otherwise  
21 defend, and that failure is shown by affidavit or otherwise, the clerk must enter the  
22 party's default." Once a party's default has been entered, the district court has discretion  
23 to grant default judgment. *See* Fed. R. Civ. P. 55(b)(2); *Aldabe v. Aldabe*, 616 F.2d  
24 1089, 1092 (9th Cir. 1980) (considering lack of merit in plaintiff's substantive claims, the  
25 court did not abuse its discretion in declining to enter a default judgment). Here, the  
26 Clerk of Court has entered Defendant's default. (Doc. 25.) Thus, the Court may consider  
27 Plaintiff's request for default judgment against Defendant.

28

1                   **ii. The *Eitel* Factors**

2           When deciding whether to grant default judgment, the Court considers the  
3 following “*Eitel*” factors: “(1) the possibility of prejudice to the plaintiff[;] (2) the merits  
4 of the plaintiff’s substantive claim[;] (3) the sufficiency of the complaint[;] (4) the sum of  
5 money at stake in the action; (5) the possibility of a dispute concerning material facts; (6)  
6 whether the default was due to excusable neglect[;] and (7) the strong policy underlying  
7 the Federal Rules of Civil Procedure favoring decisions on the merits.” *Eitel*, 782 F.2d at  
8 1471-72. In applying the *Eitel* factors, “the factual allegations of the complaint, except  
9 those relating to the amount of damages, will be taken as true.” *Geddes v. United Fin.*  
10 *Group*, 559 F.2d 557, 560 (9th Cir. 1977). As detailed below, the Court finds that the  
11 factors weigh in favor of granting Plaintiff’s Motion for Default Judgment against  
12 Defendant.

13                   **1. Possible Prejudice to Plaintiff**

14           The first *Eitel* factor weighs in favor of granting Plaintiff’s Motion. Plaintiff  
15 served Defendant on October 9, 2014. (Doc. 20.) Defendant has not answered the  
16 Complaint nor shown any interest in the current action. In view of his default, Plaintiff  
17 has no alternative means by which to resolve her claims against Defendant. *See PepsiCo,*  
18 *Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002). Therefore, Plaintiff  
19 will be prejudiced if a default judgment is not entered.

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

21           Considering the relationship between the second and third *Eitel* factors, the Court  
22 considers the merits of Plaintiff’s substantive claims and the sufficiency of the Second  
23 Amended Complaint together. The Ninth Circuit has suggested that, when combined,  
24 these factors require a plaintiff to “state a claim on which the plaintiff may recover.”  
25 *PepsiCo, Inc.*, 238 F. Supp. 2d at 1175 (citation omitted). Plaintiff asserts three claims  
26 against Defendant: (1) assault and battery; (2) false imprisonment; and (3) intentional  
27 infliction of emotional distress (I.I.E.D.). As discussed below, the Court finds that  
28 Plaintiff’s Second Amended Complaint sufficiently states claims for relief against



1 Defendant.

2 **a. Assault and Battery**

3 Plaintiff asserts claims for assault and battery against Defendant in Count Three of  
4 the Second Amended Complaint. (Doc. 74 ¶¶ 121-24.) To establish a claim for battery  
5 under Arizona law, the plaintiff must allege that the defendant intentionally engaged “in  
6 an act that results in harmful or offensive contact with the person of another.” *A.G. v.*  
7 *Paradise Valley Unified School Dist. No. 69*, 815 F.3d 1195, 1209 (9th Cir. 2016)  
8 (quoting *Duncan v. Scottsdale Med. Imaging, Ltd.*, 70 P.3d 435, 438 (Ariz. 2003)) (en  
9 banc) (citing Restatement (Second) of Torts §§ 13, 18). Similarly, a claim for common-  
10 law assault requires that the plaintiff allege the defendant acted “with intent to cause  
11 another harmful or offensive contact or apprehension thereof, and the other person  
12 apprehend[ed] imminent contact.” *Garcia v. United States*, 826 F.2d 806, 809 n.9 (9th  
13 Cir. 1987) (citing Restatement (Second) of Torts § 21). Both torts require the defendant  
14 have the requisite intent. *Chappell v. Wenholz*, 247 P.3d 192, 195 (Ariz. Ct. App. 2011)  
15 (“Battery is an intentional tort under Arizona law.”); *Blankinship v. Durante*, 669 P.2d  
16 994, 999 (Ariz. Ct. App. 1983) (characterizing assault and battery as intentional torts).  
17 Under Arizona law, “the act that caused the harm will qualify as intentional conduct only  
18 if the actor desired to cause the *consequences*—and not merely the act itself—or if he was  
19 certain or substantially certain that the *consequences* would result from the act.” *Mein ex*  
20 *rel. Mein v. Cook*, 193 P.3d 790, 794 (Ariz. Ct. App. 2008) (emphasis in original).

21 Here, Plaintiff asserts that Defendant “intentionally caused harmful and offensive  
22 contact, and the apprehension thereof, to Plaintiff . . . .” (Doc. 74 ¶ 122.) Plaintiff set  
23 forth a clear explanation that: (1) Defendant took advantage of her while unsupervised  
24 and forced her into a restroom; (2) Defendant grabbed her, pinned her to the ground, and  
25 began hitting and stabbing her until she conceded to him; and (3) while laying still,  
26 fearful for her life, Defendant brutally raped her even though she attempted to fight his  
27 advances and scream. (Doc. 74 ¶¶ 48-60.) Based on the underlying facts alleged, the  
28 Second Amended Complaint sufficiently alleges that Defendant intentionally caused

1 harmful or offensive contact to Plaintiff and that Defendant caused Plaintiff to fear that  
2 her life was in jeopardy if she did not submit to him. (*Id.*) Accordingly, the Court is  
3 satisfied that Plaintiff has sufficiently pled claims for assault and battery.

4 **b. False Imprisonment**

5 To establish a claim for false imprisonment in Arizona, a plaintiff must show  
6 detention without consent or lawful authority. *Slade v. City of Phoenix*, 541 P.2d 550,  
7 552 (1975). “The essential element necessary to constitute . . . false imprisonment is  
8 unlawful detention.” *Id.* In this case, Plaintiff has alleged that Defendant forced her to  
9 the ground, ordered her to “shut up,” and held her against her will. (Doc. 74 ¶¶ 52-60.)  
10 Therefore, Plaintiff has sufficiently alleged that she was detained without consent by the  
11 Defendant to state a claim for false imprisonment.

12 **c. Intentional Infliction of Emotional Distress**

13 A plaintiff alleging I.I.E.D. in Arizona must demonstrate three elements: (1) the  
14 defendant’s conduct was extreme and outrageous; (2) the defendant intended to cause  
15 emotional distress or “recklessly disregarded the near certainty” that his conduct would  
16 produce such distress; and (3) the defendant’s conduct actually caused severe emotional  
17 distress. *Bodett v. Coxcom, Inc.*, 366 F.3d 736, 746 (9th Cir. 2004); *Ford v. Revion*, 734  
18 P.2d 580, 585, (Ariz. 1987) (en banc); *Craig v. M & O Agencies, Inc.*, 496 F.3d 1047,  
19 1058 (9th Cir. 2007). The extreme and outrageous element is met when a defendant’s  
20 conduct is “so outrageous in character and so extreme in degree, as to go beyond all  
21 possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a  
22 civilized community.” *Mintz v. Bell Atl. Sys. Leasing Int’l, Inc.*, 905 P.2d 559, 563 (Ariz.  
23 Ct. App. 1995) (citations omitted).

24 Plaintiff alleges many facts in the Second Amended Complaint in support of her  
25 I.I.E.D. claim, the most egregious of which include the following: (1) Defendant grabbed  
26 Plaintiff and pushed her to the ground; (2) Defendant ordered Plaintiff to “shut up” and,  
27 when she failed to follow his orders, he stabbed her in the head and hands; (3) Defendant  
28 tore off Plaintiff’s clothes and violently raped her; (4) after Defendant raped Plaintiff, he

1 shattered a radio against the wall because no officer would respond to his calls; and (5) as  
2 a result of the rape and assault, Plaintiff suffered great fear for her life and well-being and  
3 severe and traumatic emotional distress, with which she continues to struggle to this day.  
4 (Doc. 74 ¶¶ 53-76.)

5 The Court finds that Plaintiff has sufficiently pled facts to state an I.I.E.D. claim.

6 Based on the above analysis, the Court finds that the second and third *Eitel* factors  
7 weigh in favor of the entry of default judgment.

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

9 Under the fourth *Eitel* factor, “the court must consider the amount of money at  
10 stake in relation to the seriousness of Defendant’s conduct.” *PepsiCo, Inc.*, 238 F. Supp.  
11 2d at 1177. “If the sum of money at stake is completely disproportionate or  
12 inappropriate, default judgment is disfavored” *Twentieth Century Fox Film Corp. v.*  
13 *Streeter*, 438 F. Supp. 2d 1065, 1071 (D. Ariz. 2006). The Court acknowledges that  
14 Plaintiff seeks a large judgment against Defendant. Specifically, Plaintiff seeks a total  
15 judgment of \$10,000,000 against Defendant, with \$5,000,000 assessed in compensatory  
16 damages, and \$5,000,000 assessed in punitive damages. (Doc. 99 at 8-9.) Plaintiff  
17 alleges that the judgment against Defendant is justified because “the acts he committed  
18 against [Plaintiff] were horrific” and caused Plaintiff to “likely struggle with emotional  
19 and physical trauma and disturbances . . . for the rest of her life.” (*Id.* at 9.) In light of  
20 the egregious conduct alleged to have occurred, the Court finds that the judgment  
21 Plaintiff seeks, although large, is proportional to the Defendant’s alleged conduct.  
22 Therefore, the fourth *Eitel* factor weighs in favor of granting default judgment.

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

24 Here, there is little possibility of a dispute concerning the material facts as to the  
25 Defendant. Defendant has failed to contest any of the facts or appear before the Court in  
26 a manner that would imply a dispute concerning the material facts of the case.  
27 Furthermore, Defendant pled guilty to the criminal charge of rape and is now serving life  
28 in prison for his actions. (Doc. 99-1 at 2.) Thus, the fifth *Eitel* factor weighs in favor of

1 the entry of default judgment.

2 **5. Whether Default was Due to Excusable Neglect**

3 The sixth *Eitel* factor considers whether the default was due to excusable neglect.  
4 There is no evidence that Defendant's failure to appear or otherwise defend was the result  
5 of excusable neglect. Plaintiff has diligently prosecuted this matter since its inception,  
6 while Defendant has failed to defend or show any interest in this action. Thus, the sixth  
7 *Eitel* factor weighs in favor of default judgment.

8 **6. Policy Disfavoring Default Judgment**

9 Under the seventh *Eitel* factor, the Court considers the policy that, whenever  
10 possible, cases should be tried on the merits. *Eitel*, 782 F.2d at 1472. The existence of  
11 Rule 55(b), however, indicates that the preference for resolving cases on the merits is not  
12 absolute. *PepsiCo, Inc.*, 238 F. Supp. 2d. at 1177. Because Defendant has not responded  
13 to the allegations in this action, deciding this case on the merits is "impractical," if not  
14 impossible. *Id.* Thus, the seventh *Eitel* factor does not preclude the entry of default  
15 judgment.

16 On balance, the Court finds that the *Eitel* factors weigh in favor of entering default  
17 judgment against Defendant.

18 **iii. Damages**

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

1 *Philip Morris USA*, 219 F.R.D. at 498.

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

14 Plaintiff requests \$5,000,000 in compensatory damages, and \$5,000,000 in  
15 punitive damages. In support of her request for compensatory damages, Plaintiff has  
16 submitted a Declaration describing a prolonged and brutal attack and rape by Defendant,  
17 in which Plaintiff was in fear of her life while waiting for help to arrive. (Doc. 100 ¶¶  
18 12-18.) Plaintiff further avers in her Declaration that she suffers from “severe emotional  
19 distress, anxiety, depression, psychological trauma which produces flashbacks, night  
20 terrors, intense fear, helplessness, social impairment, severe insomnia, and a lack of self-  
21 esteem” as a result of Defendant’s conduct. (*Id.* ¶ 21.) Plaintiff states that she suffers  
22 from “unremitting shoulder pain” and “very intense panic and anxiety attacks.” (*Id.*)  
23 Plaintiff has been told by her psychologists that she is likely to suffer “with these traumas  
24 for the rest of [her] life.” (*Id.* ¶ 20.) Plaintiff also states that despite her “hopes and  
25 aspirations” to eventually overcome the attack and its impact on her, she continues “to  
26 live with the memory of the rape and assault every day.” (*Id.* ¶¶ 22-23.)

27 In light of this evidence, the Court is satisfied that Plaintiff has sufficiently proven  
28 up the \$5,000,000 she requests in compensatory damages. Plaintiff has established

1 extreme suffering, anxiety, and physical and emotional pain that are reasonably probable  
2 to be experienced in the future as a result of the injuries Defendant caused her.  
3 Therefore, this Court recommends that Plaintiff's request for compensatory damages be  
4 granted.

5 Plaintiff also requests \$5,000,000 in punitive damages. The purposes of punitive  
6 damages are to punish a defendant and to deter similar acts in the future. *Olson v.*  
7 *Walker*, 781 P.2d 1015, 1018 (Ariz. Ct. App. 1989). Further, punitive damages for tort  
8 claims in Arizona are awarded only where the evidence is clear and convincing that the  
9 Defendant acted with an "evil mind." *Id.* "An evil mind is found where the defendant  
10 intended to injure the plaintiff, or where the defendant, not intending to cause injury,  
11 'consciously pursued a course of conduct knowing that it created a substantial risk of  
12 significant harm to others.'" (quoting *Rawlings v. Apodaca*, 726 P.2d 565, 578 (Ariz.  
13 1986)).

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

2 Punitive damage awards also have constitutional limits. “A grossly excessive  
3 punitive damage award violates the Due Process Clause of the Fourteenth Amendment to  
4 the United States Constitution because the defendant did not have ‘fair notice’ of its  
5 exposure to the extent of punishment that could be imposed.” *Hudgins v. Southwest*  
6 *Airlines, Co.*, 212 P.3d 810, 827 (Ariz. Ct. App. 2009) (citing *BMW of N. AM., Inc. v.*  
7 *Gore*, 517 U.S. 559, 489 (1996)). Relevant guideposts for determining the  
8 constitutionality of a punitive damage award include “the degree of reprehensibility of  
9 the defendant’s misconduct, [and] the ratio between compensatory and punitive  
10 damages.” *Id.* at 490. The reprehensibility of Defendant’s conduct is “[p]erhaps the  
11 most important indicium of the reasonableness of a punitive damages award.” *BMW*, 517  
12 U.S. at 575. “Acts of violence or threats of bodily harm . . . [are] the most  
13 reprehensible.” *Hudgins*, 212 P.3d at 490 (quoting *Florez v. Delbovo*, 939 F. Supp. 1341,  
14 1348-49 (N.D. Ill. 1996)). Finally, with regard to the ratio between compensatory and  
15 punitive damages, the Supreme Court has held that “single-digit multipliers are more  
16 likely to comport with due process.” *Id.* at 491.

17 Here, as detailed above, Plaintiff suffered a prolonged, violent, and malicious  
18 physical attack and rape by Defendant. Defendant waited until Plaintiff was alone and  
19 vulnerable to grab and assault her. (Doc. 100 ¶¶ 12-13.) In spite of Plaintiff’s efforts to  
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21 <sup>3</sup> Another factor that may be considered in calculating punitive damages is a  
22 defendant’s wealth. *Olson*, 781 P.2d at 1022 (“One factor that may be considered in  
23 awarding punitive damages is the defendant’s wealth. The wealthier the defendant, the  
24 greater the amount of the award needed to punish him.”). Here, Plaintiff asserts that  
25 Defendant is a member of a tribal nation in Arizona, Tohono O’odham Nation. (Doc. 99  
26 at 7-8.) Plaintiff asserts that the Tribal Government owns and operates three casinos and  
27 “sells and leases mineral rights to support itself,” all of which “generate millions of  
28 dollars annually in revenue.” (*Id.* at 8.) Plaintiff contends that Defendant “is entitled to a  
portion of any profits that the Casinos run by” the Tribal Government may obtain. (*Id.*)  
However, Plaintiff does not provide any specific documentation or evidence regarding  
Plaintiff’s assets, net income, or the amount of profits Defendant receives or is likely to  
receive from the Tribal Government. Therefore, the Court does not consider Defendant’s  
wealth in evaluating Plaintiff’s request for punitive damages. However, a finding  
regarding Defendant’s wealth is not required. *See Hawkins*, 733 P.2d at 1084 (“A  
plaintiff is not required to put on proof of every factor, nor is any single factor a  
prerequisite to recovery of punitive damages”).

1 escape, scream, and struggle against Defendant, Defendant stabbed Plaintiff and slammed  
2 her head into the ground multiple times before tearing off her clothes and violently raping  
3 her. (*Id.* ¶¶ 12-17.) Based on these facts, this Court finds that an award of punitive  
4 damages is appropriate here.

5 Further, Defendant's prolonged assault and rape of Plaintiff justify the requested  
6 amount of punitive damages. Defendant was aware of the risk of harm from his  
7 intentional, violent conduct. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408,  
8 416 (2003) (in assessing the degree of reprehensibility of a defendant's conduct, courts  
9 consider whether "the harm caused was physical as opposed to economic; the tortious  
10 conduct evinced an indifference to or a reckless disregard of the health or safety of  
11 others; the target of the conduct had financial vulnerability; the conduct involved  
12 repeated incidents or was an isolated incident; and the harm was the result of intentional  
13 malice, trickery, or deceit, or mere accident."). Finally, the Court finds that the 1 to 1  
14 ratio of compensatory to punitive damages is reasonable and comports with due process  
15 in this case.

16 For the reasons above, the Court finds that Plaintiff has proven up her requested  
17 award of damages.

### 18 **III. Conclusion**

19 Because the Court has subject matter jurisdiction over this action and personal  
20 jurisdiction over Defendant, the application of the *Eitel* factors weighs in favor of the  
21 entry of default judgment, and Plaintiff has sufficiently proven up her damages, the Court  
22 will recommend that Plaintiff's Motion for Default Judgment against Defendant be  
23 granted.

24 Accordingly,

25 **IT IS RECOMMENDED** that Plaintiff's Motion for Default Judgment (Doc. 95)  
26 against Defendant Jacob Harvey be **GRANTED**.

27 **IT IS FURTHER RECOMMENDED** that the Court direct the Clerk of Court to  
28 enter judgment against Jacob Harvey and award Christine Rode damages of \$10,000,000.



1 This recommendation is not immediately appealable to the Ninth Circuit Court of  
2 Appeals. Any notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1)  
3 should not be filed until entry of the District Court's judgment. The parties shall have 14  
4 days from the date of service of a copy of this recommendation within which to file  
5 specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6  
6 and 72. Thereafter, the parties have 14 days within which to respond to the objections.

7 Failure to file timely objections to the Report and Recommendation may result in  
8 the District Court's acceptance of the Report and Recommendation without further  
9 review. *See United States v. Reyna-Tapia*, 328 F.3d 114, 1121 (9th Cir. 2003). Failure to  
10 file timely objections to any factual determinations of the Magistrate Judge may be  
11 considered a waiver of a party's right to appeal review of the findings of fact in an order  
12 or judgment entered pursuant to the recommendation. *See* Fed. R. Civ. P. 72.

13 **IT IS FURTHER ORDERED** that the Clerk of Court shall mail a copy of this  
14 Report and Recommendation to Defendant Jacob Harvey, Inmate 279133, at ASPC –  
15 Eyman P.O. Box 3500, Florence, AZ 85132-3500 (*see* Doc. 99 at 10).

16 Dated this 3rd day of August, 2016.

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Honorable John Z. Boyle  
United States Magistrate Judge