UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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

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In its brief ("TZAC Br."), TZAC misreads well-settled precedent, ignores wholesale several arguments in Christian Aid's motion to dismiss, and continues to rely on conclusory allegations.[1] Christian Aid respectfully asks the Court to dismiss the Amended Complaint.

First, TZAC pushes for departures from applicable precedent governing the False Claims Act ("FCA") and the law of personal jurisdiction, making extreme arguments that if accepted would have sweeping consequences. TZAC advocates for what is effectively a "mere negligence" standard of scienter. TZAC would water down the False Claims Act's "rigorous" materiality standard so that a breach of any express contractual condition would suffice, despite contrary Supreme Court and Second Circuit decisions. Those same courts have also debunked TZAC's theory that a single contract with a U.S.-based party, without more, is sufficient for personal jurisdiction. Under TZAC's proposed rule, anyone who does business with the United States government, regardless of the circumstances or the location of that counter-party, would be subject to jurisdiction in the United States. TZAC's invitation to revolutionize the law of personal jurisdiction should be rejected.

Second, TZAC fails to address several Christian Aid arguments entirely, not disputing or even attempting to rebut, among other things, that:

- there are no plausible allegations that Christian Aid is vicariously liable under the False Claims Act as LPHU's "partner" or principal;
- there are no particularized allegations of ***how*** Christian Aid is alleged to have provided material support to terrorism; and
- the exercise of jurisdiction here would be unreasonable.

By failing to address Christian Aid's arguments, all of these issues should be deemed waived.

[1] To the extent terms are undefined herein, they shall have the same meaning as in Christian Aid's memorandum in support of its motion to dismiss (the "Opening Brief"). (Dkt. No. 22.)

Third, bereft of plausible factual allegations to rely upon, TZAC turns instead to its pleading's vague, boilerplate allegations. The problem for TZAC is that just characterizing that one's vague, generalized allegations as plausible and particularized does not make it so. Nor can TZAC forestall dismissal of its pleading in hopes that something learned in discovery might allow it to meet its pleading burden. Plausible allegations must precede discovery.

Finally, TZAC seeks leave to amend yet again, but neither submitted a proposed second amended complaint nor offered any explanation for how an amendment would cure the defects identified in this motion. The Amended Complaint should be dismissed without leave to amend.

I. THE AMENDED COMPLAINT FAILS TO STATE A VIOLATION OF THE FALSE CLAIMS ACT

A. TZAC Bootstraps Its Scienter Argument With Conclusory Allegations

In the Amended Complaint, TZAC never alleges that Christian Aid engaged in a knowing violation of the FCA. Its scienter allegations instead rested on two bases: (a) vicarious liability based on LPHU's knowledge, and (b) "reckless disregard." In its opposition, TZAC effectively abandons the former, and then identifies no plausible allegations to support the latter.

Begin with TZAC's vicarious liability theory. As argued in the opening brief, TZAC identifies no facts from which it could be plausibly inferred that Christian Aid is vicariously liable as LPHU's partner, or as LPHU's principal in an agency relationship. TZAC offers no substantive response at all, saying only that this is an "issue for discovery." (TZAC Br. 6–7). Without a response, TZAC has waived the issue. *See, e.g.*, *Kao v. British Airways, PLC*, No. 17 CIV. 0232 (LGS), 2018 WL 501609, at *5 (S.D.N.Y. Jan. 19, 2018) (failure to oppose specific argument constitutes waiver of that issue) (citation omitted).

Aside from waiver, arguing that a legal defect in the complaint is an "issue for discovery" puts the cart before the horse. To say "we will allege it after discovery" is precisely what

Twombly and *Iqbal* prohibit and without plausible allegations for support, claims must fail. *See also Fahs Constr. Group, Inc. v. Gray*, No. 10 Civ. 0129 (GTS/DEP), 2012 WL 2873532, at *3 (N.D.N.Y. July 12, 2012) ("Plaintiff must allege facts. . . to proceed to discovery and cannot rest its Amended Complaint on the mere hope that the discovery process will provide necessary facts to support its claim."); *see also Anonymous v. Simon*, No. 13 CIV. 2927 (RWS), 2013 WL 5303932, at *2 (S.D.N.Y. Sept. 20, 2013) (quoting *Fahs Constr.*).

TZAC's only other basis for satisfying scienter is through its "reckless disregard" theory. TZAC says that a "simple inquiry would have disclosed LPHU's engagement of Jihad al binaa with Defendant's monies[.]" (TZAC Br. 7). If this is sufficient for pleading, then the knowledge requirement has been read out of the FCA. Alleging that someone should have known a given fact is easy to do, but TZAC offers no explanation for why LUPD's activities should have alerted Christian Aid of LPHU's alleged conduct.[2] After all, LPHU is a not an SDN but a recipient of USAID funding. (Opening Br. 14–15) (explaining USAID's collaboration with LPHU between 2007-2020) In support of its claims, TZAC offers only a lone conclusory statement: "LPHU openly used Christian Aid funds to engage Jihad al Binaa[.]" (TZAC Br. 7). This falls short of the types of factual allegations required for reckless disregard: What facts did Christian Aid know and intentionally disregard? Were Christian Aid funds used? What is actually depicted in the photo? The limited allegations are consistent at most with negligence or innocent mistake, not reckless disregard. *Cf. U.S. v. Raymond & Whitecomb Co.*, 53 F. Supp. 2d 436, 447 (S.D.N.Y. 1999); *Atkinson v. Pennsylvania Shipbuilding Co.*, No. CIV. A. 94-7316, 2000 WL

[2] This failure makes TZAC's attempt to analogize this case to the "ostrich" cases inappropriate: those cases rested on very different footing. *See Raymond & Whitcomb Co.*, 53 F. Supp. 2d at 440 (defendant gave "instructions" that formed basis of fraud); *U.S. ex rel. Taylor v. Gabelli*, 345 F. Supp. 2d 313, 321 (S.D.N.Y. 2004) (defendant recruited others to jerry-rig bidding process for federal licenses). Again, mere negligence, all that is alleged here, is not enough. *See Gabelli*, 345 F. Supp. 2d at 330.

1207162, at *8 (E.D. Pa. Aug. 24, 2000) (FCA's scienter requirement "is not so liberal" that "mere negligence or innocent mistake are sufficient"). In sum, TZAC's "conclusory allegations that [Christian Aid] 'knew [by virtue of a vicarious liability] or were reckless in not knowing'" are insufficient and TZAC's amended complaint should be dismissed. *See United States ex rel. Grubea v. Rosicki, Rosicki & Assocs., P.C.*, 318 F. Supp. 3d 680, 694 (S.D.N.Y. 2018).

B. TZAC Misconstrues The Materiality Standard

TZAC contends that the FCA's materiality requirement is automatically satisfied here because the USAID anti-terrorism-certification is an "express condition" in the agreement between USAID and Christian Aid.[3] (TZAC Br. 1–2, 4–6.) TZAC argues that by virtue of USAID's inclusion of the certification in the agreement, Christian Aid's alleged misrepresentation concerning the certification is necessarily "material" to USAID's decision to contract. TZAC's interpretation has stark consequences: every condition in a contract with the government being treated as sufficient for purposes of materiality.

This is not the law. "[S]uperficial designations," express or otherwise, do not determine materiality.[4] *See United States v. Strock*, 982 F.3d 51, 59 (2d Cir. 2020). Materiality here concerns "the government's decision to do business with a defendant in the first instance." *Id*. at

[3] TZAC confuses the materiality standard under the FCA with the standard for "material support" of terrorism. (TZAC Br. 4–5). To be sure, "material support" of terrorism does not turn on the quantum of support rendered to a terrorist organization (and so even providing a modest benefit can amount to material support). 18 U.S.C. § 2339B (defining material support to include, *inter alia*, "*any* property, tangible or intangible") (emphasis supplied). Materiality under the FCA, however, concerns the "effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Universal Health Servs., Inc. v. U.S. ex. rel. Escobar*, 136 St. Ct. 1989, 2002 (2016). Only this standard for materiality, established in *Escobar* and its progeny, is applicable here.

[4] Allowing materiality just because there is a provision in a contract would eviscerate the statutory definition of materiality, not to mention Congressional intent. *See* 31 U.S.C. § 3729(b)(4) ("the term material means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."); *see Escobar*, 136 S. Ct. at 2002 (citing 31 U.S.C. § 3729(b)(4)).

61. Here, both USAID's current policy and the minor nature of the alleged noncompliance provide no reason to conclude that USAID would not have contracted with Christian Aid. Further, all three *Strock* factors only bolster that conclusion.

First, while TZAC argues that the certification was an "express condition" of the USAID grant, the Supreme Court has ruled that "[a] misrepresentation cannot be deemed material merely because the Government designates compliance with a particular [] contractual requirement as a condition of payment." *See Escobar*, 136 S. Ct. at 2003.

Falling flat too is TZAC's argument that *Strock*'s second factor—the government's response to similar misrepresentations—supports materiality. The Amended Complaint makes no allegations at all about how the Government has responded to similar misrepresentations. (Opening Br. 17.)[5] TZAC attempts to cure that omission by citing two cases purporting to show how the Government would have responded if it had known the facts alleged here. (TZAC Br. 5). The public record demonstrates that neither cited case is anything like this one. Both cases alleged *knowing* violations by the USAID grantee, allegations that are absent here. In one case, the defendant allegedly worked *directly* with the Iranian military for seven years conducting mine clearance operations. *See United States v. Norwegian Peoples Aid*, No. 15-CV-4892 (S.D.N.Y. Apr. 3, 2018). (Ex. A).[6] The other case is equally off base: there, the defendant itself hosted multi-day seminar workshops for trainees that sanctioned entities allegedly attended and

[5] The Amended Complaint makes no allegation whatsoever about how knowledge of the violation would influence the Government's decision to award the contract. The absence of such an allegation is telling and "very strong evidence that the misrepresentation was not material." *See United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 490 (3d Cir. 2017) (holding that "where a relator does not plead that knowledge of the violation could influence the Government's decision to pay, the misrepresentation likely does not have a natural tendency to influence payment as required by the [FCA]") (quotation marks citation and omissions omitted).

[6] Citations to "Ex. _" refer to the exhibits to the accompanying Declaration of Harry Sandick.

participated in. *See United States v. American Univ. of Beirut*, No. 14-CV-6899 (S.D.N.Y. Mar. 30, 2017). (Ex. B). Christian Aid is not alleged to have had any direct contact with any sanctioned entities or even knowledge of sanctioned entities participating in the program.

Lacking any allegations or supporting precedent, TZAC needed to confront the only evidence in the record about the Government's response to similar misrepresentations: the current USAID agreement, which expressly permits USAID to contract with entities who cannot make the anti-terrorism certification. TZAC's only response is to say that this new language did not appear in the certification signed by Christian Aid (TZAC Br. 6). Although this is true, TZAC offers no reason to think that a fact that was not at all disqualifying in 2020 would somehow have been strictly disqualifying in 2017. Common sense suggests otherwise.

Equally meritless is TZAC's argument that the third *Strock* factor—that the alleged noncompliance with the condition was substantial—favors a finding of materiality. In TZAC's view, any allegation that Christian Aid provided material support to a sanctioned entity amounts to "substantial" noncompliance. This cannot be reconciled with *Strock*, which holds that noncompliance is "substantial" when the "performance [of the contractual condition] by the [defendant] is at the very heart of the" contract. *Strock*, 982 F.3d at 65.[7]

Here, TZAC cannot dispute that the core aim of the USAID grants was humanitarian relief and that the alleged conduct did not undermine (or even affect) that central interest.[8] Nor

[7] Misapprehending this issue, TZAC cites a pair of immigration removal cases—neither of which construed, discussed, or involved the FCA—that examined an issue that has no relevance here: whether the Board of Immigration Appeals had properly concluded that an immigration applicant had provided "material support" within the meaning of immigration statutes. *See Hincapie-Zapata v. U.S.,* 977 F. 3d 1197 (11th Cir. 2020); *Rayamajhi v. Whitaker*, 912 F.3d 1241 (9th Cir. 2019). As noted above, "material support" for terrorism is a different legal standard than "materiality" under the FCA.

[8] USAID's own public statements makes this clear: grants " deliver assistance across all regions and sectors in which [USAID] work and to promote inclusive economic growth, strengthen health and education at the community level, support civil society in democratic reforms and assist countries

can TZAC plausibly allege that the anti-terrorism certification was at the "very heart" of the USAID grants. At most, the allegations depict that, without Christian Aid's actual knowledge, a portion of Christian Aid's grant award to LPHU for a single training program for disabled people was siphoned to JAB. Aside from this single isolated event, there are no allegations of any other malfeasance by Christian Aid. There is no reason to think—and TZAC does not plausibly allege—that USAID would have regarded the allegations here as anything other than "minor or insubstantial." *See Strock*, 982 F.3d at 65.

C. TZAC Ignores Fed. R. Civ. P.'s 9(b) Pleading Requirement

In its opening brief, Christian Aid recounted how the Amended Complaint suffers from a fatal defect by falling short of Rule 9(b)'s stringent requirement that fraud be pled with particularity. In particular, the pleading never alleges the foundational conduct on which this FCA claim is premised: how Christian Aid allegedly provided material support to terrorism and why the anti-terrorism certification was fraudulent when executed. (Opening Br. 19).

In response, TZAC says nothing at all. Not even a fleeting attempt is made to mount a defense based on the complaint or otherwise. Electing not to make any argument constitutes waiver. *See Kao*, 2018 WL 501609 at *5. Apart from waiver, the Amended Complaint should be dismissed because a plaintiff must explain with particularity how a defendant acted fraudulently. Absent these allegations, the Court should dismiss. *See 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).

recovering from disasters." *USAID: How to Work With USAID*, https://www.usaid.gov/partnership-opportunities/ngo (last updated Dec. 9, 2019).

II. TZAC HAS NOT ALLEGED A BASIS FOR PERSONAL JURISDICTION

TZAC takes a shotgun approach to personal jurisdiction and also backtracks on concessions made previously in this litigation. First, TZAC seeks to revive an argument that it previously abandoned: that Christian Aid consented to this Court's jurisdiction. (Dkt. No. 19 at 2.) In any event, TZAC cannot identify any forum selection clause or jurisdictional consent clause within the USAID contracts. USAID, as the drafter, could have, but did not, include such a clause.[9] Instead, TZAC points to a clause that affords USAID the "right to seek judicial enforcement of these assurances." (TZAC Br. 9). Nothing therein provides that the parties to this action consented to this or any other particular court's jurisdiction.

Second, TZAC claims that Christian Aid's alleged isolated contacts with the United States here are enough. But TZAC also concedes that just one of the alleged contacts—the USAID contract—is relevant to the pending FCA claim. All of the others have nothing to do with this lawsuit. (Opening Br. 24 n. 14). As TZAC's own authority makes clear (TZAC Br. 9), such contacts will only suffice "if the relevant cause of action arises from [those contacts]." *See Bank Brussells Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 787 (2d Cir. 1999).

Specific jurisdiction then, hinges on a single contact with the United States, the USAID contract. To TZAC, that contract—one not alleged to have been negotiated, executed or performed in the United States, nor expressly governed by United States law—is enough,

[9] *See El Educ., Inc. v. Pub. Consulting Grp., Inc.*, No. 15-CV-9060 (DAB), 2016 WL 5816994, at *5 (S.D.N.Y. Sept. 23, 2016) (where sophisticated drafters omit a term from a contract, "the inescapable conclusion is that the parties intended the omission."). Any inference should be drawn against the Government. *See Nat'l City Golf Fin. v. Higher Ground Country Club Mgmt. Co., LLC*, No. 06 CIV. 7784(GEL), 2008 WL 904728, at *4 (S.D.N.Y. Apr. 3, 2008) ("[A] contract is to be construed against the party who drew it."); *Discover Growth Fund v. 6D Glob. Techs. Inc.*, No. 15-CV-7618 (PKC), 2015 WL 6619971, at *5, n. 8 (S.D.N.Y. Oct. 30, 2015) ("[A] normal rule of contractual construction is that when one party is responsible for the drafting of an instrument, absent evidence indicating the intention of the parties, any ambiguity will be resolved against the drafter.") (citation, quotation marks, and omissions omitted).

because even a "single transaction" can be sufficient for personal jurisdiction. (TZAC Br. 9.) Yet, the case TZAC cites in support of that proposition construed a long-arm statute—N.Y. CPLR § 302(a)—that TZAC does not even invoke and in fact expressly disclaimed. (Dkt. No. 15 at 2.) Even if relevant, TZAC only makes boilerplate allegations that the "transacting business" prong construed in that case is satisfied here.[10] *See* N.Y. CPLR § 302(a)(i).[11] Nor does TZAC cite any case upending the well-settled law that 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). "Common sense," which TZAC raises in the absence of any authority, actually undercuts TZAC's position. A ruling for TZAC would confer jurisdiction over any non-U.S. entity who agreed to provide services to the U.S. government anywhere in the world.

Third, TZAC never disputes Christian Aid's argument that the exercise of personal jurisdiction would be unreasonable here. As noted, offering no objection means this Court should deem this issue waived. *See SPV Osus Ltd. v. UniCredit Bank Austria*, No. 18-CV-3497 (AJN), 2019 WL 1438163, at *6 (S.D.N.Y. Mar. 30, 2019) (plaintiff waived jurisdictional argument by not addressing it on motion to dismiss); *see Kao*, 2018 WL 501609 at *5.

[10] For example, TZAC does not allege that Christian Aid is a New York entity, Christian Aid negotiated, executed or performed the grants in New York, or 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).

[11] The remaining bases for jurisdiction under that statute are not viable: 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).

III. TZAC SHOULD NOT BE GRANTED LEAVE TO AMEND

For a second time, TZAC asks this Court for leave to amend its complaint. This request is unaccompanied by any legal authority, any proposed basis for the amendment, any proposed amended complaint, or any insight into the amendment's merit. Because TZAC "gives no clue as to how the complaint's defects would be cured," this Court should deny the request. *See Loreley Fin. (Jersey) NO. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 190 (2d Cir. 2015); *Food Holdings Ltd. v. Bank of Am. Corp.*, 423 Fed. App'x 73, 76 (2d Cir. 2011) (summary order) (affirming denial of leave request made on final page of brief "in boilerplate language and without explanation as to why leave to amend was warranted."). Christian Aid, a global nonprofit, has already expended substantial resources briefing this motion, and it should be spared from having to allocate even more resources to defend a legally deficient claim.

CONCLUSION

For the foregoing reasons, the Amended Complaint should be dismissed, with prejudice and without leave to amend, for failure to state a claim, or, in the alternative, for lack of jurisdiction.

Dated: March 26, 2021
New York, New York

By: _____

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