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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Lynnell Levingston,	)	No. CV-09-8138-PCT-LOA
Plaintiff,	)	<b>ORDER</b>
vs.	)	
Patricia Piburn, et al.,	)	
Defendants.	)	

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This matter is before the Court on Plaintiff’s Second Motion for Expenses for Failure to Waive. (docket # 85) Plaintiff seeks to recover expenses incurred due to the failure of several defendants to waive service of process. Plaintiff filed the pending motion on March 10, 2010, while this matter was stayed and on the Court’s inactive calendar. In a March 25, 2010 Order, the Court returned this matter to the active calendar. In view of the procedural history of this case, the Court permitted Defendants until April 9, 2010 to respond to Plaintiff’s motion. (docket # 89) Although the deadline has passed, none of the Defendants identified in Plaintiff’s motion has filed a response. Despite Defendants’ failure to respond, Plaintiff has not shown that she is entitled to recover expenses for failure to waive service.

**I. Federal Rule of Civil Procedure 4(d)(2)**

Federal Rule of Civil Procedure 4(d)(2) provides that:

If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

1 (A) the expenses later incurred in making service; and

2 (B) the reasonable expenses, including attorney's fees, of any motion  
3 required to collect those service expenses.

4 *Id.* A plaintiff may recover expenses pursuant to Rule 4(d)(2) even if she does not  
5 ultimately prevail in the action. *Estate of Darulis v. Garate*, 401 F.3d 1060, 1064 (9<sup>th</sup> Cir.  
6 2005).

7 If a plaintiff does not produce admissible evidence showing that the defendant  
8 refused a request to waive service, a district court should deny the Rule 4(d)(2) motion.  
9 *Royal Travel, Inc. v. Shell Management Hawaii, Inc.*, No. 08-00314-JMS-LEK, 2010 WL  
10 167954, at \* (D. Hawai'i 2010), *amended by, Royal Travel, Inc. v. Shell Management*  
11 *Hawaii, Inc.*, 2010 WL 932007 (D.Hawai'i 2010) (awarding expenses under Rule 4(d) after  
12 plaintiff provided sufficient evidence of mailing waiver requests to defendants). There is  
13 good cause for failing to waive service if the defendant never received the request for waiver  
14 of service. *Id.* (citing *Double S. Truck Line, Inc. v. Frozen Food Express*, 171 F.R.D. 251,  
15 253 (D. Minn. 1997)). However, "[i]t is not good cause for failure to waive service that the  
16 claim is unjust or that the court lacks jurisdiction." *Royal Travel*, 2010 WL 167954, at \* 3  
17 (citing Fed.R.Civ.P. 4(d), advisory committee note (1993 Amendments)).

## 18 **II. Analysis**

19 In her pending motion, Plaintiff states that Defendants Earle, Garms, McClain,  
20 Haverstick, Chavez, Patricia Piburn, Raymon Piburn, and Kenneth Isaacson "failed to sign  
21 and return the requested Waiver of Service Summons, required by Rule 4 of the Federal  
22 Rules of Civil Procedure." (docket # 85) Plaintiff does not identify the dates on which she  
23 mailed the requests to waive the service of summons to each Defendant identified in her  
24 motion. Plaintiff merely refers to "attachment 1" as evidence that she mailed requests for  
25 waiver of service of summons to Defendants Earle, Garms, McClain, Haverstick, Chavez,  
26 Patricia Piburn, Raymon Piburn, and Kenneth Isaacson. (docket # 85 at 1) Plaintiff's  
27 motion, however, does not include an "attachment 1" or other any other exhibits regarding  
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1 mailing a request for waiver of service to Defendants Earle, Garms, McClain, Haverstick,  
2 Chavez, Patricia Piburn, Raymon Piburn, and Kenneth Isaacson.

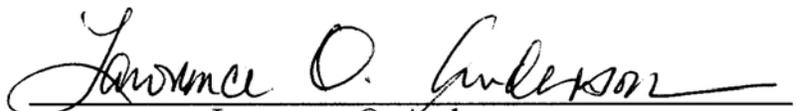
3 Plaintiff previously filed an similar motion for expenses for failure to waive  
4 service which the Court denied, without prejudice, as premature. (dockets # 65, # 66)  
5 Unlike the pending motion, Plaintiff's first motion included an "attachment 1." (docket #  
6 65) However, that attachment is merely a blank "Waiver of Service of Summons Form"  
7 and contains no information regarding the dates on which Plaintiff allegedly mailed such  
8 forms to Defendants Earle, Garms, McClain, Haverstick, Chavez, Patricia Piburn, Raymon  
9 Piburn, and Kenneth Isaacson.

10 In view of the lack of evidence that establishing that Plaintiff mailed requests for  
11 waiver of service to Defendants Earle, Garms, McClain, Haverstick, Chavez, Patricia  
12 Piburn, Raymon Piburn, and Kenneth Isaacson and that these Defendants allegedly refused  
13 to waive service, the Court will deny Plaintiff's Rule 4(d)(2) motion.

14 Accordingly,

15 **IT IS ORDERED** that Plaintiff's Second Motion for Expenses for Failure to  
16 Waive, docket # 85, is **DENIED** with prejudice.

17 DATED this 10<sup>th</sup> day of June, 2010.

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20 Lawrence O. Anderson  
21 United States Magistrate Judge  
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