21-1542

To Be Argued By:
HARRY SANDICK

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA EX REL. TZAC, INC.,

Plaintiff-Appellant,

ABC,

Plaintiff,

—against—

CHRISTIAN AID,

Defendant-Appellee,

DEF,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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FRAP 26.1 Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the undersigned counsel for Defendant-Appellee Christian Aid states that it has no parent corporation nor does any publicly held company own 10% or more of its stock.

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QUESTION PRESENTED

Whether the district court correctly concluded that it lacked personal jurisdiction over Christian Aid, a non-profit aid organization which is neither incorporated nor headquartered in the United States, and about which TZAC made no plausible allegations of suit-related conduct in the United States.

STATEMENT OF THE CASE

For more than 75 years, Christian Aid has been a leading provider of humanitarian aid. Headquartered in London and working with organizations around the globe, Christian Aid has funded initiatives that have impacted millions of people. In 2016 and in 2017, the United States Agency for International Aid and Development ("USAID") awarded grants to Christian Aid in support of its aid work in other countries.

In 2017, Christian Aid was sued in federal court by a plaintiff-relator for alleged violations of the False Claims Act relating to a false certification purportedly made by Christian Aid in its USAID grant applications. Christian Aid was sued in the Southern District of New York in a complaint that contained no factual allegations connecting Christian Aid to the United States. For example, the complaint nowhere alleged:

- that Christian Aid negotiated or entered into its grant agreements within the United States, or even met with USAID in the United States;

- that Christian Aid's grant agreements involved performing any work within the United States;
- that Christian Aid consented to jurisdiction in the United States in the grant agreements or otherwise; or
- that Christian Aid's alleged violations of the certifications occurred in the United States.

Despite being given an opportunity to amend its complaint, the plaintiff-relator—an organization named The Zionist Advocacy Center ("TZAC") that has repeatedly filed actions against nonprofit organizations that provide humanitarian aid in the Middle East—was unable to carry its burden of establishing jurisdiction over Christian Aid. As a result, the district court dismissed the Amended Complaint for a lack of personal jurisdiction, bringing to an end this burdensome case.

Judge Castel explained his reasoning in a 10-page written decision that carefully examined the allegations in the Amended Complaint and the contentions made by the parties. Judge Castel held that exercising jurisdiction over Christian Aid would deprive Christian Aid of its right to due process, as TZAC failed to establish Christian Aid's minimum contacts with the United States. The district court recognized that there was no general jurisdiction over Christian Aid, a U.K.-based non-profit organization. The district court also concluded that specific jurisdiction did not exist: there was no suit-related connection between Christian Aid and the United States. The district court also recognized that if USAID wished

to compel its grantees to litigate disputes in the United States, it has the power to include a consent to jurisdiction provision in the USAID grant agreement.

On appeal, TZAC presents largely the same arguments that were rejected by the district court. This presents a challenge for TZAC, as the Amended Complaint is almost devoid of allegations that tie together Christian Aid, the alleged violation, and the United States. Facing this deficit, TZAC has manufactured a new allegation for the appeal—that Christian Aid "reached out" to USAID in the United States, and for this reason, there is jurisdiction. This new, conclusory allegation of "reaching out" should be ignored. It is found nowhere in the Amended Complaint, nor is there any explanation of what Christian Aid actually did. This leaves TZAC with a solitary contact connecting this action to the United States—that Christian Aid received grants from USAID—and a theory of jurisdiction which the Supreme Court has specifically rejected. Without any basis for specific jurisdiction, this Court should affirm the district court's dismissal of the Amended Complaint for lack of personal jurisdiction.

STATEMENT OF FACTS

A. The Parties

1. *Christian Aid*

Christian Aid is a not-for-profit international aid organization that is headquartered in London. (A. 19 (¶ 2)). Churches in the United Kingdom and Ireland established Christian Aid in 1945 to meet the staggering humanitarian needs of refugees in the aftermath of World War II. For the last 75 years, Christian Aid has been guided by its founding belief that "poverty can be ended based on [its] understanding of scripture and the work of a creative, loving God."[1] Christian Aid funds humanitarian relief organizations that work to curb injustice, eradicate poverty, and channel resources to marginalized communities. Millions of people around the world have benefitted from Christian Aid's work.

2. *TZAC*

TZAC is an advocacy organization that has served as a relator in several *qui tam* lawsuits brought against international nonprofit organizations that operate in the Middle East. For example, TZAC brought a *qui tam* action against The Carter Center—former President Jimmy Carter's non-profit focused on peacemaking and humanitarian relief. Filed in 2015 and dismissed in 2018, that

[1] *Christian Aid: What We Believe*, CHRISTIAN AID, https://www.christianaid.org.uk/our-work/what-we-believe (last visited December 3, 2021).

suit rested on allegations that at a meeting of Palestinian political parties held as part of its peacemaking efforts, The Carter Center served cookies and beverages to the meeting's participants, which included members of Hamas. *See U.S. ex rel. TZAC, Inc. v. The Carter Center, Inc.*, No. 15-cv-02001 (D.D.C. 2015), Dkt. Nos. 22-23.

TZAC is a registered agent of a foreign principal, the International Law Forum. The International Law Forum is an Israeli entity that receives funding from the Government of Israel.[2]

B. TZAC's Allegations In The Amended Complaint

TZAC alleges that Christian Aid made false certifications in connection with the USAID grants awarded in 2016 and 2017.[3] (A. 21 (¶¶ 8-9)). In particular, TZAC alleges that Christian Aid twice falsely certified 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[.]" (A. 21 (¶ 10)).

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[2] *See* 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.*

[3] Unless otherwise noted, the facts set forth in this section are taken from the Amended Complaint and accepted as true solely for purposes of this appeal.

What Christian Aid actually did to render its certifications false is not explained with clarity in the Amended Complaint. TZAC never alleges that Christian Aid engaged in the direct or knowing funding of terrorism. Rather, the Amended Complaint alleges that the Lebanese Physical Handicapped Union ("LPHU"), a Christian Aid grantee that provides social services to the disabled in Lebanon, organized a vocational program in 2015 for disabled individuals. (A. 21 (¶12)). The Amended Complaint says that the LPHU—not Christian Aid—"was well aware that Jihad al Binaa [JAB]," had been hired" to "perform" the vocational training. (*Id.*). JAB has been designated as a terrorist organization by the United States government.

The Amended Complaint concedes that it was LPHU, and not Christian Aid, that ran the vocational training classes, stating that they were "overseen by LPHU's Activity Coordinator." (A. 21 (¶ 12c)). There is no allegation in the Amended Complaint that Christian Aid took any action to hire JAB, or even knew that JAB had been hired by LPHU. The Amended Complaint nonetheless asserts that Christian Aid should be "directly chargeable" for LPHU's knowledge, without providing any supporting detail. (A. 21 (¶ 12f)).

Any funding provided by Christian Aid was made to LPHU—not to JAB—and only for the organizing of "vocational training activities," not for terrorism. (*Id.*). The Amended Complaint says nothing about the terms on which

Christian Aid made the grant to LPHU, or that the grant involved any USAID funding (it did not). Christian Aid is not alleged to have earmarked money for the training classes, organized the training classes, or hired anyone—including JAB—for the training classes. The Amended Complaint never even alleges that Christian Aid knew of JAB's involvement in the program when it signed the USAID certifications.

In addition, all of the conduct that rendered the certifications allegedly false occurred outside the United States, primarily in Lebanon. (A. 22 (¶ 12)). There are no allegations that Christian Aid ever conducted programs in the United States as part of its receipt of USAID grants or otherwise. According to the Amended Complaint, the negotiation, execution, and submission of the anti-terrorism certifications occurred outside the United States. (A. 22 (¶ 10a)). Christian Aid signed one certification in Nairobi and one in London. (*Id.*). Nor is there any allegation that the grants contained a choice of forum or consent to jurisdiction provision, or that the receipt of USAID funds was contingent on Christian Aid agreeing to resolve any disputes in the United States.

C. TZAC Files A Complaint And DOJ Declines To Intervene

Based on the foregoing, TZAC filed this *qui tam* suit in 2017 in the United States District Court for the Southern District of New York, alleging a violation of the False Claims Act, 31 U.S.C. § 3729 *et seq*. TZAC sued Christian

Aid under this fraud statute despite its belated acknowledgment that its lawsuit "arises out of a breach of [] contract." (TZAC Br. 4). *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S.176, 194, 136 S. Ct. 1989, 2003, 195 L.Ed.2d 348 (2016) (FCA is not a "vehicle for punishing garden-variety breaches of contract"); *see also United States ex rel. Ladas v. Exelis, Inc.*, 824 F.3d 16, 26 (2d Cir. 2016) (FCA is not a general enforcement device for federal contracts).[4]

On September 9, 2020, after approximately three years of investigation by the U.S. Attorney's Office for the Southern District of New York, the government declined to intervene in the lawsuit and left TZAC to press forward alone. After the declination and the subsequent unsealing of the *qui tam* complaint, Christian Aid requested the district court's permission to file a motion to dismiss TZAC's complaint pursuant to Federal Rules of Civil Procedure 9(b) (for a failure to plead with the requisite particularity), 12(b)(2) (for lack of personal jurisdiction), and 12(b)(6) (for failure to state a claim). (A. 2).

[4] This makes good policy sense as other courts have observed. *See, e.g.*, *United States v. Kellogg Brown & Root*, 800 F. Supp. 2d 143, 155 (D.C. Cir. 2011) (quoting *United States ex rel. Owens v. First Kuwaiti Gen. Trading & Constr. Co.*, 612 F.3d 724, 726–27 (4th Cir. 2010)) ("To blur the distinction between fraud and breach of contract, then, is to contradict the purpose of the statute. 'Allowing [the FCA] to be used in run-of-the-mill contract disagreements ... would burden, not help, the contracting process, thereby driving up costs for the government and, by extension, the American public.' ").

Faced with Christian Aid's proposed motion to dismiss, TZAC requested leave to amend its complaint, which the district court granted. (A. 3). After again seeking permission from the district court, Christian Aid moved to dismiss the Amended Complaint. (A. 3).

D. The District Court Dismisses The Amended Complaint

On June 9, 2021, the district court granted Christian Aid's motion to dismiss for lack of personal jurisdiction. (A. 77-86). In the absence of jurisdiction, the district court did not reach the other arguments presented by Christian Aid in support of dismissal.

First, the district court observed that TZAC bears the burden of pleading allegations sufficient to prove personal jurisdiction. (A. 78-79). As the district court explained, "[o]n a motion to dismiss for lack of personal jurisdiction, plaintiff bears the burden of demonstrating the court's personal jurisdiction over the defendant." (A. 78 (quoting *Penguin Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 34-35 (2d Cir. 2010))). While cognizant that courts must "construe[] any pleadings and affidavits in the light most favorable to the plaintiff and resolve[] all doubts in plaintiff's favor," the district court observed that "courts should not draw argumentative inference in plaintiff's favor or accept as true a legal conclusion couched as a factual allegation." (A. 79).

Drawing again on this Court's well-settled precedent, the district court identified the three requirements for personal jurisdiction:

> First, the plaintiff's service of process upon the defendant must have been procedurally proper. Second, there must be a statutory basis for personal jurisdiction that renders such service effective. Third, the exercise of personal jurisdiction must comport with due process principles. *Waldman v. Palestinian Liberation Organization*, 835 F.3d 317, 327 (2d Cir. 2016) (quoting *Licci ex. Rel. Licci v. Lebanese Canadian Bank, SAL*, 674 F.3d 80, 59-60 (2d Cir. 2012).)

(A. 80).

The district court concluded that the first two of the three requirements were satisfied. (*Id.*). However, it held that the third requirement—that jurisdiction comport with due process—was unmet. (*Id.*). The district court explained:

> [T]here are two parts of the due process test for personal jurisdiction. . . the minimum contacts inquiry and the reasonableness inquiry. *Waldman*, 835 F.3d at 331 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945) and *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 127 (2d Cir. 2002)).
>
> The minimum contacts inquiry requires that the court determine whether a defendant has sufficient minimum contacts with the forum to justify the court's exercise of personal jurisdiction and the reasonableness inquiry requires the court to determine whether the assertion of personal jurisdiction over the defendant comports with traditional notions of fair play and substantial justice.

(A. 81).

Here, the Amended Complaint failed the threshold minimum contacts test.[5] First, the district court held that Christian Aid was not subject to general jurisdiction in the United States. (A. 83). The district court reasoned that Christian Aid—a charity headquartered in, and organized under, the laws of the United Kingdom—is not "at home" in the United States. (*Id.*). In its analysis, the district court evaluated whether any of Christian Aid's other alleged activities in the United States—"occasional business trips to New York, membership in the Act Alliance, and taking unspecified steps to facilitate the creation of Inspiraction, [a] New York based nonprofit"—made this the "exceptional" case that justified the exercise of general jurisdiction where an entity is not "at home." (*Id.*). They did not. All of these "alleged facts f[e]ll far short of the constant and pervasive contacts justifying the exercise of general jurisdiction." (*Id.*).

Second, the district court held that Christian Aid was not subject to specific jurisdiction. (A. 83-84). The district court observed that the "suit related contact between Christian Aid and the United States is minimal." (*Id.*). The court explained:

> This is an FCA case, so the suit-related contacts pertain to the making of the false claim. Here, the Amended Complaint is sparse on details. No facts regarding the

[5] Because the only cause of action here was a federal cause of action, implicating the Fifth Amendment's Due Process Clause, the district court analyzed Christian Aid's contacts with the United States not the State of New York. (A. 82 n. 1).

> negotiation, discussion, or government signing of the certifications have been pleaded. The allegedly fraudulent [certifications] were signed by Christian Aid executives in cities outside of the United States. The alleged terrorist-affiliated program was put on in Lebanon.

(A. 84).

TZAC's other allegations that did involve the United States did not have anything to do with the alleged false claim. (A. 84) (Christian Aid's "membership in the Act Alliance, founding the nonprofit, attending business meetings, and lobbying have nothing to do with the present suit."). Not only that, the district court also concluded that the Amended Complaint's allegations were insufficient under the "effects test" because there was no allegation that "Christian Aid actually knew about the association with [JAB], [knew] how much money it directly or indirectly gave to the organization or whether the support was earmarked for use in specific schemes." (A. 84).

The district court also rejected TZAC's argument that the certification's clause providing that "the United States will have the right to seek judicial enforcement of these assurances" functioned as a forum selection clause. (A. 84). The court reasoned that "USAID is an agency with a 2019 budget of over $16 billion dollars for organizations like Christian Aid. Had the agency wished to

ensure jurisdiction over any suits arising out of the certifications, it could have included the forum selection clause." (A. 85).[6]

Holding that the Amended Complaint did not establish the threshold showing of minimum contacts to support jurisdiction, the district court did not reach the second step of the Due Process inquiry and examine whether exercising jurisdiction over Christian Aid would be reasonable. (A. 85). The district court also denied TZAC's requests for discovery and for an evidentiary hearing, which were unwarranted because Christian Aid made no factual submissions and TZAC provided no explanation for how this would remedy the Amended Complaint's jurisdictional defects. (*Id*.).

The district court also denied TZAC's request to further amend the complaint. (A. 86). For three years, TZAC had the opportunity to cure any jurisdictional defects but did not, even after Christian Aid identified those defects in two-pre-motion letters and a motion to dismiss.

This appeal followed.

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[6] Nor has USAID added a consent to jurisdiction clause to its standard form grant agreement in the several months since the District Court's ruling. USAID, CERTIFICATIONS, ASSURANCES, REPRESENTATIONS AND OTHER STATEMENTS OF THE RECIPIENT: A MANDATORY REFERENCE FOR ADS CHAPTER 303 §4, (December 1, 2021), available at https://www.usaid.gov/sites/default/files/documents/303maa.pdf.

SUMMARY OF ARGUMENT

The district court correctly held that it lacked personal jurisdiction over Christian Aid. On appeal, TZAC only contends that there was specific jurisdiction over Christian Aid, abandoning its arguments based on consent and general jurisdiction presented to the district court. As the district court held, there is no specific jurisdiction over Christian Aid.

TZAC argues that specific jurisdiction exists because Christian Aid "reached out" to USAID. This newly presented assertion—made roughly seven times in TZAC's 12-page brief—appears nowhere in the Amended Complaint or the proceedings below. No factual allegations about Christian Aid's application or negotiation over the terms of the grant appear in the Amended Complaint, except that Christian Aid signed the certifications outside of the United States. Nor can the only suit-related contact with the United States—a grant from USAID to Christian Aid—create specific jurisdiction. The Supreme Court has expressly recognized that a contract with an in-forum party does not make the out-of-forum party subject to specific jurisdiction in the forum state. With the overwhelming bulk of suit-related contacts occurring internationally, and with the sole relevant U.S. contact legally deficient, the district court correctly concluded that it could not exercise personal jurisdiction over Christian Aid. The district court faithfully applied the law of this Circuit and its ruling should be affirmed.

In addition, the district court did not need to address the question of whether the exercise of jurisdiction over Christian Aid would be reasonable. If this Court reaches the issue, it should conclude that it would be unreasonable to force Christian Aid to litigate this dispute in the courts of the United States, a forum in which it never agreed to litigate and with which it has had no contacts apart from the grants identified in this lawsuit.

ARGUMENT

I. The District Court Correctly Held That Christian Aid Did Not Have The Minimum Contacts Required For Specific Jurisdiction

A. Applicable Law

Personal jurisdiction can either be general or specific. General jurisdiction exists 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). Specific jurisdiction, by contrast, only allows a court to "exercise[] personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." *Id.* Here, TZAC does not argue that general jurisdiction exists—nor could it given that Christian Aid is a British nonprofit with no activities in the United States. Instead, TZAC relies solely upon a specific jurisdiction theory.

The specific jurisdiction inquiry "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).

Here, the forum contacts that must be evaluated are Christian Aid's contacts with the United States. When a plaintiff asserts a federal cause of action against a foreign defendant, the Due Process Clause of the Fifth Amendment acts as a limitation on the federal court's exercise of jurisdiction. *See Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974). To decide whether the *de minimis* contacts alleged here are sufficient for specific jurisdiction, this Court must evaluate the suit-related contacts Christian Aid had with the United States. *See id*. ("It is not the State of New York but the United States which would exercise its jurisdiction over [defendant]"); *Waldman v. Palestinian Liberation Organization*, 835 F.3d 317, 335 (2d Cir. 2016) (analyzing nationwide contacts in case asserting federal cause of action against foreign defendant).

Under Federal Rule of Civil Procedure 12(b)(2), the plaintiff bears the burden of making "a prima facie showing that [personal] jurisdiction exists" and thus must present "an averment of facts that, if credited, would suffice to establish jurisdiction over the defendant." *Charles Schwab Corp v. Bank of America Corp.*,

883 F.3d 68, 81 (2d Cir. 2018) (quotation marks and alteration omitted). While the Court should construe the record "in the light most favorable to the plaintiff," *Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 85 (2d Cir. 2013), it need not credit "conclusory" statements and allegations, which are insufficient to make out a prima facie showing of personal jurisdiction. *Jazini by Jazini v. Nissan Motor Co.*, 148 F.3d 181, 185 (2d Cir. 1998); *see also Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 793 (2d Cir. 1999) ("conclusory statements" are insufficient to support jurisdiction).

B. Standard of Review

The district court's dismissal on jurisdictional grounds is reviewed *de novo*. *Licci v. Lebanese Canadian Bank*, 732 F.3d 161, 167 (2d Cir. 2013). Any underlying factual conclusions are reviewed for clear error. *See Troma Entm't, Inc. v. Centennial Pictures Inc.*, 729 F.3d 215, 217 (2d Cir. 2013).

C. There Is No Specific Jurisdiction Over Christian Aid

The district court correctly declined to exercise specific jurisdiction over Christian Aid. As that court recognized, in a False Claims Act, "the suit-related contacts pertain to the making of the false claim." (A. 84). Here, the "'suit-related contact' between Christian Aid and the United States is minimal." (A. 83-84).

Almost all of the alleged suit-related conduct occurred outside the United States. The certifications were made by Christian Aid in London and Nairobi. (A. 22 (¶ 10a)). The aid work to be undertaken pursuant to those grants was to be performed 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). Moreover, the alleged training classes that are at the core of the dispute occurred in Lebanon. In fact, the only relevant contact connecting the suit-related conduct and the United States is that Christian Aid entered into grants with a component of the United States government, USAID. But this fact alone cannot "automatically establish sufficient minimum contacts." *See Burger King v. Rudzewicz*, 471 U.S. 462, 478 (1985) (contract with out-of-state party cannot by itself establish minimum contacts with the counterparty's home forum); *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).

This conclusion makes sense here. As observed by the district court, "[n]o facts regarding the negotiation, discussion, or government signing of the certifications have been pleaded." (A. 84). Christian Aid personnel are not alleged to have met, contacted, or conferred with USAID in the United States. Nor are

there any allegations that Christian Aid directed any of its services, products, or even sent invoices to the United States. Beyond the fact of receiving a USAID grant, no allegations tie Christian Aid's suit-related conduct to the United States.[7]

In the absence of any suit-related allegations in the Amended Complaint that would support specific jurisdiction, TZAC now chooses to invent an entirely new charge: that Christian Aid "reached out" to USAID. (TZAC Br. 3-4, 6-7). This oft-repeated phrase in TZAC's brief on appeal is found nowhere at all in the Amended Complaint, and it should be ignored. To do otherwise would be tantamount to allowing TZAC to amend its pleading on the fly. The district court already exercised its discretion to deny TZAC a second opportunity to amend its complaint, after having failed to remedy its insufficient jurisdictional allegations. TZAC has waived any argument that this was error by failing to raise the argument in its opening brief. *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005) ("[A]rguments not made in an appellant's

[7] As the district court properly concluded, TZAC's allegations about Christian Aid's membership in the Act Alliance, founding a New York nonprofit, and taking occasional business trips to New York have "nothing to do with the present suit." (A. 84). Therefore, they cannot serve as a basis for exercising specific jurisdiction here. *See SPV Osus, Ltd.*, 882 F.3d at 343. In any event, these contacts fail for another reason: they are all conclusory. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000). TZAC's claim that Christian Aid "regularly transact[ed]" business in the United States is baseless. (TZAC Br. 3).

opening brief are waived even if the appellant pursued those arguments in the district court or raised them in a reply brief.").

Left with no factual basis to support its argument, TZAC leans heavily on *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).[8] TZAC's reliance is misplaced. First, *Burger King*—contrary to what TZAC implies—states that "an individual's contract with an out-of-state party *alone* can[not] automatically establish sufficient minimum contacts in the other party's home forum." 471 U.S. at 478 (emphasis in original). Here, all TZAC has identified in support of jurisdiction is the USAID grant. As *Burger King* makes plain, that is insufficient to establish Christian Aid's minimum contacts with the United States. To allow such an attenuated contact to be used as a snare for jurisdiction is precisely what the Supreme Court has instructed that due process prohibits. *Walden v. Fiore*, 571 U.S. 277, 286 (2014) ("Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on random, fortuitous, or attenuated contacts he makes by interacting with other persons affiliated with the State.) (citation and quotation marks omitted).

[8] TZAC also cites *Waldman v. Palestine Liberation Organization*, 835 F3d 317 (2d Cir. 2016), but that case is of no help: this Court held in *Waldman* that there was no personal jurisdiction under Rule 4(k)(1)(C) because the suit-related conduct occurred outside the U.S. *Waldman*, 835 F.3d at 337. This same is true here and so *Waldman* supports affirming dismissal for lack of jurisdiction.

Second, *Burger King*'s facts are distinguishable from the facts alleged here. In *Burger King*, there were substantial connections between the defendant, the suit, and the forum state. For example, the defendant "deliberately reached out" and negotiated with a corporation based in the forum state. No such allegation is made in the Amended Complaint. Also, the defendant in *Burger King* transacted business by mail and wire communications with the corporation based in the forum state. 471 U.S.at 481. Again, no such allegation is made here. In *Burger King* too there was a physical tie between the defendant, the suit, and the forum state; the defendant's business partner even attended a training class directly related to the dispute in the forum state. No physical ties related to the suit exist here.

Most of all, in *Burger King* there was a choice-of-law provision that mandated that disputes be resolved according to the forum state's law and evidence, and the defendant purposefully availed himself of the benefits and protections of the forum state's laws. *Id*. There is no clause here subjecting Christian Aid to jurisdiction in the United States or applying U.S. law, nor is there any purposeful availment of the sort that existed in *Burger King*. TZAC's errant interpretation of *Burger King* would eviscerate that case's core: that "the constitutional touchstone [of Due Process] remains whether the defendant purposefully established minimum contacts in the forum State." *See id*. at 474

(internal quotation marks and citation omitted). Under TZAC's view, a mere contract would suffice, even without any allegation of other contact with the forum state. This is the opposite of what *Burger King* holds.[9]

With failing factual and legal arguments, TZAC puts forth a long-shot policy argument.[10] TZAC speculates that USAID would never have entered into a contract with a grantee unless it knew that it could enforce the contract in the courts of the United States. This misses the mark for several reasons. First, this argument presumes that USAID has no means to address grant disputes without recourse to the False Claims Act. That is untrue. If USAID believes that a grantee has violated its grant agreement, it has a range of remedies. USAID can decline to renew an existing contract. USAID can partially withhold future funds owing under a contract or disallow costs incurred by the grantee (effectively imposing a financial penalty on the grantee). USAID can terminate the contract, or if it deems

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[9] The same is true with *McGee v. Int.'l Life Ins. Co.*, 355 U.S. 220 (1957). There, the Supreme Court concluded the "suit was based on a contract which had *substantial connection* with [the forum] State." *See McGee*, 355 U.S. at 223 (emphasis added). As discussed above, no "substantial connection" is alleged here—the only factor supporting jurisdiction is that one party to the contract is located in this jurisdiction, while all other relevant events occurred outside of it.

[10] In the absence of controlling or even persuasive legal authority in support of its argument, TZAC relies on a law firm blog post summarizing the district court's opinion. (TZAC Br. 7). That blog post did not criticize the district court's decision; rather, its authors affirmed that the core principles of civil litigation, such as jurisdiction, are sometimes the "key to dismissing a relator's suit."

the violation to be sufficiently serious, even move to suspend or debar the grantee from receiving future funding awards from USAID. If a grantee is dissatisfied with any of these remedies, it would be forced to sue USAID, presumably in the United States. USAID is far from helpless in the face of a breach of contract.

Second, USAID does not need the federal courts to do for it what it has elected not to do for itself. As the district court observed, USAID has a multi-billion-dollar budget that it uses to fund initiatives around the globe. USAID is more than capable of deciding on what terms it will contract with grantees. Should USAID desire in the future to compel grantees with no connection to the United States to be amenable to suit in federal court over disputes stemming from those grants, USAID can include a consent to jurisdiction or forum selection clause as the district court noted if it wishes to include one and if USAID grantees are willing to accept it. (A. 85). Furthermore, it is not the province of the courts to rewrite the terms of the parties' contracts, or to imply terms that the parties elected not to include. *See Fisher v. SD Prot., Inc.*, 948 F.3d 593, 606 (2d Cir. 2020) (courts does not have the authority to rewrite contract provisions); *see also Utica Mut. Ins. Co. v. Fireman's Fund Ins. Co.,* 957 F.3d 337, 344 (2d Cir. 2020) ("a court is not free to alter [a] contract") (citations omitted). In the absence of a consent to jurisdiction clause, USAID "must comport with the due process limitations on hauling a party into a distant forum without its consent." (A. 85).

In essence, TZAC's argument is that any business that elects to enter into a contract with the United States government must accept being sued in the courts of the United States, even if that business never consented to jurisdiction and had no contacts with the United States. This Court should not accept TZAC's sweeping proposition, which is unsupported by law and inconsistent with due process.

II. Exercising Jurisdiction Over Christian Aid Would Not Be Reasonable

A. Applicable Law

If the defendant's contacts with the forum state rise to the minimum level required by due process, the defendant still may defeat jurisdiction by presenting a "case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477.

Courts must weigh several factors in evaluating this "reasonableness" requirement of due process. These include "the burden on the defendant; the interests of the forum State and the plaintiff's interest in obtaining relief[;] 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.' " *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 113-14 (1987) (quoting *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980)). When a

defendant is not located in the United States, " [g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi*, 480 U.S. at 115 (quotation marks omitted).

B. Forcing Christian Aid To Litigate In This Forum Would Not Be Reasonable

TZAC cannot show that Christian Aid had minimum contacts with the United States. Because TZAC could not make that threshold showing, the district court did not even consider the reasonableness prong of the due process inquiry. (A. 85). But if this Court concludes that the district court erred in its minimum contacts analysis, it should still affirm, as the exercise of jurisdiction over Christian Aid would be unreasonable.

Forcing Christian Aid to litigate a case in New York concerning events that occurred on three other continents in at least three different countries—not one of which is the United States—imposes a heavy burden on Christian Aid. It would compel a non-profit organization to litigate in another country with which it has virtually no contacts. *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 164-65 (2d Cir. 2010) (identifying burden on the defendant as the first factor to consider). Compounding that burden is the fact that virtually all of the discovery would occur outside of the United States, rendering this forum an inefficient one for resolution of the controversy. *Id*. It is a particular burden on

Christian Aid to be forced to litigate in the United States, as it is a nonprofit organization.

Protecting defendants—particularly those located abroad—from litigating in distant forums where the burden is heavy is what the Due Process Clause protects against. *See Asahi*, 480 U.S. at 115. Evading that protection here cannot be justified merely because this forum might be more convenient to USAID, particularly when USAID drafted the terms by which it and its grantee would be bound. Rewriting those terms now would be improper for this Court—particularly at the invitation of an organization that is not even a party to the relevant contract. TZAC's claim that USAID agreed to these contracts expecting disputes to be litigated in the United States is impossible to reconcile with the USAID drafter's decision not to include a clause compelling the USAID grantee to consent to jurisdiction.

The other factors are likewise unavailing for TZAC: the courts of the United States have little interest in forcing litigation to occur here when the relevant events occurred entirely outside of the United States, as this would be an inefficient forum. Nor are there particular "substantive social policies" at issue in a case about whether a USAID grantee, using non-USAID funds, funding vocational training classes that, without its knowledge or intent, in some way involved a specially designated national.

Accordingly, should this Court find that the meagre contacts Christian Aid had with the United States suffice for the minimum contacts test, the Court should still dismiss because exercising jurisdiction would offend notions of justice and fair play and therefore violate Christian Aid's right to due process.

CONCLUSION

For the reasons stated above, the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Local Rule 32.1(a)(4), because it contains 6124 words, calculated by the word processing system used in its preparation, and excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: December 3, 2021
New York, New York

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