EXHIBIT A

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Western Division.
Alex COTTON, Plaintiff,
v.
BST ROCKFORD, INC. and BST Servo-Technik GmbH Defendants.

No. 95 C 50205.
Oct. 21, 1996.

Steven B. Varick, McBride, Baker & Coles, Chicago, IL, for Plaintiff.

Jeffry S. Spears, Amy E. Shappert, Lord, Bissell & Brook, Rockford, IL, Michael P. Comiskey, Kathryn G. Montgomery, Lord, Bissell & Brook, Chicago, IL, Patrick E. Deady, Hogan, Marren & McCahill, Ltd., Chicago, IL, for Defendants.

MEMORANDUM OPINION AND ORDER
REINHARD, District Judge.

INTRODUCTION

*1 Plaintiff, Alex Cotton, filed a four-court complaint against defendants, BST Rockford, Inc. (BST Rockford), an Illinois corporation with its principal place of business in Rockford, Illinois, and BST Servo-Technik GmbH (BST Bielefeld), a German corporation with its principal place of business in Bielefeld, Germany. Jurisdiction is premised on 28 U.S.C. § 1331 as Count II of the complaint alleges a cause of action under 18 U.S.C. §§ 1962(c), 1962(d) and 1964(c). BST Bielefeld has moved to dismiss the complaint against it, contending service was not properly made within the 120 days required by Fed.R.Civ.P. 4(m).

FACTS

The following facts are taken from the allegations of the complaint and evidentiary materials submitted in support of, and objection to, the motion to dismiss. Plaintiff filed his complaint on May 2, 1995. Sometime in early May 1995, counsel for BST Rockford received a letter dated May 3, 1995 from plaintiff's counsel which refers to two enclosures: a copy of the complaint and a summons to BST Rockford. The letter further asks "if you will accept service for [BST Bielefeld] or if we must effect service directly."

In a letter dated May 9, 1995, counsel for BST Rockford acknowledged receipt of the complaint and summons. The May 9 letter advises that BST Rockford's counsel is not authorized to accept service on behalf of BST Bielefeld. The letter also points out that the summons enclosed with the May 3 letter was addressed to BST Bielefeld and not BST Rockford. The May 9 letter, therefore, requests that plaintiff's counsel send a copy of the summons addressed to BST Rockford.

In a letter dated May 12, 1995, an administrative assistant to plaintiff's counsel expressed her "regret [for] the error in delivering to you the wrong summons." The May 12 letter refers to an enclosed summons to BST Rockford and requests the "return [of] the inappropriate summons in the enclosed, postage-paid envelope, so we may have it served."

There is no evidence submitted by either party that any service was attempted on BST Bielefeld thereafter until May 3, 1996. On that date, Wolfgang Küster, one of the chief executive officers of BST Bielefeld, came to Chicago, Illinois to give his deposition. Küster was also president of BST Rockford and it was in that capacity that he gave his deposition. At the end of Küster's deposition, plaintiff's counsel gave Küster a copy of the complaint and a summons addressed to BST Bielefeld. The return of service was filed with the court on June 19, 1996.

Further facts relevant to this motion are that BST Rockford was a wholly owned subsidiary of BST Bielefeld. The president and sole officer of

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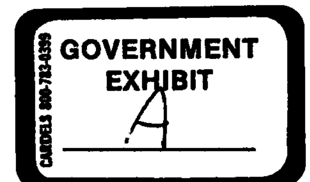

BST Rockford was Küster, who also served as CEO of BST Bielefeld. Although Küster was the president of BST Rockford, he was only employed by BST Bielefeld who paid his salary entirely. There were only three directors of BST Rockford, two of them, Küster and Joachim Kreutz, were chief officers of BST Bielefeld. The third was president of a sister corporation of BST Bielefeld. According to Küster, only he and Kreutz could hire and fire employees at BST Rockford and they alone controlled the BST Rockford workforce. Furthermore, BST Bielefeld formed BST Rockford for the purpose of providing service and spare parts to BST Bielefeld's United States customers. Later, BST Rockford also performed sales functions for BST Bielefeld. BST Bielefeld had no employees in the United States. Additionally, the financial and tax reporting for BST Rockford was consolidated with that of BST Bielefeld. In that regard, BST Rockford's outside accountants submitted draft financial statements directly to BST Bielefeld for approval and alteration. Lastly, Küster acknowledged that he learned of the lawsuit from BST Rockford's counsel "shortly after it began."

CONTENTIONS

*2 BST Bielefeld seeks dismissal from this case because plaintiff has not effected proper service and has not complied with the 120-day requirement of Rule 4(m). Specifically, BST Bielefeld argues that the purported service on BST Bielefeld in May 1995 did not satisfy Rule 4(h), that plaintiff violated Rule 4(m) because he has not served BST Bielefeld within the United States within 120 days after filing the complaint and because he has not served BST Bielefeld outside the United States and that even if Rule 4(m) were ignored the purported service upon BST Bielefeld via delivery of a summons and complaint to Küster at his deposition was ineffective.

Plaintiff responds that the service on BST Rockford in May 1995 of a summons addressed to BST Bielefeld was proper service because of BST Rockford's relationship to BST Bielefeld. Alternatively, plaintiff contends that the service on Küster was effective and that it was not barred by Rule 4(m) because Rule 4(m) contains an exception for service abroad and because plaintiff had good cause for not serving Küster earlier.

DISCUSSION

While the present motion raises several interesting issues, this matter may be resolved more simply than the briefs suggest. In a case such as the present, where a plaintiff has attempted to serve process on a foreign corporation pursuant to Illinois' service of process provision, as allowed by Fed.R.Civ.P. 4(e), the court must turn to Illinois law to evaluate whether plaintiff's service of process complies with those requirements. *See Geick v. American Honda Motor Co.,* 117 F.R.D. 123, 125 (C.D. Ill. 1987); *see also Akari Imeji Co. v. Qume Corp.,* 748 F. Supp. 588, 590 (N.D. Ill. 1990). In that regard, the court must assess if the defendant has been served with process in accordance with the formal requirements of Illinois law. *Id.* (citing *Schlunk v. Volkswagenwerk Aktiengesellschaft,* 145 Ill. App. 3d 594, 495 N.E.2d 1114[FN1] (1st Dist. 1986), *aff'd, Volkswagenwerk Aktiengesellschaft v. Schlunk,* 486 U.S. 694 (1988)).

Under Illinois law, service of a summons directed to a parent constitutes proper service provided there is a relationship between the subsidiary and parent sufficient to deem the subsidiary the parent's agent for service of process. *Wissmiller v. Lincoln Trail Motosports, Inc.,* 195 Ill. App. 3d 399, 552 N.E.2d 295, 298 (4th Dist. 1990); *Schlunk,* 503 N.E.2d at 1049-53. While the mere existence of a parent-subsidiary relationship is insufficient to establish the necessary relationship, it is not necessary that a parent's control of a subsidiary be so pervasive as to make the two corporations essentially one, or to make the subsidiary an alter ego or mere department of the parent. *Wissmiller,* 552 N.E.2d at 298 (citing *Schlunk,* 503 N.E.2d at 1045).

The focus is on whether the parent-subsidiary relationship establishes that the parent is doing business in Illinois.[FN2] *Wissmiller,* 552 N.E.2d at

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298. Several Illinois cases have established a list of factors which courts may consider in determining whether a parent/subsidiary relationship is sufficient to deem a subsidiary the parent's agent for the service of process. *Akari Imeji,* 748 F. Supp. at 591. Although not expressly articulated by the cases listing factors, a guiding principle underlying the factors appears to be the issue of control. *Akari Imeji,* 748 F. Supp. at 591-92. Some of the factors looked to by the various cases are: (1) the subsidiary was established and wholly owned by the parent; (2) the parent paid the salaries of the subsidiary's directors; (3) the parent guaranteed the subsidiary's lease; (4) the subsidiary's sole business was the sale of parts for the parent; (5) the parent listed the subsidiary's address in advertisements; (6) the subsidiary existed primarily to promote the sale and distribution of the parent's products; (7) the subsidiary was obligated to repair and sell parts for the parent's products; (8) the subsidiary was contractually required to apprise the parent of all aspects of its business; (9) the parent controlled the subsidiary's choice of dealers, designation of products and services, stock levels and methods of ordering; (10) the parent dominated the subsidiary's board of directors; (11) the subsidiary conducted its board meetings in the domicile of the parent; and (12) the subsidiary was listed on a consolidated financial sheet along with the parent rather than publishing its own annual report. *Akari Imeji,* 748 F. Supp. at 592.

***3** In the present case, while the evidence does not support the existence of all of these factors, it does show sufficient control by BST Bielefeld over BST Rockford for the court to conclude that the relationship between the two is sufficient to allow for service on BST Bielefeld through BST Rockford. It is undisputed that BST Rockford was a wholly owned subsidiary of BST Bielefeld. Further, Küster, the president and sole officer of BST Rockford was in essence the CEO of BST Bielefeld. Although he was the president of BST Rockford, he was employed and paid by BST Bielefeld. The board of directors consisted of Küster and Kreutz, chief officers at BST Bielefeld, and a third person who was also president of a sister corporation of BST Bielefeld. Additionally, Küster and Kreutz did all of the hiring and firing at BST Rockford and they alone controlled the workforce. BST Rockford established BST Bielefeld for the purpose of providing service and spare parts to BST Bielefeld's United States customers and, later, for the purpose of performing sales functions for BST Bielefeld. Lastly, the financial and tax reporting for BST Rockford was consolidated with that of BST Bielefeld and BST Rockford's accountants submitted draft financial statements to BST Bielefeld for approval and alteration. This evidence overwhelmingly supports a finding under Illinois law that BST Rockford had such a relationship with BST Bielefeld as to make service of a summons addressed to BST Bielefeld upon BST Rockford proper.

That, however, does not resolve the dispute before the court regarding the propriety of service. Although plaintiff could have *properly* served BST Bielefeld via BST Rockford within the 120-day limit, they never served BST Bielefeld at all. The closest plaintiff came to doing so was when they inadvertently sent the summons addressed to BST Bielefeld to BST Rockford with the letter of May 3, 1995. Plaintiff's intent, as evidenced by the May 3 letter, however, was not to serve a summons addressed to BST Bielefeld, but rather, was to serve a summons addressed to BST Rockford. This intent is further reflected in the May 12 letter which apologizes for erroneously delivering the wrong summons to BST Rockford and requests the return of the summons addressed to BST Bielefeld. Under these unique facts, plaintiff never actually served BST Rockford with a summons addressed to BST Bielefeld.

Because no service, proper or otherwise, occurred on May 3, 1995, plaintiff never served BST Bielefeld within the 120 days required by Rule 4(m). If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion

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or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specific time, provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. *Panaras v. Liquid Carbonic Indust. Corp.*, 94 F.3d 338, 338-39 (7th Cir. 1996). If good cause is shown, the court has no choice but to extend the time for service. *Id.* at 340. If good cause does not exist, the court may, in its discretion, either dismiss without prejudice or direct that service be effected within a specified time. *Id.* Thus, absent a showing of good cause, a district court must still consider whether a permissive extension of time is warranted. *Id.*

***4** Accordingly, in this case the court need not decide whether plaintiff has shown good cause for its failure to serve BST Bielefeld within 120 days because even if no good cause were shown the court would allow an extension of time to serve BST Bielefeld via BST Rockford. This seems to be the most efficient method of proceeding under the circumstances. It seems to the court to be inefficient and unnecessarily costly for plaintiff to have to proceed to serve BST Bielefeld under the Hague Convention when it can do so by simply serving a summons addressed to BST Bielefeld upon BST Rockford.[FN3] Further, BST Bielefeld can certainly plead no prejudice as Küster admitted that BST Bielefeld has known of the suit since shortly after it began.

CONCLUSION

For the foregoing reasons, the court denies defendant, BST Bielefeld's, motion to dismiss and allows plaintiff 21 days from the date of this order to serve a summons and complaint addressed to BST Bielefeld upon BST Rockford. Plaintiff's failure to do so will result in dismissal of BST Bielefeld from this case unless plaintiff otherwise properly serves BST Bielefeld under the Hague Convention.[FN4]

FN1. For some unknown reason, the *Schlunk* case also appears at 503 N.E.2d 1045. The parallel citation given for the official reporter is the same -- 145 Ill. App. 3d 594. Furthermore, the case as reported in 503 N.E.2d 1045 is the same as that reported at 495 N.E.2d 1114. The court will utilize the citation for *Schlunk* found at 503 N.E.2d 1045 as that is the citation used by cases citing *Schlunk* after the *Geick* decision.

FN2. Although the court in *Geick* adopted and applied *Schlunk,* it noted that the concepts of minimum contacts and service of process are distinct and require differing standards when determining that each is met. 117 F.R.D. at 128. Like the court in *Geick,* this court follows Illinois law, as it must, notwithstanding any distinction between minimum contacts and service of process.

FN3. The 120-day limit does not apply to foreign service. *See Lucas v. Natoli,* 936 F.2d 432, 433 (9th Cir. 1991) (holding forerunner of Rule 4(m), Rule 4(j), makes the 120-day provision inapplicable to service in a foreign country); *Pennsylvania Orthopedic Assoc. v. Mercedes-Benz A.G.,* 160 F.R.D. 58, 60 (E.D. Penn. 1995) (Rule 4(m) acts to remove any deadline for service in a foreign country).

FN4. Because of the court's ruling, there is no need to reach the question of whether service was proper on Küster at his deposition although such service is questionable as it occurred outside the 120 day limit and without court authorization.

N.D.Ill.,1996.
Cotton v. BST Rockford, Inc.
Not Reported in F.Supp., 1996 WL 607004 (N.D.Ill.)

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United States District Court,
D. Utah,
Central Division.
UNITED STATES of America, Plaintiff,
v.
Johnson MATTHEY PLC, Johnson Matthey, Inc., John David McKelvie, and Paul Card Greaves, Defendants.

No. 2:06-CR-169 DB.
Feb. 26, 2007.

Andrea T. Steward, Richard Poole, U.S. Department of Justice (Enrd Ecs), Washington, DC, Barbara Bearnson, U.S. Attorney's Office, Salt Lake City, Ut, for Plaintiff.

MEMORANDUM DECISION AND ORDER GRANTING MOTION TO QUASH SERVICE OF SUMMONS

DAVID NUFFER, U.S. Magistrate Judge.

*1 This matter was referred to Magistrate Judge David Nuffer by District Judge Dee Benson pursuant to 28 U.S.C. § 636(b)(1)(A).[FN1] Before the court is Motion to Quash Service of Summons on Indictment by Defendant Johnson Matthey Plc (JM Plc).[FN2]

FN1. Order Referring Case, docket no. 67.

FN2. Motion to Quash Service Of Summons on Indictment, docket no. 60.

Defendant John Matthey, Inc. (JM Inc) is a wholly-owned subsidiary of Johnson Matthey Holdings, Inc. whose parent company is Defendant JM Plc.[FN3] JM Plc is incorporated under the law of England and Wales and with its principal place of business in London, England.[FN4] JM Plc asserts that it has not been effectively served by the government under Rule 4 of the Federal Rules of Criminal Procedure. JM Plc further argues that in this criminal case, service of process upon it cannot be accomplished under Rule 4 and the government must turn to a different source to properly serve JM Plc, such as the Mutual Legal Assistance Treaty (MLAT) between the United Kingdom and the United States.[FN5]

FN3. Affidavit by David Firn, ¶ 3, docket no. 62; *see also* Memorandum in Opposition, Attachment 3 at 5, docket no. 64.

FN4. *Id.* ¶ 4.

FN5. Memorandum in Support of Motion to Quash at 5, docket no. 61; Reply Memorandum at 9, docket no. 68.

In response, the government contends that it has properly served an officer and managing agent and mailed copies of the summons to the corporation, as required by Rule 4.[FN6]

FN6. Memorandum in Opposition at 14.

Rule 4 of the Federal Rules of Criminal Procedure provides that:

> A summons is served on an organization by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. A copy must also be mailed to the organization's last known address within the district or to its principal place of business elsewhere in the United States.[FN7]

FN7. *Fed.R.Crim.P. 4(c)(3)(C.)*

The government claims that it properly served Defendant McKelvie in his role as either an officer or managing agent for JM Plc.[FN8] Although the record is clear that McKelvie was formerly an officer of the other corporate defendant, JM Inc,[FN9] it is

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unclear whether he was ever an officer or agent for JM Plc. Regardless of his former position, it is undisputed that McKelvie has been on administrative leave from his position with JM Inc since May 2005.[FN10] Therefore, at the time he was served in 2007, McKelvie had no authority to act on behalf of JM Inc or the parent company, JM Plc.

FN8. Memorandum in Opposition at 6-10.

FN9. Affidavit by David Firn, ¶ 5.

FN10. *Id.* ¶ 6; Attachment 5 to Memorandum in Opposition.

The government also claims that it properly served Grant Angwin as a managing agent for JM Plc.[FN11] Angwin is the acting site General Manager [FN12] or current Business Manager [FN13] for JM Inc at the Salt Lake Facility. There is no evidence that Angwin is an agent for the parent company JM Plc. Consequently, the government has failed to JM Plc "by 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." [FN14]

FN11. Memorandum in Opposition at 11-12.

FN12. *Id.*, Attachment 5.

FN13. Affidavit by David Firn, ¶ 12.

FN14. *Fed.R.Crim.P. 4(c)(3)(C.)*

The government asserts that it complied with the second part of Rule 4 by mailing a copy of the summons to the last known address of JM Plc within the district or to its principal place of business elsewhere in the United States by mailing a copy of the summons to the Salt Lake refinery run by JM Inc and to JM Inc in Wayne, Pennsylvania. However, as previously noted, JM Inc is a wholly-owned subsidiary of parent company JM Plc [FN15] and service upon the subsidiary is not sufficient service on the parent company.[FN16] The government has failed to properly serve Defendant JM Plc in this criminal case under either requirement of Rule 4. Accordingly, the service of summons on the indictment is quashed.

FN15. Affidavit by David Firn, ¶ 3; Memorandum in Opposition, Attachment 3 at 5.

FN16. *See Benton v. Cameco Corp., 375 F.3d 1070, 1081 (10th Cir.2004*) (" '[A] holding or parent company has a separate corporate existence and is treated separately from the subsidiary in the absence of circumstances justifying disregard of the corporate entity.' " (quoting *Quarles v. Fuqua Indus., Inc.*, 504 F.2d 1358, 1362 (10th Cir.1974;) *Davies v. Jobs Adverts Online, Gmbh,* 94 F.Supp.2d 719, 722-23 (E.D.Va.2000) ("[S]ervice of process on a foreign defendant's wholly-owned subsidiary is not sufficient to effect service on the foreign parent so long as the parent and the subsidiary maintain separate corporate identities.").

ORDER

***2** IT IS HEREBY ORDERED that the Motion to Quash Service of Summon on Indictment [17] is GRANTED and service of the summons is QUASHED.

IT IS FURTHER ORDERED that the arraignment hearing for JM Plc, previously scheduled for Thursday, March 1, 2007 at 9:45 a.m. is VACATED.

D.Utah,2007.
U.S. v. Matthey
Not Reported in F.Supp.2d, 2007 WL 634269 (D.Utah)

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