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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 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.

I. Background

In a six-page complaint (the "Complaint") filed on May 30, 2017, 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 reached 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 Complaint, Christian Aid certified compliance with USAID's anti-terrorism certification in 2017, knowing that its certification was false because it had sponsored a 2015 training for disabled Syrian refugees that was "put on" by a specially designated national, Jihad-al-Binaa ("JAB"), an entity allegedly affiliated with Hezbollah. These

allegations are not true, and as explained below, neither are they alleged with sufficient particularity nor in a manner that states a claim under the FCA.

For more than three years after the filing of the Complaint, 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 October 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

TZAC's Complaint, as discussed below, should be dismissed for at least three independent reasons.[1] First, the Complaint does not allege personal jurisdiction over Christian Aid because neither general jurisdiction nor specific jurisdiction exists. Second, the Complaint does not, as it must, allege fraud with particularity; instead, the Complaint's fraud allegations are vague, general, and speculative. Third, the Complaint fails adequately to allege scienter, which is a required element for a claim under the FCA. Each is an independent basis for dismissal.

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

TZAC's Complaint fails to allege personal jurisdiction over Christian Aid, as TZAC cannot establish that the Court has either general jurisdiction or specific jurisdiction over Christian Aid. *See SPV Osus, Ltd. v. UBS AG*, 882 F.3d 333, 343 (2d Cir. 2018) (personal jurisdiction may either be "general" or "specific"). General jurisdiction—governed by New York Civil Practice Law & Rule ("N.Y. CPLR") § 301—allows a court "to hear any and all claims against an entity." *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 134 (2d Cir. 2014) (internal quotation marks omitted). Specific jurisdiction—governed by N.Y. CPLR § 302(a)—allows a court to hear only "issues that 'aris[e] out of or relat[e] to the [entity's] contacts with the forum.'" *Id*. (citation omitted). Neither exists here.

No general jurisdiction exists here because Christian Aid is not "at home" in New York. TZAC does not—and could not—allege that Christian Aid's principal place of business is in New York, nor that its state of incorporation is New York. *See Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 627 (2d Cir. 2016) (a corporate defendant is "at home" where "it is incorporated or maintains it principal place of business"). Given that TZAC makes no allegations of Christian Aid having operations, much less "substantial" operations, within New York, TZAC cannot evade this general rule. *See Daimler AG v. Bauman*, 571 U.S. 117, 139 n.19

[1] This does not constitute a waiver of any other grounds Christian Aid may pursue to dismiss TZAC's Complaint, and Christian Aid hereby expressly reserves any and all rights to move to dismiss the Complaint on grounds unidentified herein.

(2014) (explaining that only in the "exceptional case" will a "corporation's operations in a forum other than its formal place of incorporation or principal place of business [] be so substantial and of such a nature as to render the corporation at home in that State").

Nor can TZAC's conclusory allegations about InspirAction USA and the Act Alliance salvage general jurisdiction here. Both of those entities are legally distinct from Christian Aid, with no allegation to the contrary in the Complaint. Neither of those entities is alleged to be "at home" in New York or even to be New York entities. The most that is said is that those entities have or had offices in New York. TZAC has not, and cannot, allege an affiliation between Christian Aid and those entities that supports jurisdiction.[2] *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000) ("[A] court of New York may assert jurisdiction over a foreign corporation when it affiliates itself with a New York representative entity and that New York representative renders services on behalf of the foreign corporation that go beyond mere solicitation and are sufficiently important to the foreign entity that the corporation itself would perform equivalent services . . . ."); *Perkins v. Sunbelt Rentals, Inc.*, No. 514CV1378BKSDEP, 2015 WL 12748009, at *10 (N.D.N.Y. Aug. 13, 2015) (same); *Erick Van Egeraat Associated Architects B.V. v. NBBJ LLC*, No. 08 CIV. 7873 (JSR), 2009 WL 1209020, at *2 (S.D.N.Y. Apr. 29, 2009) (same).

Likewise, specific jurisdiction is nonexistent here. Not one basis under N.Y. CPLR § 302(a) is adequately alleged. There are only boilerplate allegations that Christian Aid regularly "transacts business" in New York.[3] N.Y. CPLR § 302(a)(i). There are no allegations at all that Christian Aid committed a tortious act within New York, much less that any such alleged act caused an injury within New York. *See* N.Y. CPLR § 302(a)(2)-(3). And there are no certainly no allegations that Christian Aid owned, used, or possessed real property within New York. *See* N.Y. CPLR § 302(a)(4). Because TZAC has failed to allege a single basis for

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[2] InspirAction USA was a Missouri corporation that was incorporated on May 23, 2014. On December 11, 2019, InspirAction USA filed articles of dissolution by voluntary action in Missouri, and on August 19, 2020, InspirAction USA ceased to exist when it filed articles of termination. Moreover, contrary to TZAC's suggestion, mere membership in an industry organization, like Christian Aid's alleged membership in the Act Alliance, does not confer personal jurisdiction over a defendant. *See Snow Sys., Inc. v. Sneller's Landscaping, LLC*, No. 18 C 5842, 2019 WL 1317746, at *6 (N.D. Ill. Mar. 22, 2019) (no personal jurisdiction based on defendant's membership in nationwide trade organization) (citing cases); *see also Carmouche v. Tamborlee Mgmt., Inc*., 789 F.3d 1201, 1204 (11th Cir. 2015) (same).

[3] For example, TZAC does not allege that USAID is a New York entity, that Christian Aid negotiated and executed the grants with USAID in New York, that any Christian Aid personnel stepped foot in New York, or that any of the grants required notices and payments be sent to New York. *See Agency Rent A Car Sys., Inc. v. Grand Rent A Car Corp.*, 98 F.3d 25, 29 (2d Cir. 1996) (reciting factors for finding a foreign corporation transacts business in New York); *see also Pieczenik v. Dolan*, No. 03 CIV. 6336 (SAS), 2003 WL 23095553, at *3 (S.D.N.Y. Dec. 30, 2003) (defendant did not transact business in New York where contract was negotiated and entered into in England).

jurisdiction under N.Y. CPLR § 302(a), its Complaint should be dismissed.[4] *See, e.g.*, *Brooks v. Von Lenthe*, No. 05 CIV. 3655 RMB AJP, 2006 WL 177146, at *2 (S.D.N.Y. Jan. 24, 2006) (dismissing complaint for failure to satisfy N.Y. CPLR § 302(a)(1)-(4)), *aff'd*, 207 F. App'x 85 (2d Cir. 2006).

Nor would the exercise of jurisdiction accord with the Due Process Clause, as there is no allegation of precisely how Christian Aid "purposefully availed" itself of the forum state, New York. *See Best Van Lines, Inc.*, 490 F.3d at 242 (under the Due Process Clause the "crucial question is whether the defendant has purposefully availed itself of the privilege of conducting activities within the forum State") (citations, internal quotation marks, and alteration omitted); *see also Byun v. Amuro*, No. 10 CIV. 5417, 2011 WL 10895122, at *7 (S.D.N.Y. Sept. 6, 2011) (no need to conduct due process clause analysis without statutory jurisdiction).

Finally, forcing Christian Aid—a non-profit organization with no operations in the United States—to litigate a case in this District involving events that occurred outside of the United States, with discovery largely if not entirely to occur outside of the United States—would work a particular hardship. This case should be dismissed for a lack of personal jurisdiction.

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

TZAC's 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); *Gold v. Morrison-Knudson Co.*, 68 F.3d 1475, 1476-77 (2d Cir. 1995) (same). 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).

The Complaint, however, misses that mark. Start with the Complaint's conclusory allegation that Christian Aid "material[ly] support[ed]" JAB. (Compl. ¶ 11). Nowhere does the Complaint support that boilerplate allegation with a factual basis. Nothing is alleged about what Christian Aid's purported sponsorship entailed, either in degree or in kind. There are also no allegations about what, if any, of Christian Aid's resources, including USAID grant funds, were siphoned to JAB, much less that Christian Aid intended to provide, or knowingly provided, any of its resources to JAB (or to any sanctioned entity for that matter). Nor does the Complaint provide anything beyond bare bones allegations about the "sponsored"

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[4] Should TZAC move for jurisdictional discovery, that application should be denied. *See Haber v. United States*, 823 F.3d 746, 753 (2d Cir. 2016); *see also Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 255 (2d Cir. 2007) ("[T]he district court acted well within its discretion in declining to permit discovery because the plaintiff had not made out a prima facie case for jurisdiction.").

training: it contains no particularized allegations about who from JAB allegedly "put on" the training, how Christian Aid was involved, what the training entailed, how long the training lasted, where it specifically occurred (other than to say it was in Lebanon), or who from Christian Aid supported the training. A sweeping temporal allegation—that the training occurred "in late 2015" (*Id*. at ¶ 12)—is all the detail the Complaint musters.

Such unspecific, general, and conclusory allegations will not pass muster under Rule 9(b).[5] *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) (dismissing FCA claim for failure to comply with Fed. R. Civ. P. 9(b) because the alleged fraud rested on general and conclusory allegations). Where, as here, a complaint does not allege with particularity the "who, what, when, where and how of the alleged fraud," the complaint should be dismissed. *U.S. ex. rel. Sarafoglou v. Weil Med. Coll. of Cornell Univ.*, 451 F. Supp. 2d 613, 623 (S.D.N.Y. 2006) (citation and internal quotation marks omitted); *see also DiCicco v. PVH Corp.*, No. 19 CIV. 11092 (ER), 2020 WL 5237250, at *3-4 (S.D.N.Y. Sept. 2, 2020). Nor could amendment cure the deficiencies in TZAC's Complaint, because Christian Aid made no false statements in connection with any activity alleged in the Complaint. 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 Complaint Fails to Adequately Allege Scienter

Nor does the Complaint adequately allege scienter. For a viable FCA claim, TZAC must allege facts sufficient to establish Christian Aid acted "knowingly." 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).

All of TZAC's allegations about Christian Aid's scienter are conclusory, merely tracking the relevant legal standard without factual detail. (Compl. ¶ 14). As several courts have held, this is cause for dismissal. *See U.S. ex rel. Grubea v. Rosicki, Rosicki & Assocs., P.C.*, 319 F. Supp. 3d 747, 750 (S.D.N.Y. 2018) (dismissing FCA claim where scienter allegations "were based on little more than conjecture"); *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

[5] Nor does TZAC's inclusion in the 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.

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). And while TZAC alleges that "minimum due diligence" would have surfaced the alleged fraud here, those allegations, at best, are mere claims of simple negligence, which are 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). The Complaint does not even allege direct support of JAB by Christian Aid, but rather that Christian Aid "sponsored vocational training" in Lebanon in "late 2015," which was actually "put on by" JAB. (Compl. ¶ 12). Apart from implying that Christian Aid did *not* knowingly provide funding to JAB, this vague allegation fails to provide any further detail on the alleged involvement of JAB in activities sponsored by Christian Aid, let alone that Christian Aid acted "knowingly" with respect to any alleged actions.

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 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:

- Motion to dismiss to be filed on or before December 18, 2020 (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 February 1, 2021 (or approximately six weeks after the motion to dismiss is filed); and
- Reply to be filed on or before February 15, 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 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

cc: David Abrams, Esq. (counsel to TZAC)