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VIA ECF

The Honorable P. Kevin Castel
United States District Judge
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: United States of America ex. rel. TZAC, Inc. v. Christian Aid, No. 17-cv-4135

Dear Judge Castel:

We represent Christian Aid, the defendant in the above-referenced action. Pursuant to Rule 3.A of the Court's Individual Practices in Civil Cases, we respectfully write to seek permission to file a motion to dismiss the amended complaint filed by Plaintiff-Relator The Zionist Advocacy Center ("TZAC") under Federal Rules of Civil Procedure 9(b), 12(b)(2), and 12(b)(6). A court conference has not yet been scheduled in this matter.

As discussed below, TZAC's amended complaint (the "Amended Complaint" or "AC") should be dismissed for at least three independent reasons. First, the Amended Complaint fails to adequately allege scienter, a required element for a FCA claim. Second, the Amended Complaint does not, as it must, allege fraud with particularity. Instead, the Complaint's allegations are vague, general, and speculative. Third, the Amended Complaint does not allege personal jurisdiction over Christian Aid. Christian Aid has not consented to jurisdiction, and there is neither general jurisdiction nor specific jurisdiction. Each of these grounds is an independent basis for dismissal. [1]

[1] This does not constitute a waiver of any other grounds Christian Aid may pursue to dismiss TZAC's Amended Complaint, and Christian Aid hereby expressly reserves any and all rights to move to dismiss the Amended Complaint on grounds unidentified herein. In addition, for the sake of clarity, Christian Aid disputes the accuracy of the allegations in the Amended Complaint, accepting them only to the extent necessary for purposes of this motion to dismiss.

I. Background

In an eight-page Amended Complaint filed on December 18, 2020, TZAC asserts a single claim—that Christian Aid violated the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et. seq*. TZAC alleges that Christian Aid, an international non-profit humanitarian aid organization headquartered in the United Kingdom, made false certifications to the United States Agency for International Development ("USAID").

Christian Aid was founded in 1945 by British and Irish churches to help refugees in the aftermath of World War II, and it remains the official international development agency for 41 British and Irish churches. In the 75 years since its founding, Christian Aid has assisted millions of people in the aftermath of major humanitarian crises such as the Ethiopian famine of the 1980s and the Indian Ocean tsunami of 2004. It also helped organize Voluntary Service Overseas, an international organization similar in purpose to the United States Peace Corps.

According to the Amended Complaint, Christian Aid certified compliance with USAID's anti-terrorism certification on two specific and identified instances in 2017. (AC ¶ 10a). One of these agreements was signed by Christian Aid in London, United Kingdom and the other was signed in Nairobi, Kenya. (*Id*.). The Amended Complaint does not allege that either agreement contained a choice of forum or consent to jurisdiction provision that conditioned Christian Aid's receipt of funds on an agreement that disputes would be adjudicated in either this district, or indeed anywhere in the United States.

According to TZAC, Christian Aid's certification was false because Christian Aid had "sponsored vocational activities in Lebanon for mentally disabled individuals" that were "put on" by a specially designated national, Jihad-al-Binaa ("JAB"). (AC ¶ 12). In the Amended Complaint, TZAC now concedes that the program was actually organized not by Christian Aid but by a grantee of Christian Aid, the "Lebanese Physical Handicap Union," ("LPHU") a group that provides social services in Lebanon. (*Id*. ¶ 12a). The Amended Complaint also now admits that Christian Aid made payments to LPHU—not to JAB—for certain program activities. (*Id*. ¶¶ 12a, 12c, 12f).

For more than three years after the filing of the original complaint on May 30, 2017, the Civil Division of the United States Attorney's Office for the Southern District of New York investigated TZAC's allegations against Christian Aid. In September 2020, the government declined to intervene in this action. TZAC is now pursuing this action independently as relator for the government. After the government declined to intervene, TZAC served Christian Aid by mail at its London offices.

II. Christian Aid's Grounds for Its Anticipated Motion to Dismiss

A. The Amended Complaint Fails to Adequately Allege Scienter

The Amended Complaint should be dismissed for failure to allege adequately the element of scienter. For a viable FCA claim, TZAC must allege facts sufficient to establish that Christian Aid acted "knowingly" when it made a false certification. 31 U.S.C. § 3729(a)(1)(B). This is a "rigorous" standard, *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 2002 (2016), and requires TZAC to show that Christian Aid had "actual knowledge" of the false certification, acted in "deliberate ignorance" of the false certification, or acted with "reckless disregard" of the false certification. *See* 31 U.S.C. § 3729(b)(1); *see also U.S. ex rel. Hussain v. CDM Smith, Inc.*, No. 14-CV-9107 (JPO), 2017 WL 4326523, at *6 (S.D.N.Y. Sept. 27, 2017).

TZAC has not satisfied this standard. TZAC acknowledges in its Amended Complaint that Christian Aid did *not* make payments to JAB (knowingly or otherwise) but rather provided funding to LPHU. LPHU is in turn alleged to have hired JAB to perform "vocational training classes for persons with disabilities, specifically a cellular phone repair course which JAB was hired to put on." (AC ¶ 12). Therefore, TZAC must plausibly allege that Christian Aid knew that its grants to LPHU would be funneled to JAB, and that Christian Aid knew this fact prior to certifying compliance with USAID's anti-terrorism certification in early 2017.

TZAC relies on two theories of scienter, but neither is properly alleged. First, TZAC advances an agency theory. TZAC claims that because Christian Aid funded its "partner" organization, LPHU, Christian Aid is "directly chargeable with the LPHU's knowledge and activities." (AC ¶ 12f). This theory of liability is legally insufficient, principally, because the Amended Complaint makes only "sparse" or "conclusory allegations" of agency, and merely having a contract with a grantee alone cannot create an agency relationship. *See Spagnola v. Chubb*, 264 F.R.D. 76, 88 (S.D.N.Y. 2010) ("[C]ourts routinely dismiss claims based on agency theory where the pleadings contain insufficient allegations in that regard."); *Jackson v. Caribbean Cruise Line, Inc.*, 88 F. Supp. 3d 129 (E.D.N.Y. 2015). TZAC does not present legally sufficient and plausible allegations to demonstrate that Christian Aid should be held liable for LPHU's activities or knowledge.

Second, TZAC claims that "even a minimum of due diligence" would have surfaced LPHU's alleged improper use of Christian Aid funds. (AC ¶¶ 12g, 14). But, at most, this is a mere claim of simple negligence, which is insufficient to allege scienter. *See U.S. ex. rel. Kirk v. Schindler Elevator Corp.*, 130 F. Supp. 3d 866, 874 (S.D.N.Y. 2015) (holding that "the requisite intent for FCA purposes is the knowing presentation of what is known to be false as opposed to negligence") (citation and internal quotation marks omitted). TZAC also accuses Christian Aid of acting with "reckless disregard" (AC ¶ 14), but TZAC never explains what Christian Aid did that was reckless or what facts it disregarded. Merely parroting the statutory standard with no supporting detail, as TZAC does here, is insufficient. *U.S. ex rel. Tessler v. City of New York*, No. 14-CV-6455 (JMF), 2016 WL 7335654, at *5 (S.D.N.Y. Dec. 16, 2016)

("conclusory allegations" about scienter "do not satisfy the requirements of Rule 9") (citation and internal quotation marks omitted), *aff'd*, 712 F. App'x 27 (2d Cir. 2017).

B. The Amended Complaint Fails to Allege the FCA Claim with Particularity

TZAC's Amended Complaint does not meet the particularity requirement of Rule 9(b) of the Federal Rules of Civil Procedure. *See U.S. ex rel. Chorches for Bankr. Estate of Fabula v. Am. Med. Response, Inc.*, 865 F.3d 71, 81 (2d Cir. 2017) (applying Rule 9(b) to FCA claim requires fraud be stated with particularity). That rule mandates a complaint must: "(1) specify the statements that the plaintiff contends were fraudulent; (2) identify the speaker; (3) state where and when the statements were made; and (4) explain why the statements were fraudulent." *Am. Med. Response, Inc.*, 865 F.3d at 81 (citation and internal quotation marks omitted). Unspecific, general, and conclusory allegations will not pass muster under Rule 9(b).[2] *See, e.g., U.S. ex rel. Scharff v. Camelot Counseling*, No. 13-CV-3791 (PKC), 2016 WL 5416494, at *2-6 (S.D.N.Y. Sept. 28, 2016) (general fraud allegations will not suffice).

The Amended Complaint presents additional allegations about the first three requirements, but still misses the mark with respect to the fourth requirement: an explanation of why the statements were fraudulent. For Christian Aid's statement to have been fraudulent, it must have been the case both that: (i) Christian Aid knowingly provided material support to JAB; and (ii) Christian Aid knew this fact when it signed the certification. Neither is alleged with sufficient specificity.

On the first issue, the Amended Complaint's conclusory allegation that Christian Aid "material[ly] support[ed]" JAB is not supported with a sufficient factual basis. (AC ¶ 11). The absence of sufficient plausible factual allegations is no surprise: Christian Aid has provided no material support to terrorism. In any event, the Amended Complaint alleges that Christian Aid provided funds to LPHU but never explains how Christian Aid should have known that its funds were being diverted to JAB. Indeed, by using the phrase "directly or indirectly," the Amended Complaint never clearly alleges that Christian Aid's grants to LPHU were themselves ever provided to JAB, as opposed to LPHU providing other funds to JAB at a time when LPHU received funds from Christian Aid. Nor does the Amended Complaint allege that Christian Aid actually knew that its funds had been provided to JAB when it signed the certifications. TZAC neither alleges with particularity that Christian Aid supported JAB nor that Christian Aid knew that its certification was false.

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[2] Nor does TZAC's inclusion in the Amended Complaint of an image purporting to depict both Christian Aid's logo and JAB's logo in a room make a difference, because TZAC does not make a single allegation about the details of what the image purports to be, where it is, who placed the logos on the wall or when or why they did so, or how the image connects to the alleged fraud.

Here, the Amended Complaint's allegations are equally consistent with a theory that LPHU's asserted conduct was unknown to Christian Aid, as they are with TZAC's theory that Christian Aid knew. Where there is an "obvious alternative explanation" for the theory of liability presented in the complaint, the complaint should be dismissed. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 (2007). Allowing TZAC to proceed on such nebulous allegations would be akin to granting TZAC a "license to base claims of fraud on speculation and conclusory allegations," *Am. Med. Response, Inc.*, 865 F.3d at 86, a license that the Second Circuit categorically prohibits and this Court should not confer.

C. The Amended Complaint Fails to Adequately Allege Personal Jurisdiction Over Christian Aid

TZAC still fails to plausibly allege personal jurisdiction over Christian Aid. TZAC tries—unsuccessfully—to shoehorn its allegations into three different jurisdiction theories: consent, general jurisdiction, and specific jurisdiction.[3] None, however, is supported by the alleged facts.

Start with consent. According to TZAC, Christian Aid "voluntarily subjected itself" to this Court's jurisdiction by agreeing to accept funds from USAID. (AC ¶ 7b). Not so. We know of no law that every entity that does business with the United States is automatically subject to suit within the United States. In particular, the hallmark of contractual jurisdictional consent is absent here: nowhere does TZAC allege the existence, execution, or enforceability of any jurisdictional consent clause in the USAID contracts that might validly subject Christian Aid to this Court's (or any court's) jurisdiction. *See D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 103 (2d Cir. 2006). Nor could TZAC have made such allegations. None of the USAID contracts at issue (which TZAC "incorporates by reference") contains a jurisdictional consent clause.

Also absent is a colorable basis for this Court to exercise general jurisdiction over Christian Aid, despite TZAC's allegations that Christian Aid "regularly transacts business" within the United States. (AC at ¶ 7) General jurisdiction lies where a defendant is "at home." *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) (a corporate entity is at home in its place of incorporation or its principle place of business). But Christian Aid is not "at home" in the United States; it is a U.K.-registered charity headquartered in London, which is not alleged to have any U.S. offices, much less an office within the U.S. functioning as its principal place of business. *See id*. Nor do any of Christian Aid's alleged meagre contacts (two business trips) with the

[3] To be sure, TZAC adamantly represents its single theory of jurisdiction under Fed. R. Civ. P. 4(k)(1)(c) is enough. (AC ¶ 7a) But, perhaps, recognizing the infirmities of that theory, TZAC has included other (insufficient and implausible) allegations of personal jurisdiction that might function as a failsafe; they do not.

United States make this the "exceptional case," allowing for TZAC to meet its burden and skirt the default rule. *See Daimler*, 571 U.S. at 139 n.19.

Equally unavailing is TZAC's theory of specific jurisdiction under Fed. R. Civ. P. 4(k)(1)(c).[4] Exercising personal jurisdiction here would flout constitutional due process principles: the Amended Complaint flunks both the "minimum contacts [test]" and "reasonableness [test]." *Waldman*, 835 F.3d at 331 (personal jurisdiction under Fed. R. Civ. 4(k)(1)(c) must satisfy the two-part constitutional due process test of minimum contacts and reasonableness). First, TZAC has not established that Christian Aid has had the requisite minimum contacts with the United States. Almost all of the alleged conduct giving rise to the alleged FCA violation—which, as discussed above, at best only tangentially connects to Christian Aid—took place thousands of miles away from the United States in another country located on another continent. This makes sense as the USAID contracts—which were not executed by Christian Aid within the United States (AC ¶ 10a)—contemplate performance entirely outside the United States, with all of the USAID funds disbursed for projects outside the United States. *See Waldman*, 835 F.3d at 337 (no personal jurisdiction under Fed. R. Civ. P. 4(k)(1)(C) where defendants' suit-related conduct occurred outside U.S.). The best TZAC can muster for minimum contacts here is only a handful of isolated and infrequent contacts Christian Aid has had with the U.S.—none of which is alleged to be related to the events giving rise to this lawsuit. *Id*. Merely having a contract with a U.S. based entity, particularly one with no forum selection clause, is not enough for personal jurisdiction. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985) ("[A]n individual's contract with an out-of-state party *alone* can[not] automatically establish sufficient minimum contacts in the other party's home forum.") (emphasis added). Second, even if TZAC could show that Christian Aid has had minimum contacts with the U.S, which it cannot, jurisdiction would be unreasonable. Litigating in this distant forum would unduly burden Christian Aid. Not only does the bulk of the alleged conduct at issue occur outside the United States, but almost all of the discovery will occur outside the United States too. This is yet another reason to find personal jurisdiction lacking.

In sum, TZAC has failed to show personal jurisdiction exists, and therefore, this case should be dismissed.

III. The Proposed Briefing Schedule for the Anticipated Motion to Dismiss

As a result of the deficiencies identified above, Christian Aid seeks leave to file a motion to dismiss TZAC's Amended Complaint. Christian Aid's counsel has conferred with TZAC's counsel and the parties jointly propose the following schedule for the anticipated motion to dismiss:

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[4] Nor does specific jurisdiction exist under New York's long-arm statute, as TZAC apparently now concedes.

- Motion to dismiss to be filed on or before February 12, 2021 (or that Christian Aid be afforded approximately four weeks from the Court's order, whichever is later, to prepare and file its brief);

- Opposition to be filed on or before March 12, 2021 (or approximately four weeks after the motion to dismiss is filed); and

- Reply to be filed on or before March 26, 2021 (or approximately two weeks after the opposition is filed).

Pursuant to the Court's Individual Practices, we understand the filing of this letter has stayed Christian Aid's time to answer or move with respect to TZAC's Amended Complaint, and we will await further order of the Court before filing Christian Aid's motion to dismiss.

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We stand ready to provide the Court with any further information and thank the Court for its consideration of this application.

Respectfully submitted,

Harry Sandick