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Indicting a Foreign Company:

Satisfying the Technical Requirements of Criminal Rule 4 by Resorting to the Civil Alter Ego Doctrine?

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Although the prosecution of foreign corporations has increased in recent years,[i] United States Department of Justice ("DOJ") policies offer little guidance to prosecutors regarding the service of process on foreign corporations pursuant to Rule 4 of the Federal Rules of Criminal Procedure ("Rule 4"). That rule requires the Government to effect service on a corporation by (1) delivering a copy of the summons "to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process" (the "Delivery Requirement"), *and* (2) mailing the summons to the company's "last known address within the district or to its principal place of business elsewhere in the United States" (the "Mailing Requirement"). *See* Fed. R. Crim. P. 4(c)(3)(C). Generally, the Government may satisfy the Delivery Requirement by delivering a copy of the summons to the foreign corporation's legally-appointed representative in accordance with the provisions of a mutual legal assistance treaty ("MLAT"). An issue arises, however, regarding whether the Government may satisfy the Mailing Requirement by mailing the summons to a foreign company's U.S.-based affiliate, assuming that such entity does not have an address within the district (i.e., where the prosecutors filed the criminal charges) or a principal place of business in the United States.

As set forth in this article, in some cases, when the Government has indicted a foreign corporation, it has claimed satisfaction of the Mailing Requirement by mailing the summons to a domestic affiliate and by asserting that said affiliate constitutes an alter ego of the foreign entity for purposes of Rule 4. In the civil context, companies diligently seek to maintain corporate formalities to avoid civil liability through a piercing of the corporate veil. While significant for purposes of civil liability, the observance of corporate formalities also may constitute a defense in the criminal context, specifically in connection with

the Government's attempt to rely on an alter ego theory to satisfy the Mailing Requirement.

The validity of using an alter ego theory to permit service of criminal indictment has yet to be addressed by a Court of Appeals, and only six federal district courts have ruled on the issue.[ii] The district court decisions are evenly split with respect to whether the Government has met its burden of proving that service on a U.S. affiliate will satisfy the Mailing Requirement. Invariably, this inquiry is fact-specific. As such, the U.S.-based affiliates of overseas companies ought to consider the factors that have led federal courts to apply the alter ego doctrine for purposes of Rule 4's Mailing Requirement.

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Criminal Service of Process

Under U.S. criminal procedure, a defendant (including a corporate defendant) is not required to engage in litigation until it has been properly served with process notifying the defendant of the impending lawsuit.[iii] Indeed, even if the defendant may have actual notice of the prosecution, the Government has an obligation to effect service of the summons, which entails "much more than mere notice."[iv] If the Government fails to properly serve a summons on a defendant, the defendant may move to quash or dismiss the indictment and the Government bears the burden of demonstrating that service was proper.[v]

As set forth above, service under Rule 4 requires satisfaction of the Delivery Requirement and the Mailing Requirement. This article primarily addresses the Mailing Requirement, particularly with respect to whether the Government may satisfy Rule 4 by mailing a summons to a foreign company's U.S.-based affiliate, satellite, or branch office.

District Courts Are Split On Service of a Criminal Summons Via a Domestic Affiliate

While no appellate court has addressed whether the alter ego doctrine may be employed for purposes of Rule 4's Mailing Requirement, a handful of district courts have decided the question. In *United States v. Johnson Matthey PLC,* No. 2:06-CR-169, 2007 WL 2254676 (D. Utah Aug. 2, 2007), the district court granted defendant's motion to quash service of the indictment. There, the Government sought to fulfill the Mailing Requirement by arguing that it had mailed the summons to the foreign defendant's "alter ego," a wholly-owned subsidiary (a domestic entity with a refinery in Salt Lake and a corporate presence in Wayne, Pa.).[vi] The *Johnson Matthey* court found that the Mailing Requirement was not satisfied because "service upon a subsidiary is not sufficient service on the parent company," particularly where, as there, no circumstances justified a disregard of the corporate separateness of the parent and subsidiary.

Subsequently, in *United States v. Alfred L. Wolff GMBH*, No. 08-CR-417, 2011 WL 4471383 (N.D. Ill. Sep. 26, 2011), the court refused to extend the alter ego doctrine to the criminal matter at issue because "the government ha[d] not met its heavy burden under a veil piercing analysis."[vii] Put simply, the Government had not alleged sufficient facts in the indictment or in supporting affidavits establishing that the overseas parent had "fraudulently formed and operated" a United States subsidiary "for the purpose of perpetuating a fraud." Likewise, in *United States v. Pangang Group Company, Ltd*, No. CR-11-00573, 2012 WL 3010958 (N.D. Cal. July 23, 2012), the court found that the Government had failed to produce evidence showing an abuse of the corporate form so as to warrant piercing the

corporate veil and disregarding the separate corporate entities of the parent and the subsidiary.

On the other hand, in *United States v. Chitron Elecs. Co., Ltd.*, 668 F. Supp. 2d 298 (D. Mass. 2009), the court found that there was a sufficient "interrelationship" between Chitron-China (the overseas defendant) and Chitron-US (the domestic subsidiary to which the summons was mailed) to find that Rule 4's Mailing Requirement had been satisfied.[viii] There, the court applied the alter ego doctrine in view of the facts that the same individual served as the general manager and president of the U.S. affiliate and foreign parent, the overseas parent sent daily "task lists" to the U.S. entity to control the work performed, there was a single shared website between the two entities, the foreign company paid the operating costs of the U.S. affiliate (*e.g.* payroll), and employees of the foreign parent company contacted U.S. customers directly and held themselves out as employees of the U.S. entity, while using a toll-free U.S. telephone number to "disguise the ultimate destination of purchases."[ix] Taken together, the court found that application of the alter ego doctrine was appropriate because the U.S. subsidiary was a "mere conduit" for the foreign parent's illegal activities. *See also United States v. Public Warehousing Company*, No. 1:09-CR-TWT, 2011 WL 1126333 (N.D. Ga. Mar. 28, 2011) (focusing on the "significant interrelationship" between the overseas parent and the U.S. affiliate for purposes of Rule 4).

Finally, in *United States v. Kim Dotcom*, No. 1:12-CR-3-LO, 2012 WL 4788433 (E.D. Va. Oct. 5, 2012), the court recognized that the Mailing Requirement "must also be adhered to." However, the court denied the corporate defendant's motion to dismiss the indictment on the ground that it was theoretically possible for the Government to attempt to mail the summons to an individual defendant—as an alter ego of the company—provided that the Government extradited such individual defendant and mailed the summons to him while in federal custody.

Showing Alter Ego Could Be Sufficient to Satisfy Rule 4's Mailing Requirement

To date, no court has ruled that the alter ego doctrine does not apply in the context of Rule 4. Rather, courts appear to have focused on whether the Government has made a sufficient factual showing to justify an application of the alter ego doctrine for purposes of the Mailing Requirement.

The Supreme Court has found that a parent's ownership of stock in a subsidiary does not automatically subject the foreign corporation to U.S. jurisdiction.[x] Indeed, "there is no litmus test for determining whether a subsidiary is the alter ego of its parent. Instead, [the court] must look to the totality of the circumstances [and] . . . resolution of the alter ego issue is heavily fact-specific."[xi] In fact, based on a review of the (limited) case law on this issue, it seems that courts may be inclined to disregard the corporate form in at least the following instances:

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- If the U.S. affiliate is a "mere conduit" for illegal activity committed by a foreign parent company or otherwise serves as a "front company" for the commission of violations of U.S. criminal law (including the perpetration of fraud).[xii]
- Where the foreign entity has a "significant interrelationship" with the U.S. entity's

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business decisions such that it directs the business affairs of the domestic affiliate.[xiii] As set forth above, facts that may lead to the application of the alter ego doctrine include whether the same individual(s) serve(s) as officers or directors of the U.S. affiliate and foreign parent, whether the overseas parent directs the work performed by the U.S. affiliate, whether the foreign company pays the operating expenses of the U.S. affiliate (*e.g.* payroll), whether employees of the foreign company hold themselves out to be employees of the U.S. entity (and vice versa), whether a shared website markets the services or goods of foreign company and the domestic affiliate, etc.[xiv] While none of these factors are dispositive, when viewed as a whole, a court may apply the alter ego doctrine for purposes of satisfying the Mailing Requirement.[xv]

In summary, the Government bears the burden of proving that the alter ego doctrine should be applied so as to comply with Rule 4's Mailing Requirement. Although there is little guidance on this issue—by way of DOJ policy—it appears that the Government may insist on the application of the alter ego doctrine where there may be a failure of corporate separateness. As such, the observance of corporate formalities may not only be prudent in the civil context, it also could serve as a key aspect of a criminal defendant's response to service pursuant to Rule 4.

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i) Indeed, Federal prosecutors increasingly target foreign corporations by emphasizing that DOJ's goal is to "root out global corruption" to "ensure the stability and security of domestic and global markets." Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 Va. L. Rev. 1775, 1776-77 (2011) (citing the address made by Alice Fisher, Assistant Attorney Gen., U.S. Dep't of Justice, to the American Bar Review National Institute, and statements publicized by the Criminal Division of the U.S. Dep't of Justice). Furthermore, prosecutions of foreign firms on U.S. soil often include front-page size penalties. For example, German industrial firm Siemens was recently prosecuted for violation of U.S. criminal law and ultimately paid fines totaling more than $1.5 billion (including $800 million in fines to both the U.S. and Germany). *Id.*

ii) *United States v. Pangang Group Company, Ltd.*, No. CR 11-00573, 2012 WL 3010958 at *3 (N.D. Cal. July 23, 2012).

iii) *United States v. Alfred L. Wolff GmbH*, No. 08 CR 417, 2011 WL 4471383, at *3 (N.D. Ill. Sept. 26, 2011) (citing *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 344, 350 (1999)).

iv) *Harding v. Williams Prop. Co.*, No. 96–2713, 1998 WL 637414, at *4 (4th Cir. Aug. 31, 1998) (Table).

v) *See, e.g., United States v. Pangang Group Co., Ltd.*, No. CR 11-00573 JSW, 2012 WL 3010958, at *2 (N.D. Cal. July 23, 2012).

vi) *Id*. at *4.

vii) *Id.* at *4.

viii) *Id.* at 306.

ix) *Id.* at 306.

x) *Shaffer v. Heitner,* 433 U.S. 186, 216 (1977).

xi) *United Steelworkers of America v. Connors Steel Co.,* 855 F.2d 1499, 1505-1506 (11th Cir. 1988).

xii) *Chitron*, 668 F. Supp. 2d at 305.

xiii) *Id.* at 305-306.

xiv) *Id.* at 306.

xv) *Pub. Warehousing Co.*, 2011 WL 1126333, at *7.

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