UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America ex. rel. TZAC, Inc. Plaintiff, v. Christian Aid, Defendant.	§ § § § § § § § § § § §	Civil Action No. 1:17 CV 4135 (PKC)

DEFENDANT CHRISTIAN AID'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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Defendant Christian Aid respectfully submits this memorandum in support of its motion to dismiss the Amended Complaint ("AC") of plaintiff-relator The Zionist Advocacy Center ("TZAC" or "Relator") for failure to state a claim upon which relief can be granted and failure to plead with particularity, or in the alternative, for lack of personal jurisdiction.

PRELIMINARY STATEMENT

TZAC has sued Christian Aid for a single alleged violation of the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et. seq*. The Civil Division of the United States Attorney's Office for the Southern District of New York investigated TZAC's allegations against Christian Aid for more than three years after May 30, 2017, the filing of the original complaint. In September 2020, the government declined to intervene in this action. In December 2020, after Christian Aid filed its first of two pre-motion letters, TZAC amended its complaint.

This Court should dismiss the Amended Complaint because the pleading omits essential elements for an FCA claim, ignores Fed. R. Civ. P. 9(b)'s particularity mandate, and fails to carry TZAC's jurisdictional burden. To accuse someone in court of making false claims to the United States Agency for International Development ("USAID") about supporting a terrorist organization is to lodge a grave and serious charge. Such a charge must be grounded in detailed and plausible factual allegations. Here, however, there are none, only conclusory assertions and legal boilerplate. Start with the key missing allegations that are required to state an FCA claim:

- the pleading does not allege that Christian Aid knew its anti-terrorism certification was false when it was made;
- the pleading does not allege that the purported false certification would have been material to USAID's contracting decision; and

- the pleading does not allege with the required particularity that Christian Aid in fact violated its certification by providing material support to a terrorist organization.

Any one of these three defects is fatal to the Amended Complaint. First, none of the Amended Complaint's allegations satisfy the FCA's scienter element. Actual knowledge is not alleged. TZAC never alleges that Christian Aid knew that its grant funds were being used to support a terrorist organization. Nor does vicarious liability solve TZAC's scienter problem. TZAC contends that Christian Aid should be vicariously liable for an FCA violation because the Lebanese Physical Handicapped Union ("LPHU"), a Christian Aid grantee which USAID also funds and recognizes as an important and valued human rights organization, allegedly worked on a single occasion with a terrorist organization, Jihad-al-Binaa ("JAB"). But the Amended Complaint falls far short of the demanding standard for vicarious liability, relying on boilerplate and conclusory allegations as a substitute for well-pleaded facts.

With other scienter theories inoperative, TZAC argues that Christian Aid should be held liable based on "reckless disregard" or "deliberate ignorance." In essence, TZAC contends that Christian Aid knew, or should have known, that LPHU was working with JAB. But TZAC alleges no facts in support of this theory. Furthermore, the same USAID, which Christian Aid is alleged to have defrauded, has worked with LPHU around the same time as Christian Aid, only further undermining TZAC's argument that Christian Aid acted recklessly. The Court should decline TZAC's invitation to convert the FCA into a "vehicle for punishing garden-variety breaches of contract or regulatory violations." *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989, 2003 (2016). In light of these inadequate allegations of scienter, the Court should dismiss the Amended Complaint.

Second, the Amended Complaint cannot satisfy the FCA's materiality element. The pleading does not plausibly allege that the charges made against Christian Aid would have

been material to USAID's decision to work with Christian Aid. The central allegation—that, without Christian Aid's knowledge, a Christian Aid grantee (LPHU) used an apparently small portion of its grant proceeds to organize a single vocational training program for persons with disabilities through a terrorist organization—is not one that plausibly would have led USAID to refuse to do business with Christian Aid had it been known prior to contracting with Christian Aid. The Complaint's allegations about materiality are not legally sufficient, and this provides an independent ground for dismissal.

Third, the Amended Complaint flouts the particularity demands of Rule 9(b). Concerning Christian Aid's alleged "material support" of terrorism, TZAC provides virtually no detail about what Christian Aid did that was wrong, or about how Christian Aid provided any material support. Measured against Rule 9(b)'s stringent particularity requirement, the Amended Complaint fails.

Finally, setting aside the Amended Complaint's failure to state a claim, the Amended Complaint sets forth no basis for this Court to exercise personal jurisdiction over Christian Aid. Serious charges have been leveled against an international humanitarian nonprofit entity that is headquartered in the United Kingdom, under whose laws it is organized. Yet the Amended Complaint is almost devoid of allegations that tie together Christian Aid, the alleged violation, and the United States. The sole relevant connection alleged is that Christian Aid entered into contracts with USAID—a fact that the Supreme Court specifically rejected as a basis for personal jurisdiction. In the absence of personal jurisdiction, this Court should dismiss.

STATEMENT OF FACTS

A. The Parties

1. Christian Aid

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. Christian Aid's founding "belief that poverty can be ended is based on [its] understanding of scripture and the work of a creative, loving God."[1] 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. Christian Aid also helped organize Voluntary Service Overseas, an international organization similar in purpose to the United States Peace Corps.

2. TZAC

Though asserting a claim on behalf of the United States, the relator in this case—TZAC—is actually a registered agent for a foreign principal, the International Law Forum ("ILF"). ILF, in turn, is an Israeli entity that receives funding from the Government of Israel. TZAC acknowledged its role as an agent for a foreign principal in a filing made last year with the Department of Justice pursuant to the Foreign Agents Registration Act.[2]

Among the other *qui tam* lawsuits filed by TZAC is a November 2015 lawsuit that it brought against the Carter Center in the District of Columbia for organizing a meeting of various Palestinian political parties in which the participants (including members of Hamas)

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[1] *Christian Aid: What We Believe*, CHRISTIAN AID, https://www.christianaid.org.uk/our-work/what-we-believe (last visited Feb. 12, 2021).

[2] *Zionist Advocacy Center Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as Amended*, U.S. DEP'T OF JUSTICE (Nov. 29, 2020), https://efile.fara.gov/docs/6676-Exhibit-AB-20201129-6.pdf; *see also* 22 U.S.C. § 611 *et seq.*

were provided with cookies and beverages, as depicted in a photograph included in TZAC's complaint. The complaint was dismissed by motion of the Department of Justice in May 2018. *U.S. ex rel. TZAC, Inc. v. The Carter Center, Inc.*, No. 15-cv-02001 (D.D.C. 2015), Dkt. Nos. 22-23.

B. The Amended Complaint

In its eight-page Amended Complaint, TZAC asserts a single claim: that Christian Aid violated the FCA by making false certifications to USAID. About three of those eight pages are devoted to the alleged wrongdoing by Christian Aid.

1. False Claim Act Allegations

According to the Amended Complaint, Christian Aid entered into grant agreements with USAID in 2016 and 2017. (AC ¶ 9).[3] As part of these agreements, Christian Aid represented its compliance with USAID's anti-terrorism certification, both in January and in March 2017. (*Id.* ¶ 10a). This certification required Christian Aid to represent that "to the best of its current knowledge, [it] did not provide within the previous ten years . . . material support or resources to any individual or entity that commits, attempts to commit, advocates, facilitates, or participates in terrorist acts[.]" (*Id.* ¶ 10). One of these alleged certifications was made by Christian Aid in London, United Kingdom on January 8, 2017, and the other was signed in Nairobi, Kenya on March 17, 2017. (*Id.* ¶ 10a). There is no allegation that the particular violation of the anti-terrorism certification alleged in the Amended Complaint would have been material to USAID's contracting decision or to its continued payment to Christian Aid under the

[3]The allegations of the Amended Complaint, which Christian Aid disputes, are accepted as true solely for the purpose of this motion to dismiss.

grant agreements. Nor does the Amended Complaint allege that compliance with the anti-terrorism certification is an express condition of payment or an express condition of eligibility.

TZAC claims that Christian Aid's anti-terrorism certification was false because Christian Aid had "sponsored vocational training activities in Lebanon for mentally disabled individuals" that were "put on" by a specially designated global terrorist organization, JAB. (*Id.* ¶ 12). TZAC concedes that the vocational program was not organized by Christian Aid but by a grantee of Christian Aid, LPHU, a group that provides social services in Lebanon. (*Id.* ¶ 12a). The Amended Complaint makes clear that LPHU, and not Christian Aid, directed the class, stating that the program was "overseen by LPHU's Activity Coordinator." (*Id.* ¶ 12c). The Amended Complaint also states that LPHU "was well aware that [JAB] had been hired" to "perform" the vocational training, but there is no allegation that Christian Aid knew that JAB had been hired, let alone that Christian Aid took any actions to hire JAB. (*Id.*). Nor does the Amended Complaint ever allege that Christian Aid knew of JAB's involvement in this program when it signed the USAID certification.

According to the Amended Complaint, Christian Aid made payments to LPHU—not to JAB—for the organizing of certain "vocational training activities." (*Id.* ¶¶ 12, 12a, 12c, 12f). The Amended Complaint provides no explanation about whether Christian Aid actually funded the vocational training, stating without any explanation that JAB was "paid monies, directly or indirectly, by Christian Aid." (*Id.* ¶ 12c). The Amended Complaint does not explain how much money was involved in this program, or on what terms Christian Aid made the grant to LPHU. Nor is there any claim that Christian Aid ever used USAID money to fund LPHU.

Rather than allege that Christian Aid knew anything about JAB's purported involvement in the vocational training organized by LPHU, TZAC instead claims that Christian

Aid is "directly chargeable with [] LPHU's knowledge and activities as LPHU was its admitted 'partner' and was acting well within the scope of the partnership arrangement by hiring [JAB]." (*Id.* ¶ 12f). The Amended Complaint provides no supporting detail at all about the nature of the relationship between Christian Aid and LPHU, apart from referring to LPHU as a "partner" of Christian Aid. There is no explanation of what the partnership entailed, or whether there was a written partnership agreement that governed the relationship. Nor is there any allegation that the terms of the partnership arrangement allowed Christian Aid to be bound by the actions of its grantee in a fashion that would create vicarious liability for Christian Aid.

In the alternative, TZAC alleges that "even the most minimal inquiry would have disclosed" JAB's involvement in the vocational training and that Christian Aid therefore "acted recklessly or in deliberate ignorance of the facts underlying the situation." (*Id.* ¶ 12g). There is no explanation of what facts relating to JAB were known or readily knowable to Christian Aid, how Christian Aid turned a blind eye to those facts, what steps Christian Aid took to vet LPHU, or why those steps were reckless or insufficient to address the risk of terrorist financing.

2. Jurisdictional Allegations

Concerning jurisdiction, the Amended Complaint does not allege that USAID's grant agreements with Christian Aid 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 this District, or indeed anywhere in the United States. There is no allegation that Christian Aid entered into its grant agreements with USAID in the United States; rather, it states that Christian Aid signed the agreements outside of the United States. (*Id.* ¶ 10a). Nor is there any allegation that the USAID grants were made for Christian Aid to conduct programs in the United States. As is a matter of public record, USAID only funds programs outside of the

United States in order to promote U.S. foreign policy interests.[4] Indeed, there is no allegation that *any* of the events relevant to Christian Aid's submission of alleged false claims occurred in New York, or for that matter, in the United States.

Based on these allegations, TZAC seeks judgment in the amount of $78,349,083, which TZAC represents is three times the total amount of grant payments alleged to have been made by USAID to Christian Aid. (*Id.* ¶¶ 18-20).

LEGAL STANDARDS

A. Rule 12(b)(6)

"To survive a Rule 12(b)(6) motion, the complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face." *Green v. Harbach*, No. 17 CIV. 6984 (AKH), 2018 WL 3350329, at *4 n.4 (S.D.N.Y. July 9, 2018) (quotation marks omitted). "Determining whether a complaint states a plausible claim is a 'context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Phoenix Entm't Partners, LLC v. J-V Successors, Inc.*, 305 F. Supp. 3d 540, 545 (S.D.N.Y. 2018) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). "[A] pleading that offers only labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Johnson v. NFL Players Ass'n*, No. 17-CV-5131 (RJS), 2018 WL 6515221, at *1 (S.D.N.Y. Nov. 26, 2018). Rather, a plaintiff must allege "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quotation marks omitted).

[4] *USAID: Where We Work*, U.S. AGENCY FOR INT'L DEV., https://www.usaid.gov/where-we-work (last updated May 7, 2019).

B. Rule 9(b)

Rule 9(b) requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). This heightened requirement applies to FCA claims. *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 which requires fraud be stated with particularity). Rule 9(b) has a "threefold" purpose: "to provide a defendant with fair notice of a plaintiff's claim, to safeguard a defendant's reputation from improvident charges of wrongdoing, and to protect a defendant against the institution of a strike suit." *U.S. v. Exelis*, 824 F.3d 16, 25 (2d Cir. 2016) (quotation marks omitted).

C. Rule 12(b)(2)

Under Rule 12(b)(2), the plaintiff bears the burden of making "a prima facie showing that [personal] jurisdiction exists . . . . including an averment of facts that, if credited, would suffice to establish jurisdiction over the defendant[s]." *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 81 (2d Cir. 2018) (quotation marks and alteration omitted).

ARGUMENT

I. TZAC FAILS TO ALLEGE ESSENTIAL ELEMENTS FOR A FALSE CLAIM ACT CLAIM

The Amended Complaint should be dismissed because TZAC fails to state a claim under the FCA. As TZAC neither alleges scienter nor materiality, TZAC's claim fails.

A. The Amended Complaint Fails to Adequately Allege Scienter

First, TZAC fails to adequately allege scienter. The Amended Complaint *never* alleges that Christian Aid actually knew *anything* about LPHU funding JAB, let alone that Christian Aid knew this fact when it made the anti-terrorism certification. To compensate for

this inadequacy, TZAC offers two long-shot theories of scienter—vicarious liability and "reckless disregard." Neither is properly alleged.

1. Applicable Law

To establish FCA liability, TZAC must allege facts sufficient to establish that Christian Aid "knowingly" presented a false certification. 31 U.S.C. § 3729(a)(1)(B). This "rigorous" standard can be satisfied only if TZAC alleges that Christian Aid had "actual knowledge" of the false certification, acted in "deliberate ignorance," or acted with "reckless disregard." *Universal Health Servs.*, 136 S. Ct. at 2002; 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). Those allegations must be pled with particularity and supported with factual details. *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") (quotation marks omitted). Otherwise, the complaint must be dismissed because merely tracking the statutory language 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(b)") (quotation marks omitted), *aff'd*, 712 F. App'x 27 (2d Cir. 2017).

2. TZAC Does Not Properly Allege Vicarious Liability

TZAC's first theory of Christian Aid's scienter is based on vicarious liability. TZAC alleges Christian Aid is "directly chargeable with the LPHU's knowledge and activities" because Christian Aid funded LPHU, its "partner" organization. (AC ¶ 12f). But TZAC has not plausibly alleged that Christian Aid is vicariously liable as LPHU's partner or as LPHU's principal in an agency relationship.

a. Christian Aid Is Not Vicariously Liable As LPHU's "Partner"

TZAC's theory of Christian Aid's partnership with LPHU stems from a fundamental misunderstanding of international aid nomenclature. Based on its pre-motion letter, this theory derives almost entirely from Christian Aid's use of the word "partner" as shorthand when referring to its grantees like LPHU. This term is commonly used in the field of international humanitarian aid to describe an organization's grantees, including by USAID, without ever suggesting that the grantor is legally responsible for the grantee's actions.[5] No reasonable person seriously thinks that the United States government—the plaintiff here—is "directly chargeable" for the actions of USAID grantees, and no one would suggest USAID is vicariously liable for the actions and knowledge of those organizations to whom it makes grants. Thus, the fallacy of TZAC's heavy reliance on its "partner" theory is plain.

Equally important, no legal partnership between Christian Aid and LPHU is alleged here. Specifically, there are no plausible allegations that Christian Aid and LPHU share profits and losses, jointly control a common business, make parallel contributions to such a common business, or intended to be partners in a common business. *See Kidz Cloz, Inc. v. Officially For Kids, Inc.*, 320 F. Supp. 2d 164, 171 (S.D.N.Y 2004) (legal partnership requires allegations of "(1) the parties' sharing of profits and losses; (2) the parties' joint control and

[5]For example, USAID states on its website that it is "partnering with the countries of Asia" when it provides humanitarian aid to those countries. *USAID: Where We Work Asia*, U.S. AGENCY FOR INT'L DEV., https://www.usaid.gov/where-we-work/asia (last updated Jan. 21, 2021). Likewise, USAID publishes information about its grant programs on a page that is entitled "Partnership Opportunities," where it refers to its grantees as "partner organizations." *USAID: Partnership Opportunities*, U.S. AGENCY FOR INT'L DEV., https://www.usaid.gov/work-usaid/partnership-opportunities?field_sectors_nid=All&field_opportunity_place_value=region&field_region_nid[]=971 (last updated Feb. 9, 2021).

management of the business; (3) the contribution by each party of property, financial resources, effort, skill, or knowledge to the business; and (4) the parties' intention to be partners.").

Here, TZAC alleges that Christian Aid made payments to LPHU so that LPHU could present vocational training. (AC ¶ 12c). In other words, LPHU was engaged by Christian Aid to take specific actions. (*Id.*). This is no partnership under the law. TZAC fails to present the allegations necessary to hold Christian Aid vicariously liable for LPHU's alleged wrongdoing (or knowledge) on a partnership theory.

b. Christian Aid Is Not Vicariously Liable As LPHU's Agent

An agency theory, if implicitly alleged here by TZAC, is likewise doomed. To start, the Amended Complaint never once uses the word "agent" or "agency" to describe the relationship between Christian Aid and LPHU. For that reason, it is difficult to see how the Amended Complaint can be said to present a sufficient claim that LPHU acted as Christian Aid's agent. *See Palm Beach Strategic Income, LP v. Salzman*, No. 10-CV-261 JS AKT, 2011 WL 441778, at *5 (E.D.N.Y. Feb. 7, 2011) (agency relationship did not exist because plaintiff "failed to plead facts (or, for that matter, even conclusory allegations)" to support agency).

Second, none of the requisite elements of an agency are alleged here. *See Cleveland v. Caplaw Enterprises*, 448 F.3d 518, 522 (2d Cir. 2006) (agency requires: (1) "the manifestation by the principal that the agent shall act for him"; (2) "the agent's acceptance of the undertaking"; and (3) "the understanding of the parties that the principal is to be in control of the undertaking.") (quotation marks omitted). The key to an agency relationship is an allegation that the agent's acts are subject to the principal's control. *See Pan Am World Airways, Inc. v. Shulman Transp. Enters, Inc.*, 744 F.2d 293, 295 (2d Cir. 1984). Here, there are no plausible, non-conclusory allegations that LPHU, a Christian Aid grantee, had the authority to act in a manner that could bind Christian Aid. Nor is there any plausible allegation that Christian Aid

had the right to control the specifics of LPHU's work—only that the two entities had a "relationship."

TZAC does not allege that the relationship was contractual in nature, but even if it had, the existence of a contract between Christian Aid and LPHU, absent more, is not enough to create an agency relationship. *See Jackson v. Caribbean Cruise Line, Inc.*, 88 F. Supp. 3d 129, 138-39 (E.D.N.Y. 2015). As the Second Circuit has held, it is the "right of control [that] distinguishes an agency relationship from a mere contractual one." *See Johnson v. Priceline.com, Inc.*, 711 F.3d 271, 278 (2d Cir. 2013). Likewise, the fact that Christian Aid made payments to LPHU does not establish an agency relationship. *See In re Parmalat Sec. Litig.*, 501 F. Supp. 2d 560, 589 (S.D.N.Y. 2007) ("The provision of financing does not in every circumstance establish the ability to control the way the beneficiary corporation performs its work. And where it does—perhaps because the financing corporation can threaten to cut off future support—it does not necessarily entail the beneficiary's power to act on the financing corporation's behalf.").[6]

In sum, there are no allegations—with particularity or otherwise—sufficient to state that LPHU was an agent of Christian Aid. *See Charles Schwab Corp.*, 883 F.3d at 86 ("sparse" or "conclusory" allegations of agency are insufficient); *Spagnola v. Chubb Corp.*, 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."); *see also Kolbeck v. LIT America,*

[6] Even in the context of an employment relationship, an employer is not vicariously liable for an employee's wrongdoing unless the employer benefitted from the misconduct. *See U.S. ex rel. Corp. Compliance Assocs. v. N.Y. Soc. for the Relief of the Ruptured & Crippled*, 07 CIV. 292 PKC, 2014 WL 3905742, at *24 (S.D.N.Y. Aug. 7, 2014) (dismissing complaint for failure to allege knowledge). Such allegations are absent here.

Inc., 923 F. Supp. 557, 569-70 (S.D.N.Y. 1996) (holding that when agency relationship is alleged as part of the fraud, plaintiff must comply with Rule 9(b))

3. TZAC Does Not Properly Allege Reckless Disregard

TZAC's alternative theory of scienter fails too. TZAC alleges that "even a minimum of [due] diligence" would have surfaced LPHU's improper use of Christian Aid funds, meaning that Christian Aid acted with "reckless disregard." (AC ¶ 14). TZAC offers no explanation for this conclusory assertion. TZAC never explains what facts were known to Christian Aid that should have put Christian Aid on notice of LPHU's relationship with JAB. LPHU is not on the list of specially designated nationals and blocked persons maintained by the Office of Foreign Assets Control. There is no prohibition under United States law—or indeed any nation's law—that prevents anyone from doing business with LPHU.

In fact, USAID itself has worked with LPHU (which is now known as the Lebanese Physically Handicapped Union, or LUPD) repeatedly in the past and continues to do so. USAID, on whose behalf TZAC claims to speak, has worked with, and praised, LPHU in its public reports.[7] For example, in a 2008 publication entitled "USAID/OTI Lebanon Field Report," USAID refers to having made a grant to LPHU. In the report, USAID credited LPHU with "mapping polling station access for people with disabilities nationwide."[8] More recently, in

[7] The Court may take judicial notice of the existence of these documents, which were created by the plaintiff United States. Fed. R. Evid. 201(b)(2) ("The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."); *Pehlivanian v. China Gerui Advanced Materials Group, Ltd.*, 153 F. Supp. 3d 628, 643-44 (S.D.N.Y. 2015); *see also Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993) (holding that court may take judicial notice of documents in plaintiffs' possession on motion to dismiss).

[8] U.S. AGENCY FOR INT'L DEV., USAID/OTI LEBANON FIELD REPORT OCTOBER-DECEMBER 2003 3 (2009), https://reliefweb.int/sites/reliefweb.int/files/resources/A5ED3B72386F815C4925756B000CC05F-Full_Report.pdf.

2017, USAID published a report entitled "Resource Guide for Gender Integration in Education Programming in Lebanon." The report stated that Sylvana Lakkis, the President of LPHU, was part of USAID's Lebanon Mission Technical Advisory Group, a prestigious committee of experts who advised USAID on the preparation of the report.[9] And, in December 2020, USAID highlighted its "collaboration with the Lebanese Union for People with Physical Disabilities" under a USAID-funded program to "secure the [disabled community's] rights" in Lebanon.[10] TZAC cannot plausibly claim that Christian Aid acted with reckless disregard when public records indicate that the plaintiff itself was working with LPHU for more than a decade, and has continued to do so as recently as December 2020.

Here, there is no basis for TZAC's claim that it was reckless for Christian Aid to have done business with LPHU. Merely parroting the statutory standard of "reckless disregard" while offering no supporting detail is legally insufficient. At most, TZAC's theory here is a mere claim of simple negligence, wholly 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") (quotation marks omitted).

B. The Amended Complaint Fails to Adequately Allege Materiality

TZAC also fails to state a claim under the FCA because TZAC has not alleged that the purported misrepresentation was material. None of the Amended Complaint's

[9] U.S. AGENCY FOR INT'L DEV., RESOURCE GUIDE FOR GENDER INTEGRATION IN EDUCATION PROGRAMMING IN LEBANON 52 (2017), https://encompassworld.com/wp-content/uploads/2018/03/EducationResourceGuide_AccFinal_altedits.pdf.

[10] USAID Lebanon, *USAID Supports the Inclusion of People with Disabilities*, FACEBOOK (Dec. 20, 2020), https://www.facebook.com/usaidlebanon/videos/429805154869636.

allegations show that Christian Aid's purported misrepresentation was material to USAID's initial decision to award the grants to Christian Aid.

1. Applicable Law

The FCA defines "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4). The materiality standard is "demanding" and must be pleaded with particularity under Rule 9(b). *Universal Health Servs.*, 136 S. Ct. at 2003; *see also U.S. ex rel. Grabcheski v. Am. Int'l Grp., Inc.*, 687 F. App'x 84, 87 (2d Cir. 2017). For materiality in a fraudulent inducement case, like this one, the plaintiff must allege that the purported misrepresentation impacted "the government's decision to do business with a defendant in the first instance." *United States v. Strock*, 982 F.3d 51, 61 (2d Cir. 2020). This materiality assessment is guided by the three *Strock* factors: (i) whether the requirement was an express condition of payment, (ii) the government's response to similar misrepresentations, and (iii) whether noncompliance was minor or insubstantial. *Id*. at 62-65. By failing to allege how those factors are present, TZAC has failed to allege materiality, an essential element of a False Claims Act claim. *See id*.

2. TZAC's Allegations Do Not Show Materiality

The Amended Complaint does not allege any of the *Strock* factors. First, there is no allegation that the certification was an "express condition" for the grant by USAID to Christian Aid. *Id.* at 62. TZAC only offers a conclusory and vague allegation that certification was "required for eligibility for USAID dollars." (AC ¶ 17). TZAC cites no authority in the underlying contracts or regulations; TZAC does not even identify the certification as a condition of payment, which would alone be insufficient at any rate. *See Universal Health Servs.*, 136 S. Ct. at 2003 ("A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a

condition of payment."); *U.S. ex rel. Daugherty v. Tiversa Holding Corp.*, 342 F. Supp. 3d 418, 428-29 (S.D.N.Y. 2018) (holding that conclusory allegations concerning the "general policies" of the government stating that compliance is important to the government are insufficient).

Indeed, the current version of the same USAID certification, adopted in May 2020, expressly provides that an applicant can admit to having previously provided material support to a terrorist group and still receive USAID grants, so long as the applicant makes this acknowledgement to USAID as part of its grant application.[11] TZAC offers no reason to believe that USAID would not have made grant awards to Christian Aid if USAID had known about the facts alleged here, which concern a single program organized by a single Christian Aid grantee.

Second, the Amended Complaint makes no allegations at all about the government's response to similar misrepresentations. *Id.* at 64. Even after knowing about the allegations in the Amended Complaint for nearly four years, USAID continues to support LUPD through its grants.[12] It is implausible that the allegations about Christian Aid, even if true, would have been material to the Government's decision. This second factor favors Christian Aid. *Id.* at 62-65.

Third, the facts alleged in the Amended Complaint make clear that the alleged noncompliance was "minor or insubstantial." *Universal Health Servs.*, 136 S. Ct. at 2003; *Strock*, 982 F.3d at 65. There is no allegation about some sweeping effort by Christian Aid to aid terrorists, but rather a complaint about a single program event. The allegations purportedly

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[11] U.S. AGENCY FOR INT'L DEV., CERTIFICATIONS, ASSURANCES, REPRESENTATIONS, AND OTHER STATEMENTS OF THE RECIPIENT 4 (2020), https://www.usaid.gov/sites/default/files/documents/1868/303mav.pdf.

[12] USAID Lebanon, *supra* note 10; USAID Lebanon , *The Livelihoods and Inclusive Finance Expansion Project - LIFE*, FACEBOOK (Sept. 1, 2020), https://www.facebook.com/592446627619355/posts/1455512677979408/?d=n.

show, at most, that Christian Aid's grant award to LPHU was provided in part to JAB, and that this was done without Christian Aid's actual knowledge. Christian Aid is a large organization with global operations and hundreds of grantees. Even if Christian Aid had made an incorrect certification based on this isolated event, this did not undercut the central goal of USAID's grants, which were made to provide humanitarian relief and thereby advance U.S. foreign policy goals.

The facts here are in stark contrast to *Strock*. There, the central purpose of the government program in which the defendant participated was meant to provide service-disabled veteran-owned small businesses with government contracts. *Strock*, 982 F.3d at 65. By misrepresenting its ownership, personnel responsibilities, and enterprise activities, the defendant in *Strock* masked the reality that its enterprise was not a service-disabled veteran-owned small business. No such subterfuge is alleged here. Furthermore, given the scope of Christian Aid's work for USAID ($26 million in grants, according to the Amended Complaint) and the *de minimis* nature of what is alleged in the Amended Complaint, it is more plausible that these facts, if they were true and had USAID become aware of them, would have been immaterial to USAID in its grant-making decision. *See, e.g., Grabcheski*, 687 F. App'x at 87 (dismissal of complaint for failure to state a claim under the False Claims Act where $100 million misrepresentation was immaterial given the nature of the government's transaction); *Tiversa*, 342 F. Supp. 3d at 429 (finding it implausible that a single false statement would have materially affected the government's contracting decision where the counterparty received $29 million in payments from DHS over an eight-year period). This third factor also favors Christian Aid.

In short, the Amended Complaint does not demonstrate the materiality of the alleged misrepresentation made by Christian Aid. To be sure, terrorist financing is a serious

issue about which USAID and Christian Aid are both concerned. However, the materiality assessment asks whether the facts alleged here—that close to six years ago, a Christian Aid grantee, without Christian Aid's knowledge, diverted funds on a single occasion to a sanctioned entity—would have influenced USAID's decision to award a grant to Christian Aid. Nothing alleged here supports that conclusion. Therefore, this defect also should lead to dismissal.

II. TZAC'S ALLEGATIONS FAIL RULE 9(B)

A second type of defect requires dismissal: TZAC never explains in any detail how Christian Aid is alleged to have provided material support to terrorism. This pleading falls far short of the demanding standard for pleading fraud with particularity.

1. Applicable Law

FCA claims must comply with Rule 9(b)'s heightened pleading mandate. This requires the complaint to: "(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 (quotation marks omitted). Unspecific, general, and conclusory allegations will not do.[13] *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); *U.S. ex rel. Chen v. EMSL Analytical*, 966 F. Supp. 2d 282, 303 (S.D.N.Y. 2013) (dismissing "hopelessly vague" and "conclusor[y]" complaint for failure to explain how the defendant acted fraudulently).

[13]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 to this analysis. TZAC never explains how the image connects to the alleged fraud.

2. TZAC's Allegations Fail Rule 9(b)

Here, TZAC does not satisfy the Rule 9(b) standard. The Amended Complaint never explains in detail how or why Christian Aid's anti-terrorism certification was fraudulent. The Amended Complaint offers only a conclusory allegation that Christian Aid "material[ly] support[ed]" JAB. (AC ¶ 11). It later states that "Christian Aid sponsored vocational training activities in Lebanon" and then qualifies even this allegation to explain that "[t]he actual training was put on by [JAB] and thus Christian Aid funded [JAB] either directly or indirectly." (*Id.* ¶ 12). The Amended Complaint never alleges that Christian Aid's grants to LPHU were themselves provided to JAB, as opposed to LPHU providing other funds to JAB at a time when LPHU received funds from Christian Aid. Nor does it logically follow that Christian Aid funds were provided to JAB merely because Christian Aid sponsored certain LPHU vocational training programs. It is not even clearly alleged that the programming on which LPHU and JAB are alleged to have worked together are the same programs on which LPHU and Christian Aid worked together. The Amended Complaint only identifies a single LUPD employee who was allegedly "aware" of JAB's involvement, but who is never alleged to have had made Christian Aid aware of JAB's involvement. (*Id.* ¶ 12c). Furthermore, an organization like LPHU, devoted to advancing the rights of the disabled, no doubt sponsored and organized many programs.

In short, the sparse detail about the underlying events here is not sufficient under Rule 9(b). Allowing TZAC to proceed on such nebulous allegations would grant TZAC a "license to base claims of fraud on speculation and conclusory allegations," *Am. Med. Response, Inc.*, 865 F.3d at 86 (quotation marks omitted), a license that the Second Circuit prohibits and this Court should not confer.

III. TZAC FAILS TO ALLEGE PERSONAL JURISDICTION

Despite the many different jurisdictional allegations in the Amended Complaint, TZAC admits that the only possible basis of jurisdiction here is specific jurisdiction related to Christian Aid's contract with USAID. In the absence of specific jurisdiction, this Court should dismiss the Amended Complaint.

1. Applicable Legal Standard

Personal jurisdiction may be either "specific," where a court "exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum," or "general," where the defendant's "general business contacts with the forum state . . . permit[] a court to exercise its power in a case where the subject matter of the suit is unrelated to those contacts." *SPV Osus, Ltd. v. UBS AG*, 882 F.3d 333, 343 (2d Cir. 2018) (quotation marks omitted).

"[T]he inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum, and the litigation." *Id.* at 344. "A court must look to whether there was some act by which the defendant purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* (quotation marks omitted). Where, as here, a "defendant has had only limited contacts with the state it may be appropriate to say that he will be subject to suit in that state only if the plaintiff's injury was proximately caused by those contacts." *Id.*

2. TZAC Does Not Adequately Allege Personal Jurisdiction

TZAC does not plausibly allege personal jurisdiction over Christian Aid. In the Amended Complaint, TZAC seemed to advance three different jurisdiction theories: consent, general jurisdiction, and specific jurisdiction. In its second pre-motion letter, TZAC abandoned

two of these theories (consent and general jurisdiction). None of these jurisdiction theories, however, is supported by the alleged facts.

Start with consent. Parties can contractually consent to a court's jurisdiction. *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 625 (2d Cir. 2016). In the Amended Complaint, TZAC alleges that Christian Aid "voluntarily subjected itself" to this Court's jurisdiction by agreeing to accept funds from USAID. (AC ¶ 7b). TZAC abandoned this consent theory in its pre-motion letter, writing that "Relator is not alleging that the Defendant signed some document explicitly consenting to personal jurisdiction in this matter." (Dkt. No. 19 at 2).

In any event, no law provides 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 any of 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) (forum selection clause is key marker of contractual consent that must meet "several conditions" before being held enforceable).

While TZAC makes allegations that Christian Aid "regularly transacts business" within the United States (AC ¶ 2), TZAC has abandoned any general jurisdiction argument. (Dkt. No. 19 at 2) (stating that the relator is not alleging general jurisdiction). With good reason: general jurisdiction lies only 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 principal place of business). Christian Aid is not "at home" in the United States; it is a U.K.-registered charity headquartered in London that is not alleged to have any office in the United States, much less its principal place of business. *See id.*

In the second pre-motion letter, TZAC conceded that its sole theory of jurisdiction is specific jurisdiction under Fed. R. Civ. P. 4(k)(1)(c). This theory is equally unavailing. Exercising personal jurisdiction here would flout constitutional due process principles: the Amended Complaint flunks both the "minimum contacts [test]" and "reasonableness [test]." *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 331 (2d Cir. 2016) (personal jurisdiction based on national contacts must satisfy minimum contacts and reasonableness).

First, TZAC has not established that Christian Aid has had the requisite minimum contacts with the United States. Missing from the Amended Complaint are all of the customary allegations for satisfaction of that test here. No allegations are made that the contractual negotiations with USAID occurred in the United States; that the USAID contracts were governed by United States law; that Christian Aid personnel traveled to the United States for meetings with USAID; that any Christian Aid products or services were directed toward the United States; or even that Christian Aid sent invoices to the United States. Far from showing extensive contacts with the United States, the Amended Complaint reveals the exact opposite. Almost all of the alleged conduct took place in Lebanon. The USAID contracts were not executed by Christian Aid within the United States (AC ¶ 10a) and contemplate performance by Christian Aid entirely 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 the United States). A handful of isolated, infrequent contacts between Christian Aid and the United States as a

jurisdiction,[14] none of which are related to the events giving rise to this lawsuit, do not amount to minimum contacts.[15] *Id.*

The only contact relevant to the claim is that Christian Aid entered into agreements with USAID. But 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 original); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 NRB, 2015 WL 6243526, at *31 (S.D.N.Y. Oct. 20, 2015) (same); *see also JCorps Int'l, Inc. v. Charles & Lynn Schusterman Family Fund Found.*, 828 F. App'x 740, 745 (2d Cir. 2020) (same) (summary order).

Second, even if TZAC could show that Christian Aid has had minimum contacts with the United States, 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. TZAC has failed to show personal jurisdiction exists and therefore, this case should be dismissed.

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[14]The Amended Complaint makes a conclusory allegation that Christian Aid "regularly transacts" business within the United States, yet only identifies Christian Aid making two discrete business trips to America separated by nearly a year, which were unrelated to this lawsuit. (AC ¶ 7). Each trip occurred after the conduct giving rise to this lawsuit, and therefore, should be disregarded in the minimum contacts analysis. *See Nielsen v. Sioux Tools, Inc.*, 870 F. Supp. 435, 439-40 (D. Conn. 1994) (rejecting argument that the court should consider "continuing contacts with the forum at the time suit is filed").

[15]TZAC attempts to use InspirAction USA, a dissolved Missouri corporation, and the Act Alliance, a coalition of nonprofits, as piggybacks for establishing jurisdiction. (AC ¶ 7). These conclusory allegations do not support specific jurisdiction. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000). Nor does membership in an industry organization, like Christian Aid's alleged membership in the Act Alliance, by itself, confer personal jurisdiction. *See Carmouche v. Tamborlee Mgmt., Inc.*, 789 F.3d 1201, 1204 (11th Cir. 2015).

IV. TZAC SHOULD NOT BE GRANTED FURTHER LEAVE TO AMEND

TZAC should not be granted further leave to amend its complaint. TZAC has already amended its complaint once, and the case has been pending for almost four years, giving TZAC ample opportunity to identify additional relevant facts. Even with the benefit of previewing Christian Aid's arguments, the Amended Complaint still suffers from many of the same defects that plagued the first. There is no compelling reason to believe that another amendment opportunity will yield a different outcome. Had TZAC been able to cure the Amended Complaint's defects, it would have done so by now. Affording TZAC another opportunity will only run up costs, divert key resources from a leading international aid agency, and waste this tribunal's time. This Court should deny any further leave to amend the complaint.

CONCLUSION

For the foregoing reasons, the Amended Complaint should be dismissed for failure to state a claim, failure to be pleaded with sufficient particularity, or, in the alternative, for lack of personal jurisdiction. Since TZAC already has amended its complaint once, the dismissal should be with prejudice and without leave to amend.

Dated: February 12, 2021
New York, New York

By: _____

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