

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	CRIMINAL INDICTMENT
v.	:	
	:	NO. 1:09-CR-0490-AJB-TWT
THE PUBLIC WAREHOUSING	:	
COMPANY, K.S.C., a/k/a Agility;	:	First Superseding
AGILITY DGS HOLDINGS, INC.,	:	
f/k/a Agility Defense &	:	
Government Services, Inc.,	:	
f/k/a PWC Logistics Services, Inc.;	:	
AGILITY DGS LOGISTICS SERVICES	:	
COMPANY, K.S.C.(c), d/b/a and f/k/a	:	
PWC Logistics Services K.S.C.(c);	:	

Defendants.

**UNITED STATES' BRIEF IN OPPOSITION TO DEFENDANT PUBLIC  
WAREHOUSING COMPANY K.S.C.,a/k/a AGILITY'S AMENDED  
MOTION TO QUASH SERVICE OF PROCESS ON INDICTMENT**

Now comes the United States, by its attorneys, F. Gentry Shelnut, Acting United States Attorney for the Northern District of Georgia with respect to this matter, Barbara E. Nelan, Assistant United States Attorney, and Richard E. Reed, Special Assistant United States Attorney, and hereby submit this brief in opposition to defendant Public Warehousing Company K.S.C., a/k/a Agility's ("PWC/Agility") Amended Motion to Quash Service of Process on the indictment and superseding

indictment.<sup>1</sup> The defendant's motion, as amended, should not even be considered by this Court, but, if it is, it should be denied as the defendant has been properly served pursuant to Fed. R. Crim P. 4.

Defendant PWC/Agility has received over \$8.5 billion from the United States pursuant to three Prime Vendor contracts<sup>2</sup> issued by the Department of Defense. It frequently has taken advantage of courts of the United States to sue agencies of the United States and has regular, almost daily, contacts with the United States and has for the last six years. On November 17, 2009, after it was indicted and charged with conspiring to defraud the United States and engaging in multiple fraudulent schemes in connection with its overcharging for providing troop support services to the United States during Operation Iraqi Freedom, in a press release that it issued worldwide, it denied the charges and asserted that it looked forward to its day in this court. Now that it is faced with that prospect, it has retreated to the safe haven of Kuwait. Defendant PWC/Agility contemptuously contends that it is not subject to the laws or courts of the United States.

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<sup>1</sup> PWC/Agility original motion- Doc. 25; PWC/Agility amended motion- Doc. 54; PWC/Agility brief in support of motion- Doc. 51.

<sup>2</sup> During the relevant period of time, PWC/Agility by and through subsidiaries, had numerous contract with the United States in addition to the three prime vendor contracts that are the subject of the present case.

PWC/Agility is a fugitive from American justice, and this Court should not entertain its motion to quash. A corporation, such as PWC/Agility, who has amassed sizeable profits from contracting with and overcharging the United States during Operation Iraqi Freedom and who seeks to invoke the processes of the United States law when it sues PWC/Agility while flouting those very same laws, simply is not entitled to call upon the resources of this Court for determination of its motion.

### **I. BACKGROUND**

In March 2003, the United States and its Coalition partners launched Operation Iraqi Freedom, following in the tank tracks of Operation Desert Storm. The troops in Operation Iraqi Freedom were supported by, among others, the Defense Logistics Agency (DLA), a logistics combat support agency within the Department of Defense, and the Defense Supply Center Philadelphia (DSCP), the troop support center agency of the DLA. DSCP is the center for managing four major commodities: medical material, subsistence/garrison feeding, construction and equipment, and clothing and textiles. DSCP also is responsible for managing DOD's prime vendor contracts within those commodities, including prime vendor contracts for subsistence/garrison feeding for military personnel located in the Middle East.

As part of its mission of supporting troops worldwide, in particular in the Middle East, DSCP issued solicitations for the acquisition of foodstuffs and non-food items

for various parts of the Middle East, including Iraq, Kuwait, and Jordan. These solicitations sought proposals to provide foodstuffs and non-food items pursuant to prime vendor contracts.

On May 10, 2002, DSCP issued Solicitation SPO300-02-R-4003 to establish contracts with prime vendors to provide food and non-food products to the military and other authorized customers of the DLA in three Overseas European Zones, including Zone III-the Middle East. This solicitation was for a one-year base period, up to four one-year options, and had an estimated total acquisition value of \$111,959,520.

Defendant PWC/Agility submitted a proposal and on May 28, 2003, DSCP issued a notice of award to defendant PWC awarding it Contract SPO300-03-D-3061, which was known as Prime Vendor I (PV-I), to provide full-line food and non-food distribution in Zone III (Kuwait and Qatar). On June 27, 2003, DSCP issued Modification P00001 to PV-I, creating an Iraqi Deployment Zone and providing that defendant PWC would also provide food and non-food items to the military in Iraq. This Modification provided that the maximum total acquisition value limit of PV-I could increase by as much as 1200% over the estimated contract dollar value.

Thereafter, while DSCP was in the process of soliciting proposals for a new prime vendor contract in the Middle East, on February 16, 2005, defendant PWC/Agility was awarded Contract SPM300-05-D-3119 (also known as Modification

P00036 to PV-I). This “Bridge Contract” provided for continued prime vendor operation under the terms and conditions of PV-I through December 15, 2005.

On September 3, 2004, DSCP issued Solicitation SPM300-04-R-0323 to establish a prime vendor contract for the acquisition of food and non-food items for the military and other authorized customers in several Middle Eastern Zones, including Zone I comprised of Iraq, Kuwait, and Jordan.

On November 16, 2004, defendant PWC provided its initial proposal and on July 7, 2005, DSCP awarded Contract SPM300-05-D-3128, known as Prime Vendor II (PV-II), to PWC to provide food and non-food items to the military and other authorized customers in Zone I. The estimated value of the award over the life of the contract with options was \$4,668,890,200.

Over the duration of the three prime vendor contracts defendant PWC/Agility has been paid at least the following approximate amounts: PV-I- \$934,000,000; Bridge- \$1 Billion; PV-II- \$6.6 Billion.

All of the prime vendor solicitations were issued from the United States, the offerors were required to submit their proposals to DSCP in the United States, and the contracts awarded to “Prime Vendors” pursuant to the solicitations were executed in the United States. In addition, the prime vendor contracts contained a “Buy American” provision that required, with some exceptions, that all foodstuffs provided pursuant to

the prime vendor contracts come from United States' vendors and that all foodstuffs provided be shipped on U.S. flagged vessels.

Apart from regular, frequent, often every-day, contacts that defendant PWC/Agility had with DSCP and with vendors here in the United States, the defendant had a staffed office in Winchester, Virginia. The office was opened in the spring of 2004, although a formal lease was not executed until the fall of 2004. While the lease agreement continued until the fall of 2008, the office was abandoned in the spring of 2008, just after defendant PWC received the initial subpoena from the grand jury that ultimately indicted it. *See* Government Exhibit. A<sup>3</sup> and B.

PWC/Agility knew about the impending original indictment as early as October 23, 2009. On that day, in an e-mail communication, counsel for the United States asked PWC/Agility counsel to "identify a PWC representative who will accept a summons with respect to an initial appearance /arraignment." On October 30, PWC's counsel responded in relevant part that: "I spoke with Sam McCahon [PWC internal counsel] regarding the availability of someone to receive a summons on behalf of PWC. He noted that PWC's senior staff travels a great deal and often on short notice, so it is it [sic] not always predictable as to who will be where at a particular time. He

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<sup>3</sup> As demonstrated in Government Exhibit A, PWC/Agility used the trade name of "PWC Logistics" in the performance of the prime vendor contracts.

did note that if you can provide perhaps as little as a week's notice, he should be able to specify someone for your purposes, if not himself."

Prior to its indictment, PWC/Agility had accepted service of both civil and grand jury subpoenas through one of its United States based counsel. On November 9, 2009, a grand jury sitting in this District issued an indictment against the defendant. That indictment was unsealed on November 16, 2009. After the indictment was unsealed, early Monday morning, November 16, 2009, federal agents for the government went to the office of PWC's counsel in Atlanta, Georgia. While the summons and indictment were left at Atlanta counsel's location, the agents were told that counsel would not accept service on behalf of PWC. Less than ten days later, PWC's board of directors passed a resolution stating in relevant part that "PWC has determined that it is in the best interest of PWC to appoint a single officer to acknowledge or receive service of lawful process for and on behalf of PWC in any action against PWC instituted in any court of any jurisdiction." The resolution went on state that PWC did "appoint and authorize Ahmed Alsayed Abdulziz as the only officer of [PWC] to acknowledge service of lawful process," of a purported worldwide PWC workforce of 37,000.<sup>4</sup> Conveniently, it appears that Ahmed Alsayed Abdulziz has no intention of being physically present anywhere other than in Kuwait. Moreover, contrary to the

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<sup>4</sup> See Exhibit K to PWC/Agility Brief.

October communications noted above, Sam McCahan, PWC/Agility's internal counsel, has never identified any of the well traveled PWC/Agility senior staff that would make themselves available for service.

To further avoid service of the summons that it is fully aware of, after indictment PWC/Agility has sought safe passage (i.e. an agreement to not serve the summons or any other process) for its employees entering the United States. Given this conduct of PWC/Agility the Government, as more fully explained in the next section of this brief, identified persons who acted as managing or general agents for the defendant and served those individuals with process.

## II. ARGUMENT

### A. This Court Should Not Entertain The Motion Of A Fugitive

Defendant PWC/Agility is a fugitive from justice. As discussed below, precedent deprives a fugitive of judicial process if it is not willing to likewise grace the criminal courts with its presence. This Court should invoke the fugitive disentitlement doctrine and not even consider the defendant's request for relief.

The basis for the fugitive disentitlement doctrine is that a "fugitive from justice has demonstrated such disrespect for the legal processes that [it] has no right to call upon the court to adjudicate [its] claim." *Ortega-Rodriguez v. United States*, 507 U.S. 234, 246-47 (1993). *See also Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970).

The goal of the fugitive disentitlement doctrine is not so much to punish the fugitive, but rather to eliminate the possibility of “heads I win, tails you’ll never see me again” litigation, wherein the fugitive could enjoy the results of a victory while ignoring (and by its conduct, effectively negating) the consequences of defeat. As the Eleventh Circuit stated, “the rationales for this doctrine include the difficulty of enforcement against one not willing to subject himself to the court’s authority, the inequity of allowing that ‘fugitive’ to use the resources of the courts only if the outcome is an aid to him, the need to avoid prejudice to the non-fugitive party, and the discouragement of flights from justice.” *United States v. Barnette*, 129 F.3d 1129, 1183 (11<sup>th</sup> Cir. 1997) (citing *Molinaro*, 396 U.S. at 366). “While such [fugitive status] does not strip the case of its character as an adjudicable case or controversy . . . it disentitles the defendant to call upon the resources of the Court for determination of his claims.” *Molinaro*, 396 U.S. at 366.

The fugitive disentitlement doctrine is based on equitable principles, *see United States v. Sharpe*, 470 U.S. 675, 681 n.2 (1985). The equities in this case tilt overwhelmingly in favor of invoking the doctrine and dismissing defendant PWC/Agility’s motion to quash. In fact, the temerity of this defendant is breathtaking.

- Defendant PWC/Agility has received over \$8.5 billion dollars

(\$8,500,000,000) of United States taxpayers' monies pursuant to numerous prime vendor contracts and now seeks to evade litigating criminal conduct over its overcharging the United States for the performance of these contracts.

- Defendant PWC/Agility has previously sought relief from numerous U.S. courts when it contends that it is the injured party; yet, it continues to avoid service of process. For example, in just the last three years, PWC/Agility or its subsidiaries have filed lawsuits in several U.S. courts including: (1) a case filed in the United States District Court for the District of Columbia seeking a TRO and preliminary injunction to block the Defense Logistics Agency from suspending them as a result of the Indictment; (2) a Freedom of Information Act case filed in the United States District Court for the District of Columbia in which PWC/Agility is seeking the government's price negotiation memoranda regarding PV I and II; (3) a case filed in the United States District Court for the District of Columbia in which PWC/Agility challenged an adverse past performance determination and, when the case was dismissed, PWC/Agility refiled it in the United States Court of Claims; (4) an appeal to the Armed Services Board of Contract Appeals in which PWC/Agility

seeks a contract interpretation decision that it can retain “prompt payment” discounts under the PV contracts; and (5) an appeal to the Armed Services Board of Contract Appeals in which PWC/Agility claims that it is owed additional monies for the use of trucks pursuant to one of the PV contracts. In addition to availing itself of the jurisdiction of United States tribunals when wanted to do so to its economic advantage, PWC/Agility has accepted service of process of civil and criminal subpoenas, but only before it was indicted.

- Defendant executed the contracts related to this matter and had almost daily contact within the United States as part of its performance of these contract.
- Defendant PWC/Agility boasts repeatedly in the media that it wishes to vindicate its reputation in this Court by fully litigating this case, yet it remains a fugitive, trying to litigate its claims in the court of public opinion, while attempting to evade this court of law.
- On the heels of the Indictment, defendant PWC/Agility approved a measure that only one person could accept process on its behalf and the person it approved is outside the United States. To further avoid service of the summons, post-indictment , PWC/Agility has sought and received

safe passage for its employees to meet with DLA officials at a Food Service meeting.

In all candor, the Government is hard-pressed to find any equitable factor that would weigh in defendant PWC/Agility's favor.

The threshold question that this Court must determine is whether defendant PWC/Agility is a fugitive. Whether any given defendant is a fugitive from justice is a question of fact to be determined by the acts and intent of that defendant. The government readily concedes that mere absence from the jurisdiction in which a crime occurred does not render a suspect a fugitive from justice. Rather, the government must prove by preponderance of the evidence that the defendant "absented [it]self from the jurisdiction with the intent to avoid prosecution." *United States v. Fonseca-Machado*, 53 F.3d 1242, 1244 (11th Cir.1995). However, the Eleventh Circuit has made clear that "intent to flee from prosecution or arrest may be inferred from a person's failure to surrender to authorities" once the defendant learns of the charges while outside of the jurisdiction. *United States v. Barnette*, 129 F.3d 1179, 1184 (11<sup>th</sup> Cir. 1997). The courts have not read the requirement of fugitive status in an overly technical manner, but have aimed to sweep up defendants "who know that they are subject to arrest in this country" yet have not subjected themselves to criminal process." *Collazos v. United States*, 368 F.3d 190, 197 (2nd Cir. 2004) ; *see also Brin v. Marsh*, 596 F.Supp.

1007, 1010 (D.D.C.1984) (applying “fugitive from justice” doctrine to court-martialed soldier who remained “at large,” though somewhere in the United States); *United States v. Eng*, 951 F.2d 461, 464 (2d Cir.1991)(“A defendant is a fugitive from justice when he ‘actively resists returning from abroad to face [criminal] charges.’ ”); *United States v. Contents of Account Number 68108021*, 228 F.Supp.2d 436, 443 (S.D.N.Y.2002) (claimant was fugitive where she knew she was subject to arrest but “declined to face the charges against her”). Thus, the critical element of proof is knowledge of a pending charge.

It is beyond peradventure that defendant PWC/Agility has knowledge of, and indeed a copy of the original Indictment, the Superseding Indictment, and the summons. In fact, there is some indication that defendant PWC/Agility has been planning its flight from justice for some time, well before the actual return of the original Indictment. Defendant PWC/Agility had an office in the United States at Winchester, Virginia and employees in the United States, but the office was permanently closed and the employees were sent back to what defendant PWC/Agility clearly hoped was the safe haven of Kuwait, even before its lease expired, after the defendant received the initial Grand Jury subpoena from the very Grand Jury that eventually indicted it.

The criminal investigation of and charges against defendant PWC/Agility has

received substantial media coverage. In fact, defendant PWC/Agility acknowledged the Indictment by passing a measure that limited service of process to only one individual who remains outside the United States. It is apparent from this coverage that the news has reached Kuwait where defendant PWC/Agility is located. The Chairman of the Board of defendant PWC/Agility has made numerous comments reported in the media about the case and boasted about vigorously defending the charges in this Court. In addition, defendant PWC/Agility's attorneys (and there are many) have represented that they have conveyed messages about the charges to defendant PWC/Agility's Board of Directors. From this alone, it is clear that defendant PWC/Agility has actual knowledge of the Indictment, the Superseding Indictment and the summons to appear in court.<sup>5</sup>

Courts frequently have invoked the fugitive disentitlement doctrine to deny defendants the benefit of the courts's power and possible relief without facing any of the attendant risk, and they have done so in the context of pretrial motions like that filed by defendant PWC/Agility. In *United States v. Kashamu*, 656 F. Supp. 2d. 863 (N.D. Ill. 2009), the court refused to consider the defendant's motion to quash arrest

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<sup>5</sup> PWC/Agility's knowledge of the indictments and summons as well as its intent to avoid service is evidenced by its corporate resolution ten days after the indictment was unsealed which attempts to limit who can accept service on behalf of the company to one inaccessible person, and its avoidance of employee travel into the United States without an agreement that they not be served with process.

and dismiss indictment because the defendant was a fugitive and refused to submit himself to the jurisdiction of the court. In invoking the fugitive disentitlement doctrine and refusing to consider the defendant's motion, the court noted that, "(c)ourts are reluctant to afford fugitive defendants the benefits of a potential legal victory when these defendants face no adverse consequences from unfavorable rulings. *Id.* at 866. Similar results were reached in *United States v. Adamov*, 2008 WL 1943550 (W.D. Pa. 2008)(court refused to allow defendant to make special appearance for limited purpose of moving to dismiss indictment as Russia refused to extradite defendant to face charges in United States); *United States v. Nabepanha*, 200 F.R.D. 480, 483 (S.D. Fl. 2001)(court denied defendant's motion for discovery because defendant was fugitive from justice and a fugitive's absence does not "entitle him to an advantage"). *See also United States v. Fonseca-Machado*, 53 F.3d 1242, 1244 (11th Cir. 1995)(statute of limitations tolled while defendant was fugitive from justice). *But see In Re Hijazi*, 589 F. 3d 401 (7th Cir. 2009)(appellate court issued writ of mandamus ordering district court to rule on motion to dismiss indictment by defendant, a Lebanese national who was a resident of Kuwait, even though defendant refused to surrender to U.S. authorities and be arraigned); *United States v. Noriega*, 683 F. Supp 1373(S.D. Fl. 1988)(given unique status of defendant as head of state, court agreed to consider

defendant's motion to dismiss indictment, even though he was a fugitive).<sup>6</sup>

While this Court has discretion to allow defendant PWC/Agility to specially appear and contest service, this case is not like *Noriega* or even *Hijazi*; rather, the Court should invoke the fugitive disentitlement doctrine and refuse to consider the defendant's motion. Unlike in *Noriega*, this case does not involve the unique situation of prosecuting a head of state. As more fully discussed below, other than the fact that this case and the *Hijazi* case involve Kuwaiti residents, this case is nothing like *Hijazi*. The defendant in *Hijazi* was not in privity of contract with the United States, had been to the United States only once in an unrelated visit some eight years before the conduct alleged in the indictment, and, at least as the defendant argued, had no other contact of any sort with the United States. In stark contrast, defendant PWC/Agility was and is the prime vendor on multi-billion dollar contracts with the United States government that have generated payments to defendant PWC/Agility of more than \$8.5 billion and over the years and, even now, defendant has frequent, if not daily, contacts with various agencies of the United States, including DSCP, DTS, and private vendors in

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<sup>6</sup> While the United States has been unable to find a case identical to the situation here, Congress in 2000, in conjunction with a comprehensive revision of civil asset forfeiture laws, specifically conferred statutory authority on federal courts to order disentitlement in civil forfeiture cases. See 28 U.S.C. § 2466. Significantly, Congress specifically authorized disentitlement to apply to corporations. See *United States v. \$6,976,934.65*, 554 F. 3d 123 (D.C. Cir. 2009), for a discussion of application of CAFRA and the doctrine to a corporation.

the United States. In addition, defendant PWC/Agility and the other defendants have numerous other contracts with the United States government. Here the defendant asserts that this Court does not have jurisdiction over it, but that is because the defendant refuses to submit to the Court's jurisdiction. *See United States v. Eagleson*, 874 F.Supp. 27, 31 (D. Mass. 1994) (Canadian citizen and fugitive could not rely on self-created absence to support motion to vacate restraining order and *lis pendens*). Defendant PWC/Agility is trying to use this Court's process as a sword, while at the same time attempting to shield itself from this Court's process. Such conduct simply stated is unfair and should not be countenanced. *See United States v. One Lot of U.S. Currency*, 628 F. Supp. 1473, 1476 (S.D. Fl. 1986).

**B. Defendant PWC Was Properly Served With Process Pursuant to Fed. R. Crim. P. 4 As The United States Served Several of Its Managing or General Agents, An Alter Ego of The Defendant, And Also Mailed Process to The Defendant's Principal Place Of Business In The United States**

Contrary to its claims, defendant PWC/Agility was properly served with process pursuant to Fed. R. Crim. P. 4. Fed. Rule Crim. P. 4 (Arrest Warrant or Summons on a Complaint) provides in pertinent part at subpart (c)(3)(C):

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.

The United States served not one, but three of the defendant's managing or

general agents with service of process. The United States also served the registered agent of defendant Agility DGS Holdings, Inc., the alter ego of defendant PWC/Agility here in the United States. Finally, the United States mailed the process to PWC/Agility's only place of business in the United States in Alexandria, Virginia.

**1. The United States Served Managing or General Agents Of The Defendant**

The United States submits and PWC/Agility does not dispute that Daniel Mongeon, Paul Cerjan, and Edward Hoffman were served with summons for each of the named defendants, including defendant PWC/Agility. As the affidavits of these individuals attest, they each received summons for the named defendants with respect to the Superseding Indictment. ( *See* affidavits B, D, and F attached to defendant PWC/Agility's Amended Motion to Quash). While defendant contends that none of these individuals are officers of defendant PWC/Agility, the United States submits that all of them were managing or general agents of defendant PWC/Agility at the time of the service of process and service on them comports with Fed. R. Crim. P. 4.

In December 2005, Toby Switzer of defendant PWC advised DSCP that Mr. Mongeon was "joining PWC." *See* Government Exhibit C. Daniel Mongeon joined PWC Logistics as a Vice President, Defense & Government Services. Later that year, he was promoted to president of Agility DGS and in that capacity, met with DSCP regarding the prime vendor contracts. *See* Government Exhibit D.

Prior to his hiring by Agility, Daniel Mongeon had been a Major General in the Army serving as the Director of Operations of DLA and was the commander of DSCP. On July 16, 2008, Agility announced that Mr. Mongeon was being named the CEO of its Defense & Government Services business group succeeding Toby Switzer who was assuming a new advisory role. At the time of the appointment, the largest contract held by Mr. Mongeon's group was the PV contract. *See* Government Exhibit E.

When the Wall Street Journal reported on the investigation of PWC on January 15, 2008, Agility and PWC issued what it called a "Correction to the Wall Street Journal Article on January 15, 2008" and in the correction began by saying, "Retired Army Maj. Gen. Dan Mongeon, now at Public Warehousing Co. of Kuwait, was a commander of the Defense Supply Center from 1998 to 2000." *See* Government Exhibit F.

Recently, when Agility announced that it was not being awarded PV III, the announcement was issued to all Agility employees by Mr. Mongeon, identified as the President and CEO of Agility DGS Holdings. The announcement noted that the "company has been planning and adjusting for the potential loss of the Prime Vendor revenue..." and added, "we won the first Prime Vendor contract in 2003." It added that "I want to thank you for the extraordinary commitment... and it is that commitment, along with the assets and experience we put behind Prime Vendor, that will drive

Agility's success..." See Government Exhibit G.

Shortly after Mr. Mongeon's promotion in 2008, on July 21, 2008, Agility announced the appointment of Paul Cerjan as the president of Agility Defense & Government Services. Like Mr. Mongeon, Mr. Cerjan also has acted as an agent for defendant PWC/Agility. At the time of his retirement from the military, Mr. Cerjan was an Army Lt. General. The announcement indicated that Cerjan "will be based in Kuwait and will be responsible for Agility DGS's Prime Vendor contract, that covers the supply of most food items to U.S. troops in Iraq and Kuwait. See Government Exhibit H.

As to Mr. Hoffman, Edward Hoffman is the Vice President and General Counsel for Agility DGS. Before he started working for Agility, he was in private practice working on Agility matters and also had several positions with DLA. See Government Exhibit D. Moreover, at various times since the onset of the investigation and the subsequent indictments, both Messrs. Mongeon and Hoffman have met with and discussed with DLA a possible settlement of this case. In fact, both Messrs. Mongeon and Hoffman, met with DLA to discuss this case at a time when PWC/Agility was the only defendant.

While the United States could find no cases discussing service of process on a general or managing agent in a criminal case, there are numerous cases that discuss

such service in a civil case. Those cases demonstrate that Messrs. Mongeon, Cerjan, and Hoffman are general or managing agents of defendant PWC/Agility.

The determination whether an individual is a “managing or general agent” depends on a factual analysis of that person’s authority within the organization. *Gottlieb v. Sandia American Corporation*, 452 F.2d 510, 513 (3rd. Cir. 1971). A person not in charge of a corporation’s activities... may still qualify as a general or managing agent for the purpose of Rule 4(d)(3) if his position is one of sufficient responsibility so that it is reasonable to assume he will transmit notice of the commencement of the action to his organizational superiors. *Alloway v. Wain-Roy Corporation*, 52 F.R.D. 203, 204 (E.D. Pa. 1971), (citing *Remington Rand, Inc. v. Knapp-Monarch Company*, 139 F. Supp. 613, (E.D. Pa. 1956)). Messrs. Mongeon, Cerjan, and Hoffman all fit that description, and all clearly transmitted the process to organizational superiors. As the court recognized in *Boryk v. The dehavilland Aircraft Co.*, 341 F.2d 666, (2nd Cir. 1965), in finding that the plaintiff had properly served a managing agent:

That Fossett or Inc. was not explicitly labeled “managing agent” by Ltd. or authorized (by it) to accept service of process...is not decisive. Here, as throughout the area of jurisdiction, the realities and not just the formalities must be dealt with. ...Ltd.’s timely answer indicates that it was not prejudiced by the actual method of service. Specification of the proper recipients of process is made to ensure that there will be actual notice to the responsible officers. That purpose has been served.

*Id.* at 668-669 (internal citation omitted); *See also Estates of Ungar v. the Palestinian Authority*, 153 F. Supp.2d 76 (D. R.I. 2001) (administrator of estates of decedents who

were killed in Israel by terrorist group Hamas properly served Palestinian Authority and Palestine Liberation Organization as persons served were individuals with the authority to exercise independent judgment and discretion in the performance of duties and thus were managing or general agents of entities).

In *Heise v. Olympus Optical Company, Ltd.*, 111 F.R.D. 1, (N.D. Ind. 1986), the plaintiff filed suit for a personal injury suffered during a physician's use of a medical instrument manufactured by the defendant OOC, Ltd., a Japanese corporation, and distributed in the United States by its subsidiary, OC/America. OOC, Ltd. was not incorporated in the United States and had its principal place of business in Tokyo, Japan. OC/America had its principal place of business in New York. The complaint was served by certified mail on an officer of OC/America in New York. The Japanese parent filed a motion to dismiss for insufficiency of service of process contending that service on an officer of the U.S. subsidiary was not effective service on the Japanese parent.

While acknowledging that a parent/subsidiary relationship, standing alone, is insufficient for purposes of establishing jurisdiction, the court concluded that service on the Group Vice President of the U.S. subsidiary, a person whose position was one of sufficient responsibility that it was reasonable to assume that he would transmit notices to OCC, Ltd., the Japanese parent, was service on a managing or general agent

within the meaning of Fed. R. Civ. P. 4(d)(3). *Id.* at 6.

Service of process on Daniel Mongeon, who is the President and CEO of Agility DGS Holdings, Inc. and the Managing Director of Agility DGS Logistics Services KSC(c), both of which are subsidiaries of defendant PWC/Agility; on Paul Cerjan, the President of a business unit of Agility DGS Logistics Services Company KSC(c) which Agility, more than once, has identified as having performed on the Prime Vendor contracts; and on Edward Hoffman, the Senior Vice President and General Counsel for Agility DGS Holdings, Inc., a subsidiary of defendant PWC/Agility, is service on managing or general agents of defendant PWC/Agility and, thus, constitutes effective service of process on PWC/Agility.

Finally, to the extent that defendant PWC/Agility suggests in its brief that only Mr. Alsayed Abdulaziz can accept service of process on its behalf, it is mistaken. It cites no authority in support of such a proposition because there is none. The Rule clearly provides that a managing or general agent, in addition to the person designated to accept service, can be served with process.

**2. The United States Served the Registered Agent of Defendant Agility DGS Holdings, Inc. Which Is The Alter Ego Of Defendant PWC/Agility**

In perfecting service on defendant PWC/Agility, the United States served the registered agent of defendant Agility DGS Holdings, Inc., a subsidiary of defendant

and an alter ego of defendant. While defendant PWC/Agility would like this Court to believe that each of the named defendants operated as totally autonomous units, the defendants' own documents and statements prove otherwise.

Defendant PWC/Agility now claims to this court that it and the other two defendants are autonomous business entities, but since at least 2006, defendant PWC/Agility went to great lengths to suggest otherwise to the world at large. Beginning in the fall of 2006, the defendant announced with great fanfare that the PWC group of companies henceforth would be known as "Agility." In October 2006, Tarek Sultan, Chairman and Managing Director of defendant in a message to all employees announced the new name noting that, "(w)ith the announcement of this exciting, single global identity, employees and offices around the world will be working in unison as one team to become market leaders..." *See* Government Exhibit I. Less than a month later, defendant announced the change to the world. The message was sent to defendant's U.S. vendors on the PV contract in an announcement signed by Toby Switzer, CEO and President, Agility, Defense & Government Services-International, and Maj. General Dan Mongeon, USA (Ret.), President, Agility, Defense & Government Services-US. *See* Government Exhibit J. From that point on, defendant and its subsidiaries have been known as Agility. The defendant's website is [www.agilitylogistics.com](http://www.agilitylogistics.com). The footer on emails indicated that the "company" was

Agility Defense and Government Services which included PWC Logistics Services, K.S.C.(c) and Agility Defense & Government Services, Inc. and their subsidiaries and affiliates. *See* Government Exhibit K.

In January 2006, the defendant requested that there be a name change to the PV contract as “PWC will complete a corporate reorganization whereby it will consolidate the performance and administration of its government contracts to PWC Logistics Services, a newly created wholly owned subsidiary of PWC.” *See* Government Exhibit L. The defendant also sought a novation agreement with DLA seeking to change the name on the PV contract to Agility. *See* Government Exhibits M & N. Ultimately, DLA decided against approving the name change or a novation agreement and the contract remained in the name of defendant PWC.

As far back as 2005, it was PWC Logistics, the predecessor to defendant Agility DGS Logistics Services Company, K.S.C.(c) (“Agility KSCC”), that was taking credit for holding the PV contract and other contracts awarded by DLA. *See* Government Exhibits O and P, PWC Logistics Awarded DLA Contract. By 2007, it was Agility Defense & Government Services that was taking credit for holding the PV contract and other contracts issued and awarded by DLA. *See* Government Exhibits Q,R, S, T, U, and V; Agility DGS Awarded \$2.8 Billion Option Year on Subsistence Contract; Agility Awarded New Contract for the Subsistence Prime Vendor Contract; Agility

DGS Wins Warehousing Contract; Agility Awarded Option Year On U.S. Army's Heavy Lift VI Contract; Agility DGS Awarded Army Vehicle Storage Contracts, Agility DGS Wins Warehousing Contract.

Yet, while the contract itself may be in the name of defendant PWC, the defendant continues to hold itself out as Agility. The defendant has signed contract modifications in the name of Agility. *See* Government Exhibit W. It has submitted invoices to DLA in the name of PWC Prime Vendor and in the name of Agility Prime Vendor. *See* Government Exhibits X.

In October 2008, proposals were due to DLA for the award of Prime Vendor Contract III ("PV III"). PWC, or Agility, or Agility Defense & Government Services, or PWC Logistics Services Co. KSC(c) submitted a proposal on October 2, 2008. The proposal was signed by Daniel G. Mongeon, President & CEO of PWC Logistics Services Co. KSC(c). The proposal represented that Agility was a "proud partner of DSCP" and "remains committed to the current mission in Iraq." As to Agility's past performance on the Prime Vendor contracts, the proposal states that, "Agility was awarded the original Prime Vendor Iraq/Kuwait contract in 2003 and has successfully managed the follow-on contract since 2005." It goes on to state, "(a)s DSCP's current PV provider in Kuwait, Iraq, and Jordan...we maintain a record of superior performance on both government and commercial programs. ... Ultimately, our

experience will demonstrate that for this critical mission, we are DSCP's proven, low-risk partner." *See* Government Exhibit Y. Apart from the proposal being signed by Daniel Mongeon, the proposal identifies other key personnel, including Paul G. Cerjan, President, Agility DGS, Middle East, Africa, and Europe, who also was served with process. *See* Government Exhibit Z.

Defendant PWC/Agility claims that it and the other two named defendants are independent entities with separate officers, boards, and books. Yet, Agility's annual reports contain consolidated financial results and, Messrs. Mongeon and Hoffman appeared before and participated in discussions with DLA regarding a resolution of this case. *See* Government Exhibit AA.

Defendant PWC/Agility cites several cases for the proposition that service on a subsidiary is not service on the parent. But where the subsidiary is the alter ego of the parent, service on the subsidiary is effective service on the parent. The United States submits that given the image and the functional reality that defendant PWC/Agility has created for the world, including with DLA and DSCP, not only are Agility DGS and Agility KSC(c) alter egos of PWC/Agility, it appears that one or both have performed on the various prime vendor contracts held in the name of defendant PWC/Agility. Moreover, the very fact that there is an integrated business unit within Agility identified as Agility Defense & Government Services demonstrates both the

unitary nature of defendant PWC/Agility's efforts to secure U.S. government contracts, and the control that defendant PWC/Agility exercises over the other two defendants in this case. Illustrative of the level of control is the attached organizational chart that shows Daniel Mongeon reporting to Toby Switzer who was located in Kuwait at defendant PWC/Agility's headquarters. *See* Government Exhibit BB.

In *Lamb v. Volkswagenwerk AK-Tiengesellschaft (VWAG)*, 104 F.R.D. 95 (S.D. Fl. 1985), defendant VWAG sought to quash service of process contending that service on its U.S. subsidiary, VWOA, and on CT Systems was not effective service on it. In the case, VWAG submitted an affidavit from one of its executives, remarkably similar to those submitted by Messrs. Mongeon, Cerjan, and Hoffman, claiming that it did not exercise control over its subsidiary and service on the subsidiary was not service on it. The court held otherwise finding that VWAG maintained a sufficient degree of control over VWOA that it essentially was nothing more than a department of VWAG. *Id.* At 101. *See also United States v. Toyota Motor Corporation*, 561 F. Supp. 354 (C.D. Cal. 1983) (IRS enforcement petition was validly served on Japanese corporation by personal service on one of its directors, who was also president of wholly-owned American marketing subsidiary, in business offices of American subsidiary).

In the instant case, PWC, Agility, Agility Defense & Government Services,

which is comprised of Agility DGS and Agility KSC(c), are used interchangeably, and Agility is represented to the world as one unitary entity. While PWC purportedly is the contractor on the PV contracts, Agility, Agility Defense and Government Services, Agility KSC(c), and PWC Logistics all have taken credit for being the prime vendor and working with DLA and/or DSCP. For defendant PWC/Agility to now try to tell this Court they are independent companies, belies belief.

In this case, service on Agility DGS is service on defendant PWC/Agility. In *United States v. Chitron Electronics Company, Ltd.*, 668 F. Supp.2d 298 (D. Mass. 2009), the defendant Shenzhen Chitron Electronics Company, Ltd. (Chitron-China) was charged with illegally exporting defense articles and technology. Chitron-China moved to dismiss all charges on the basis of insufficiency of service of process and lack of personal jurisdiction, even though it had a U.S. subsidiary, Chitron Electronic, Inc. (Chitron-U.S.) which the Government claimed was integrally managed by the Chinese parent. The court denied the defendant's motion to dismiss, concluding that the indictment and other evidence provided by the Government showed a sufficient interrelationship between the Chinese parent and the U.S. subsidiary so that service of the summons on the president of the U.S. subsidiary was sufficient to effect service on the foreign parent.

While defendant PWC/Agility claims that the *Chitron* case can be distinguished

from the instant case because its subsidiaries are distinct from it, the many admissions contained in its documents show otherwise. Defendant PWC/Agility and its defendant subsidiaries, since at least the fall of 2006, have held themselves out to be one unitary entity and all of the defendants at various times have claimed to have been awarded or to have worked on the prime vendor contracts. Given the unitary nature of the defendants and their interlocked and interlinked relationships, the instant case is no different from *Chitron*.

**3. Pursuant To Fed. R. Crim. P. 4, The United States Mailed The Summons To Defendant PWC/Agility's Principal Place Of Business In The United States**

In addition to serving managing or general agents of defendant PWC/Agility and serving an officer and the registered agent of its Agility DGS Holdings, the defendant's alter ego, the United States mailed the summons to the defendant's principal place of business in the United States in Alexandria, Virginia. The Alexandria address is the location of the defendant's subsidiary which, as previously discussed is the alter ego of the defendant. As such, a mailing to that address is a mailing to the principal place of business of the defendant in the United States as the defendant PWC/Agility, by the time it was indicted, had closed its office in Winchester, Virginia. As explained previously, defendant PWC/Agility had an office in Winchester, Virginia, but that office was closed just after the defendant received a grand jury subpoena from the

grand jury that eventually indicted it. Given the defendant's action in closing its Winchester, Virginia office, the only remaining place of business in the United States is the Alexandria address.

Defendant PWC/Agility relies on *United States v. Johnson Matthey PLC*, 2007 WL 2254676 (D. Utah 2007), in support of its claims that it has not been properly served. *Chitron*, rather than *Johnson Matthey*, more appropriately applies in the instant case. In *Johnson Matthey*, the only issue before the court was whether the government had mailed the summons to the organization's last known address within the district or its principal place of business elsewhere in the United States as counsel for the defendant had accepted service of process. The court concluded that the government had not perfected service on the defendant because it had not complied with the second part of Fed. R. Crim. P. 4. Without any discussion, the court simply indicated that service upon the defendant's subsidiary was not sufficient service on the parent. 2007 WL 2254676 at 4. There is nothing in the decision to indicate whether the government sought to demonstrate that the subsidiary was the alter ego of the defendant, as has been demonstrated in the instant case, or that the summons was mailed to the address of the alter ego subsidiary as it was in the instant case. This is a crucial distinction. Here, in addition to service on managing or general agents and the defendant's alter ego, all of the summons were mailed to the Duke Street address of Agility in

Alexandria, Virginia. Agility regularly issued press releases from the Alexandria address, and the predecessor to defendant Agility KSC(c) announced to the world that its new offices at Duke Street in Alexandria, Virginia officially opened in August 2006. *See* Government Exhibit CC. Thus, mailings to the Alexandria address, the only address for defendants in the United States, satisfied the second part of Fed. R. Crim. P. 4.

C. **The United States Is Entitled To Enforce Its Criminal Laws Against Foreign Nationals For Conduct Committed In The United States And With Respect To U.S. Government Contracts Executed and Issued In The United States**

Defendant PWC/Agility suggests that merely because it is a Kuwaiti corporation that it should not be subject to the jurisdiction of this court and that any action taken against it might have “foreign relations concerns.” A review the factual context of the prime vendor contracts highlights the weaknesses in defendant’s argument. First, defendant PWC/Agility is the prime vendor on contracts with instrumentalities of the United States, specifically DLA and DSCP. Defendant PWC/Agility submitted its proposals, not in Kuwait, but in the United States at Philadelphia, Pennsylvania; defendant PWC/Agility had a partner, at least on PV I, that is a U.S. corporation; defendant PWC/Agility had an office and employees in the United States at least until it abandoned the office and sent the employees to Kuwait, after it learned it was the

focus of a criminal investigation; defendant PWC/Agility's officers and employees made frequent visits to the United States regarding the prime vendor contracts; defendant PWC/Agility's employees, even now, have contacts virtually every day with DSCP personnel who are located in Philadelphia, Pennsylvania; defendant PWC/Agility submitted billings almost daily to DSCP in Philadelphia, Pennsylvania; and all of the prime vendor contracts contained "Buy American" provisions that required prime vendors to purchase foodstuffs from U.S. companies and for those products to be shipped on U.S. flagged vessels requiring frequent, if not daily, contacts by defendant PWC/Agility's employees with U.S. companies and with personnel of the Defense Transportation System ("DTS") in the United States.

Moreover, much of the alleged illegal conduct in the indictment took place in the United States, including the Northern District of Georgia. In short, this criminal case is not about an effort to apply the criminal laws of the United States beyond our borders but about alleged criminal conduct on these shores.

Defendant PWC/Agility emphasizes the case *In Re Hijazi*, 589 F.3d 401(2009), and seeks to equate its situation to that of the defendant in *Hijazi*.<sup>7</sup> Other than the fact

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<sup>7</sup> In *Hijazi*, the Seventh Circuit issued a writ of mandamus ordering the district court to rule on the defendant's motions to dismiss the indictment. On remand, the magistrate judge recently recommended to the district court that it deny Hijazi's motions to dismiss.

that both cases involve Kuwaiti residents, the cases are nothing alike. The defendant in *Hijazi* was not in privity of contract with the United States, had been to the United States only once in an unrelated visit some eight years before the conduct alleged in the indictment, and, at least as the defendant argued, had no other contact of any sort with the United States. In stark contrast, defendant PWC/Agility was and is the prime vendor on contracts with the United States government that have generated payments to defendant PWC/Agility of more than \$8.5 billion and over the years and, even now, defendant has frequent, if not daily, contacts with DSCP, DTS, and vendors in the United States. In addition, defendant PWC/Agility and the other defendants have numerous other contracts with the United States government.

While the Kuwaiti government has expressed some interest in this matter, it is nothing like that it expressed in the *Hijazi* case. In *Hijazi*, the Kuwaiti government made several demands that the criminal case be dismissed and that Hijazi not be prosecuted in the United States. In contrast, in the instant case, the Kuwaiti government has made one rather tepid written inquiry about this matter expressing interest in an “amicable settlement.” And, assuming for the sake of argument, as the Kuwaiti government asserts that “in accordance with Kuwaiti laws, Kuwaiti courts have exclusive jurisdiction over all criminal and civil cases related to contracts executed in the State of Kuwait with Kuwaiti companies,” that most assuredly does not

describe the case before this Court.

Further, while defendant PWC/Agility argues that this Court cannot or should not exercise jurisdiction over it because of “foreign relations concerns,” it is not at all reluctant to seek relief from U.S. courts when it contends that it is the injured party. As detailed above, in just the last three years, defendant PWC/Agility or its subsidiaries have filed at least five lawsuits in U.S. courts. When it feels that it is the injured party, defendant PWC/Agility has no compunction about seeking relief in U.S. courts. Now, however, when it faces fraud charges in a U.S. Court, PWC/Agility suggests dire consequences if this Court acts on those charges and claims that this Court cannot exercise jurisdiction over it.

Finally, defendant PWC/Agility, claiming other “foreign relations concerns,” alleges that the United States engaged in a ruse to lure Ahmed Alsayed Abdulaziz, the only person in a company of 37,000 designated to accept service of process on behalf of defendant PWC/Agility, to the U.S. Embassy in Kuwait to serve him with process. There is absolutely no truth to the allegations, and the United States can only conclude that Mr. Alsayed Abdulaziz is hopelessly mistaken or confused and apparently has submitted a mistaken or even false affidavit in support of his employer’s motion. No one working on this case on behalf of the United States, including the prosecutors and the agents assigned to this matter, including agents from the Federal Bureau of

Investigation, the Defense Criminal Investigative Service, the Army Criminal Investigative Command, or anyone acting on their behest, made any attempt to lure Mr. Alsayed Abdulaziz to the United States Embassy in Kuwait or tried to serve him with any process at any time. *See* Government Exhibit DD. In an effort to further investigate this claim, the United States requested defendant PWC/Agility provide the telephone number of Mr. Abdulaziz. With that telephone number, the United States could have checked embassy records to see if any calls were placed from the U.S. Embassy to Mr. Abdulaziz's telephone number. Defendant PWC/Agility has not responded to the request of the United States and apparently has no intention of providing the requested telephone number.

Given defendant PWC/Agility's lack of a response, one can only assume that the defendant does not want its claims of a ruse fully investigated and that the affidavit of Mr. Abdulaziz may well be false. If that is so, it would not be the first time that an employee of defendant PWC/Agility has made or encouraged others to make spurious allegations in litigation. *See* Government Exhibit EE.

There was no ruse directed at defendant PWC/Agility and this prosecution does not unduly impact foreign relations.

### **III. Conclusion**

For the foregoing reasons, the United States respectfully requests that this Court deny defendant PWC/Agility's Amended Motion to Quash Service of Process. If the Court concludes that the United States has not properly served defendant PWC/Agility, the United States requests that it be allowed time to attempt service of process through diplomatic channels with the assistance of the State Department of the United States.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served upon the persons listed below a copy of the foregoing document electronically:

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This 21st day of June, 2010.

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