

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

_____)	
ZACHARY SANDERS,)	
)	
Plaintiff,)	
)	
v.)	
)	Case No. 1:09-CV-03052 (ENV)
ADAM SZUBIN, Director of the Office of Foreign)	
Assets Control; TIMOTHY GEITHNER, Secretary)	
of the U.S.Department of the Treasury;)	
and ERIC H. HOLDER,)	
Attorney General, U.S.)	
Department of Justice,)	
)	
Defendants.)	
_____)	

ANSWER

Defendants, Adam Szubin, Director of the Office of Foreign Assets Control (“OFAC”), Timothy Geithner, Secretary of the United States Department of Treasury, and Eric H. Holder, Attorney General, United States Department of Justice, by and through counsel, hereby answer and otherwise respond to the Complaint for Injunctive and Declaratory Relief (“Complaint”), upon information and belief as follows:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Defendant responds to the numbered paragraphs of plaintiff's Complaint as set forth below.

PRELIMINARY STATEMENT

1. This paragraph contains plaintiff’s characterization of this lawsuit and is not an averment to which a response is required.
2. The first sentence of this paragraph is denied except to admit that the Office of Foreign

Assets Control (“OFAC”) of the United States Department of the Treasury enforces the Cuban Assets Control Regulations, 31 C.F.R. Part 515, under which an economic embargo exists against the nation of Cuba, and specifically denies that “Cuba Travel Restrictions” is an accurate reference to the Cuban Assets Control Regulations. The second sentence of this paragraph contains plaintiff’s characterization of the Cuban Assets Control Regulations, to which no response is required. The Court is respectfully referred to the Cuban Assets Control Regulations, 31 C.F.R. Part 515, for a complete and accurate statement of their contents.

3. Defendants admit the allegations in this paragraph in the first sentence of this paragraph. The allegations in the second sentence of this paragraph are denied except to admit that, in some instances, OFAC sends a document, titled “Requirement to Furnish Information” (“RFI”), to a traveler, requesting information about the recipient’s travel and spending in Cuba, and requesting a response within 20 business days.

4. This paragraph is denied except that defendants admit that a Request For Information (“RFI”) indicates that failure to respond to an RFI may result in the imposition of civil penalties.

5. This paragraph states legal conclusions, to which no response is required. To the extent that a response is deemed necessary to plaintiff’s characterization of the Trading With the Enemy Act, 50 U.S.C. Appx. § 16, the Court is respectfully referred to the statute itself for a complete and accurate statement of its contents.

6. The allegations in this paragraph are denied except to admit that several other economic sanctions enforcement programs administered by OFAC use RFI forms similar to those used by OFAC in enforcing the Cuban Assets Control Regulations.

6. Defendants admit the allegations in this paragraph.

7. Defendants admit the allegations in this paragraph.

8. The allegations in this paragraph are denied except to admit that the civil penalty imposed on Mr. Sanders was based on his failure to respond to the RFI.

9. This contains plaintiff's characterization of, and quotation from, the Cuban Assets Control Regulations, to which no response is required. To the extent a response is deemed necessary, defendants respectfully refer the Court to 31 C.F.R. Part 515, for a complete and accurate statement of the contents of these regulations. Defendants further aver that the specific provision of the regulations cited by plaintiffs, 31 C.F.R. § 515.718, was deleted in 2003 and moved to 31 C.F.R. § 501.746. *See* 68 Fed. Reg. 53640 (Sept. 11, 2003).

10. This paragraph contains conclusions of law to which no response is necessary but, to the extent a response is deemed necessary, defendants deny the allegations in this paragraph.

11. This paragraph contains conclusions of law to which no response is necessary but, to the extent a response is deemed necessary, defendants deny the allegations in this paragraph.

12. This paragraph describes the relief plaintiff seeks, to which no response is required but, to the extent a response is deemed necessary, defendants deny that plaintiff is entitled to any of the relief requested, or to any other relief.

PARTIES

13. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in this paragraph.

14. Defendants admit the allegations in this paragraph.

15. Defendants admit the allegations in the first sentence. The second sentence of this paragraph states legal conclusions, to which no response is required. To the extent that a response to the second sentence is deemed necessary, the allegations in this sentence are denied except to admit that Timothy Geithner is head of the United States Department of Treasury, and carries out the duties

and responsibilities of that office, and that OFAC is an agency within the Department of Treasury. The third sentence of this paragraph contains legal conclusions to which no response is necessary. To the extent that a response to the third sentence is deemed necessary, this paragraph is denied except to admit that the Secretary of the Treasury may designate a Treasury Department official to consider appeals of Administrative Law Judge decisions made in penalty proceedings held pursuant to the Cuban Assets Control Regulations.

16. Defendants admit the allegations in the first sentence of this paragraph. The second sentence of this paragraph contains legal conclusions to which no response is required but, to the extent a response is deemed necessary, Defendants deny the allegations in the second sentence except to admit that Attorney General Eric H. Holder is the head of the United States Department of Justice, and that OFAC can refer cases in which penalties are imposed under the Cuban Asset Control Regulations to the Department of Justice or OFAC can pursue such penalties administratively.

JURISDICTION AND VENUE

17. This paragraph contains plaintiff's averments of jurisdiction, to which no response is required. To the extent that a response is deemed necessary, defendant admits the averments contained in this paragraph.

18. This paragraph contains plaintiff's characterization of the Court's authority to grant the relief sought pursuant to 28 U.S.C. §§ 22201 and 2201, Rules 57 and 65 of the Federal Rules of Civil Procedure, and the Administrative Procedure Act, 5 U.S.C. § 706, to which no response is necessary. To the extent a response is deemed necessary, the Court is respectfully referred to those statutory provisions and Rules for a complete and accurate statement of their contents.

19. This paragraph contains plaintiff's averments of venue, to which no response is required. To the extent that a response is deemed necessary, defendants lack sufficient knowledge or

information to form a belief as to the truth or falsity of the allegations in this paragraph except to admit that no real property is involved in this action.

STATEMENT OF FACTS

20. Defendants admit the allegations in this paragraph.

21. Defendants deny the allegations in this paragraph except to admit that the RFI, attached to the Complaint as Exhibit A, requested that Mr. Sanders provide details about his alleged trip to Cuba, pursuant to OFAC's authority to request such information under 31 C.F.R. § 501.602. The Court is respectfully referred to Exhibit A to the Complaint for a complete and accurate statement of its contents.

22. Defendants deny the allegations in the first sentence of this paragraph except to admit that it contains a quotation from the RFI attached as Exhibit A to the Complaint, to which the Court is respectfully referred for a complete and accurate statement of its contents. Defendants admit the enclosure described in this paragraph contained the language quoted in the second sentence of this paragraph and refer the Court to the enclosure itself for a complete and accurate statement of its contents.

23. Defendants admit the allegations in this paragraph.

24. The allegations in this paragraph are denied except to admit that Mr. Sanders did not respond to the RFI within the extended deadline.

25. The allegations in this paragraph are denied except to admit that OFAC issued a Prepenalty Notice ("PPN") to plaintiff on February 13, 2002, proposing a \$10,000 administrative penalty against Mr. Sanders for failure to respond to the RFI. The Court is respectfully referred to the PPN itself for a complete and accurate statement of its contents.

26. The allegations in this paragraph are denied except to admit that it contains a quotation

from the PPN, to which the Court is respectfully referred for a complete and accurate statement of its contents.

27. This paragraph contains plaintiff's characterization of the PPN issued by OFAC to plaintiff on February 13, 2002, to which no response is required, and the Court is respectfully referred to the PPN itself for a complete and accurate statement of its contents. To the extent a response to the first sentence of this paragraph is deemed necessary, the allegations therein are denied except to admit that the penalty proposed against Mr. Sanders was for failure to respond to the RFI. To the extent that a response to the second sentence of this paragraph is deemed necessary, the allegations contained therein are denied.

28. This paragraph contains plaintiff's characterization of, and quotation from, the Cuban Democracy Act of 1992, Pub. L. No. 102-484, sec. 1710(c)(2), 106 Stat. 2316, 2580-81 (Oct. 23, 1992) (codified at 50 U.S.C. Appx. § 16(b)(3)), to which no response is required but, to the extent a response is deemed necessary, the allegations in this paragraph are admitted. The Court is respectfully referred to the statute itself for a complete and accurate statement of its contents.

29. The allegations in this paragraph are denied except to admit that Mr. Sanders responded to the PPN by letter dated March 10, 2002 addressed to then-Director of OFAC R. Richard Newcomb, and in this letter Mr. Sanders requested an agency hearing and pre-hearing discovery.

30. Defendants admit the allegations in this paragraph.

31. Defendants deny the allegations contained in this paragraph except to admit that, starting in August 2003, OFAC obtained the services of Administrative Law Judges to hear cases involving enforcement of the Cuban Assets Control Regulations, and that an "opportunity for a hearing" before imposition of civil penalties was provided in the Cuban Democracy Act of 1992, Pub. L. No. 102-484, sec. 1710(c)(2), 106 Stat. 2316, 2580-81 (Oct. 23, 1992) (codified at 50 U.S.C. Appx.

§ 16(b)(3)), to which the Court is respectfully referred for a complete and accurate statement of its contents.

32. Defendants deny the allegations contained in the first sentence of this paragraph except to admit that plaintiff requested a hearing in 2002 and OFAC issued an Order Instituting Proceedings in 2005. Defendants admit the allegations in the second sentence.

33. The allegations in this paragraph are admitted, and the Court is respectfully referred to Mr. Sanders' Motion for Summary Disposition, dated May 20, 2005, for a complete and accurate statement of its contents.

34. Defendants admit the allegations in this paragraph.

35. The allegations in this paragraph are denied except to admit that on September 4, 2008, ALJ Schroeder issued a Recommended Decision, to which the Court is respectfully referred for a complete and accurate statement of its contents.

36. Defendants admit the allegations in this paragraph.

37. The allegations in this paragraph are denied except that defendants admit that Mr. Sanders petitioned for review of ALJ Schroeder's decision by the Secretary's Designee, pursuant to 31 C.F.R. § 501.741.

38. Defendants deny the allegations in this paragraph except to admit that OFAC cross-appealed ALJ Schroeder's ruling and that, in its Amended Order Instituting Proceedings, dated June 20, 2005, OFAC sought a \$9,000 penalty. Defendants specifically deny that OFAC sought a \$10,000 penalty on review of the ALJ's decision. Defendants further aver that, although OFAC's petition for review inadvertently indicated that it sought a \$10,000 penalty, in briefing before the Secretary's Designee, OFAC sought a \$9,000 penalty.

39. The allegations in this paragraph are denied except to admit that the Secretary's

Designee limited the parties to addressing in their briefs “the question of whether Judge Schroeder erred in the appropriateness of the amount of the penalty assessed.” The Court is respectfully referred to the Determination and Order for a complete and accurate statement of its contents.

40. The allegations in this paragraph are denied except that defendants admit that, on January 16, 2009, the Secretary’s designee issued a Determination and Order modifying the ALJ’s decision by increasing the penalty to \$9,000, and respectfully refer the Court to the Determination and Order for a complete and accurate statement of its contents.

41. Defendants admit the allegations contained in this paragraph and respectfully refer the Court to the letter described therein for a complete and accurate statement of its contents.

42. This paragraph is denied except to admit that this paragraph refers to 31 C.F.R. §§ 501.702(e) and 501.719(a), to which the Court is respectfully referred for a complete and accurate statement of their contents.

43. Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in this paragraph except that the Department of Treasury defendants admit that they have not sent a response to the letter described in paragraph 42, above.

44. This paragraph contains conclusions of law to which no response is necessary but, to the extent a response is deemed necessary, defendants deny the allegations contained in this paragraph.

45. This paragraph contains conclusions of law to which no response is necessary but, to the extent a response is deemed necessary, defendants deny the allegations contained in this paragraph.

46. Defendants deny the allegations in this paragraph except to admit that the Trading With the Enemy Act, 50 U.S.C. Appx. § 16, provides for criminal fines, imprisonment, or both for certain willful violations of regulations promulgated under that statute, and respectfully refers the Court to the statute itself for a complete and accurate statement of its contents.

47. The allegations in this paragraph contain plaintiff's characterization and legal conclusions, to which no response is required. The Court is respectfully referred to 31 C.F.R. Part 501 for a complete and accurate statement of its contents. To the extent that a response is required, defendants deny the allegations in this paragraph except to admit that it includes an accurate partial quotation of the cited regulation.

48. This first sentence of this paragraph contains conclusions of law, to which no response is required. To the extent a response is deemed necessary, the defendants deny the allegations in this sentence except to admit that in the RFI, OFAC stated that 31 C.F.R. § 501.602 authorized OFAC's request for information. The second sentence of the paragraph contains a quotation from 31 C.F.R. § 501.602, to which no response is required and, to the extent a response is deemed necessary, the Court is respectfully referred to 31 C.F.R. § 501.602 for a complete and accurate statement of its contents.

49. Defendants admit the allegations in this paragraph.

50. The allegations in this paragraph are denied except to admit that, over the last decade, OFAC has issued RFIs to persons suspected of violating its regulations restricting transaction related to Cuba and Iraq and issued RFIs to persons suspected of violating sanctions regulations against other nations and entities as well.

51. Defendants admit the allegations in this paragraph

52. The allegations contained in this paragraph are denied except to admit that TWEA, IEEPA, and UNPA all contain provisions making willful violations of regulations promulgated under those statutes criminal offenses.

53. The allegations contained in this paragraph are denied except that defendants admit that OFAC considers RFIs, as well as other evidence, in determining whether to refer a case either to the Civil Penalties Division of OFAC for civil penalties action or to the U.S. Department of Justice or

other federal law enforcement agency for further investigation and possible criminal prosecution.

54. The allegations in this paragraph are denied except that defendants admit that persons can be prosecuted for criminal violations of sanctions programs enforced by OFAC. The Court is respectfully referred to the testimony of then-OFAC Director R. Richard Newcomb, House Financial Services Subcommittee on Oversight and Investigations (June 16 2004) for a complete and accurate statement of its contents.

55. Defendants admit the allegations in this paragraph.

56. Defendants admit the allegations in this paragraph.

57. Defendants admit the allegations in this paragraph.

58. Defendants deny the allegations in this paragraph, except that defendants admit that they have pursued a civil penalty against Zachary Sanders.

FIRST CAUSE OF ACTION
U.S. CONST. Amend. V
(Fifth Amendment privilege against self-incrimination)

59. Defendants repeat their answers to paragraphs 1 - 58.

60. This paragraph contains conclusions of law to which no response is necessary, but, to the extent a response is deemed necessary, defendants deny the allegations contained in this paragraph.

SECOND CAUSE OF ACTION
Administrative Procedure Act, 5 U.S.C. § 701, et seq.
(Arbitrary or capricious agency action)

61. Defendants repeat their answers to paragraphs 1 - 60.

62. This paragraph contains conclusions of law to which no response is necessary, but, to the extent a response is deemed necessary, defendants deny the allegations contained in this paragraph.

THIRD CAUSE OF ACTION
U.S. Const. Amend. VIII
(Eighth Amendment ban on excessive fines)

63. Defendants repeat their answers to paragraphs 1 - 62.

64. This paragraph contains conclusions of law to which no response is necessary, but, to the extent a response is deemed necessary, defendants deny the allegations contained in this paragraph.

Requested Relief

This remaining paragraphs, (a) - (d), contain plaintiff's demands for relief to which an answer is not required but, insofar as an answer may be deemed necessary, defendants deny that plaintiff is entitled to the relief requested or to any relief whatsoever.

Defendant further denies any and all allegations in the Complaint not expressly admitted herein.

WHEREFORE, defendant prays for an order: (1) denying plaintiff's requests for relief; and (2) for such other and further relief as the Court deems just and proper.

Respectfully submitted,

TONY WEST
Assistant Attorney General

BENTON J. CAMPBELL
United States Attorney

/s/ Elisabeth Layton

SANDRA M. SCHRAIBMAN
Assistant Director
ELISABETH LAYTON
Senior Counsel
U.S. Department of Justice
Civil Division, Federal Programs Branch
Mailing Address
P.O. Box 883 Ben Franklin Station
Washington, D.C. 20044
Delivery Address
20 Massachusetts Avenue, N.W., Rm. 7110
Washington, D.C. 20001
Telephone: (202) 514-3183
Facsimile: (202)616-8470
Elisabeth.Layton@usoj.gov

Of Counsel:

M. WILLIAM SCHISA
Attorney-Advisor
Office of the Chief Counsel
(Foreign Assets Control)
U.S. Department of the Treasury
1500 Pennsylvania Ave., N.W.
Washington, D.C. 20220

Attorneys for Defendants

Dated: November 4, 2009

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, in accordance with Fed. R. Civ. P. 5, and Local Rule 5.2, the foregoing Answer was served pursuant to the district court's ECF system as to ECF filers.

Dated: November 4, 2009

/s/ Elisabeth Layton

Elisabeth Layton
Trial Attorney, Federal Programs Branch
U.S. Department of Justice, Civil Division
P.O. Box 883, 20 Massachusetts Avenue, NW
Washington, DC 20044
(202) 514-3183