

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PRESS COPY

ZACHARY SANDERS,

Plaintiff

v.

ADAM SZUBIN, Director, Office of Foreign Assets Control of the United States Department of the Treasury, in his official capacity; TIMOTHY GEITHNER, Secretary, United States Department of the Treasury, in his official capacity; and ERIC H. HOLDER, Attorney General, United States Department of Justice, in his official capacity,

Defendants.

**COMPLAINT
FOR INJUNCTIVE AND
DECLARATORY RELIEF**

VITALIANO, J.

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ JUL 16 2009 ★

BROOKLYN OFFICE

PRELIMINARY STATEMENT

1. Plaintiff Zachary Sanders brings this action to challenge Defendants' policy and practice of requiring individuals to provide potentially self-incriminating information, under threat of civil penalties, as part of their enforcement of the United States embargo against Cuba.
2. 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 (hereinafter the "Cuba Travel Restrictions"), under which an economic embargo exists against the nation of Cuba. Under the terms of the Cuba Travel Restrictions, U.S. citizens and permanent residents are generally prohibited from spending money in Cuba.
3. OFAC generally begins an investigation into possibly unlawful travel-related expenditures in Cuba after receiving information from the United States Customs Service that an individual has traveled to Cuba. OFAC then typically sends the traveler an interrogatory

document, titled "Requirement to Furnish Information" ("RFI"), demanding information about the recipient's travel and spending in Cuba, and requiring a response within 20 business days.

4. The RFI threatens the recipient with several thousands of dollars in civil penalties merely for failure to respond within the deadline.

5. The information required by OFAC in the RFI about travel-related transactions in Cuba is potentially incriminating because the Trading with the Enemy Act, 50 U.S.C. Appx. § 16, specifically makes any willful violation of regulations promulgated under it (such as the Cuba Travel Restrictions) a criminal violation subject to criminal fines, imprisonment, or both.

6. Several other economic sanctions enforcement programs administered by OFAC (for instance, the restrictions on travel-related transactions that were part of the 1991-2004 embargo against Iraq) also utilize similar RFI forms, and the information requested in those forms also has the potential to subject the accused travelers to criminal sanctions.

7. OFAC sent Mr. Sanders an RFI regarding an alleged trip to Cuba by him. OFAC alleges that Mr. Sanders did not submit a response to the RFI.

8. Based *solely* on the failure to respond to the RFI and not on any alleged expenditures in or travel to Cuba, OFAC and the Department of Treasury imposed a \$9,000 fine against Mr. Sanders.

9. If an individual fails to pay a penalty imposed under the Cuba Travel Restrictions, the matter "may be referred for administrative collection measures or to the United States Department of Justice for appropriate action to recover the penalty in a civil suit in a Federal district court," 31 C.F.R. § 515.718.

10. The penalty imposed against Mr. Sanders is unlawful because the Fifth Amendment prohibits the government from punishing failure to obey any regulation that requires a self-incriminating act.

11. This penalty is also unlawful because it is grossly disproportionate to the nature of the underlying offense. As such, it violates the Eighth Amendment's prohibition against excessive fines and the Administrative Procedure Act's prohibition against arbitrary, capricious, or otherwise unlawful agency action.

12. Plaintiff asks the Court for, *inter alia*, injunctive and declaratory relief (a) declaring unlawful OFAC's policy and practice of requiring individuals to provide potentially self-incriminating information under threat of civil penalty, (b) enjoining OFAC from making such threats and from issuing such penalties, (c) setting aside the penalty imposed by OFAC against Plaintiff for failing to provide information in response to such threats, and (d) enjoining the Department of Justice from collecting funds from Plaintiff to satisfy any penalties imposed by OFAC for failure to provide information under such circumstances.

PARTIES

13. Plaintiff Zachary Sanders (hereinafter "Plaintiff" or "Mr. Sanders") is a United States citizen and a resident of the state of New York. At the time the Prepenalty Notice was issued, he lived in Brooklyn, New York.

14. Defendant Adam Szubin is the Director of the Office of Foreign Assets Control, the branch of the Department of the Treasury charged with enforcing the Cuba Travel Restrictions.

15. Defendant Timothy Geithner is the Secretary of the United States Department of the Treasury. As head of the Department of Treasury, Defendant Geithner is ultimately responsible for OFAC's actions and its enforcement of the Cuba Travel Restrictions. Defendant

Geithner also is responsible for the actions of the Treasury Department official designated by him to consider appeals of Administrative Law Judge decisions made in penalty proceedings held pursuant to the Cuba Travel Restrictions.

16. Defendant Eric H. Holder is the Attorney General of the United States. As head of the Department of Justice, Defendant Holder is ultimately responsible for the collection of penalties imposed by OFAC under the Cuba Travel Restrictions.

JURISDICTION AND VENUE

17. This court has jurisdiction over this action pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 1331.

18. The Court has authority to grant declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202, Rules 57 and 65 of the Federal Rules of Civil Procedure, the Administrative Procedures Act, 5 U.S.C. § 706, and its inherent equitable powers.

19. The Eastern District of New York is a proper venue for this action under 28 U.S.C. § 1391(e)(3) because it is the district in which the plaintiff resides and no real property is involved in the action.

STATEMENT OF FACTS

20. OFAC sent Mr. Sanders a "Requirement to Furnish Information" dated March 1, 2000, bearing OFAC serial number CU-179778, regarding an alleged trip to Cuba in June 1998. This RFI is appended to this Complaint as Exhibit A.

21. Through the RFI, OFAC ordered Mr. Sanders to provide details about the alleged trip to Cuba, pursuant to OFAC's putative authority to request such information under 31 C.F.R. § 501.602.

22. The RFI received by Mr. Sanders followed OFAC's standard model and read in part as follows:

Pursuant to the [Cuban Assets Control Regulations, 31 CFR Part 515,] and section 501.602 of the Reporting and Procedures Regulations, 31 CFR Part 501, you are hereby required to provide this Office with a detailed written report concerning your alleged trip to Cuba. Your report must specifically respond to all the items enumerated in the enclosure to this letter that are relevant to your trip. ... [P]lease sign and date your report.

Your report is due at OFAC within 20 business days from date of receipt of this letter. You should be aware that failure to respond is a violation that may result in the imposition of civil penalties.

The enclosure sent to Mr. Sanders with the RFI requests that he provide, *inter alia*, his dates of travel, the "[r]eason for your trip to Cuba," amounts paid for a Cuban visa and lodging, "[a] complete itemization of any and all other currency expenditures by you while in Cuba," and the "name and address of all travel companions."

23. On March 22, 2000, Mr. Sanders requested an extension of the response deadline by telephone. OFAC granted an extension of time to April 24, 2000.

24. OFAC alleges that Mr. Sanders did not respond to the RFI within the extended deadline.

25. On February 13, 2002—twenty-two months later—OFAC issued a Prepenalty Notice ("PPN") (Exhibit B) proposing a \$10,000 administrative penalty against Mr. Sanders, based not on any alleged unlicensed spending during his alleged trip to Cuba, but rather based *solely* on the alleged failure to respond to the RFI.

26. Specifically, OFAC asserted that Mr. Sanders committed a violation by "fail[ing] to respond to a Requirement to Furnish Information issued by OFAC concerning [his] travel-related transactions to, from, and within Cuba in June 1998."

27. OFAC makes no allegation in the PPN that Mr. Sanders engaged in violations of the Cuba Travel Restrictions during his travel to Cuba. Rather, the only violation described in the PPN is Mr. Sanders's failure to respond to the RFI.

28. Congress has mandated that, prior to imposition of a civil penalty for violation of any "order, rule, or regulation issued in compliance with [the TWEA]," which includes the Cuba Travel Restrictions, OFAC allow the party subject to the penalty an "opportunity for an agency hearing" in accordance with §§ 554-557 of the Administrative Procedure Act. Cuban Democracy Act of 1992, Pub. L. No. 102-484, sec. 1710(c)(2), 106 Stat. 2315, 2580-81 (Oct. 23, 1992) (codified at 50 U.S.C. Appx. § 16(b)(3)).

29. Mr. Sanders responded *pro se* to the PPN by letter dated March 10, 2002 addressed to then-Director of OFAC, R. Richard Newcomb. In this letter, Mr. Sanders requested an agency hearing and pre-hearing discovery as provided for by statute and by the Cuba Travel Restrictions.

30. Mr. Sanders eventually retained an attorney to represent him in relation to the PPN, and she filed a supplemental discovery request dated April 29, 2002.

31. Although Congress mandated in 1992 that an "opportunity for an agency hearing" be made available, OFAC failed to appoint Administrative Law Judges or any other officials to hear Cuba travel cases until the fall of 2003.

32. Even though Mr. Sanders requested a hearing in 2002, OFAC did not commence a hearing until 2005, when it finally issued an Order Instituting Proceedings. Administrative Law Judge Irwin L. Schroeder from the Office of Medicare Hearings and Appeals was assigned to Mr. Sanders's case.

33. Mr. Sanders, through counsel, filed a Motion for Summary Disposition dated May 20, 2005, asking ALJ Schroeder to dismiss the charges and proposed penalty primarily on the ground that they sought to punish him for failing to obey OFAC's requirement to perform a potentially self-incriminating act.

34. On June 27, 2005, ALJ Schroeder held a hearing concerning the proposed penalty against Mr. Sanders.

35. Over three years later, ALJ Schroeder issued an "Administrative Law Judge Recommended Decision" dated September 4, 2008 (attached as Exhibit C), in which he concluded that the Fifth Amendment right against self-incrimination applied in the context of the RFI, but nevertheless affirmed the imposition of a penalty against Mr. Sanders "for failure to respond to a request for information about a trip to Cuba."

36. ALJ Schroeder recommended that Mr. Sanders be fined \$1,000 for his failure to respond to the RFI.

37. Pursuant to procedures set forth in the Cuba Travel Restrictions, Mr. Sanders appealed ALJ Schroeder's ruling to the then-Secretary of Treasury Henry Paulson's designee, Deputy Assistant Secretary Dan Iannicola, Jr.

38. OFAC cross-appealed ALJ Schroeder's ruling, seeking a \$10,000 penalty even though it had sought a \$9,000 penalty throughout the proceedings before ALJ Schroeder.

39. The Secretary's designee, by order dated October 24, 2008, refused to hear Mr. Sanders's constitutional claims or any other substantive challenge to the penalty. Instead, the Secretary's designee limited the parties to arguing "the question of whether Judge Schroeder erred in the appropriateness of the amount of the penalty assessed." (See Exhibit D.)

40. On January 16, 2009, the last business day of the previous presidential administration, the Secretary's designee issued a "Determination and Order" (attached as Exhibit E), affirming the penalty and increasing it to \$9,000.

41. On February 26, 2009, present counsel for Mr. Sanders sent the Secretary's designee, Mr. Iannicola, a correspondence asking whether he had engaged in any ex parte communications about Mr. Sanders's case with any representatives or agents of the United States.

42. The Cuba Travel Restrictions prohibit the Secretary's designee from engaging in ex parte communications with any party, interested person, or representative about proceedings covered by those regulations, 31 C.F.R. §§ 501.702(e), 501.719(a).

43. To date, Plaintiff's counsel has not received a response to this inquiry.

44. It has been clear since *Leary v. United States*, 395 U.S. 6, 28 (1969), that "failure to obey a statute which require[s] an incriminatory act" cannot be punished, even in the absence of an affirmative assertion of the Fifth Amendment privilege against self-incrimination.

45. While exceptions exist for requirements to produce "required records," the information demanded by OFAC in the RFI cannot qualify as required records because, *inter alia*, the requirement to provide information is directed at a class inherently suspect of criminal activity.

46. The information requested by OFAC through the RFI is potentially incriminatory because the Trading with the Enemy Act, ("TWEA"), 50 U.S.C. Appx. § 16, specifically makes any willful violation of regulations promulgated under it (such as the Cuba Travel Restrictions) a criminal violation subject to criminal fines, imprisonment, or both.

47. The recordkeeping and reporting provisions of 31 C.F.R. Part 501 (the authority on which OFAC relies in issuing RFIs) purport to be applicable to all "economic sanctions

programs for which implementation and administration are delegated to the Office of Foreign Assets Control.” 31 C.F.R. § 501.101, § 501.606.

48. In the RFI, OFAC claims that 31 C.F.R. § 501.602 authorizes the demands made through that document. In part, section 501.602 states:

Every person is required to furnish under oath, in the form of reports or otherwise, from time to time and at any time as may be required by the Director, Office of Foreign Assets Control, complete information relative to any transaction, regardless of whether such transaction is effected pursuant to license or otherwise, subject to the provisions of this chapter.

49. Over the past fifteen years, sanctions programs administered and implemented by OFAC have included the restrictions on transactions (including, in some instances, travel-related transactions) with Cuba, Iran, Iraq, Libya, parts of the former Yugoslavia, and various designated terrorist entities.

50. Over the last decade, OFAC has issued numerous RFIs to persons suspected of violating its regulations restricting transactions related to travel to Cuba and Iraq, and, on information and belief, issues RFIs to persons suspected of violating its sanctions regulations against other nations and entities as well.

51. These OFAC sanctions programs were authorized by a variety of statutes, including TWEA, the International Emergency Economic Powers Act (“IEEPA”), 50 U.S.C. § 1701, *et seq.*, and the U.N. Participation Act (“UNPA”), 22 U.S.C. § 287c (for regulations implementing United Nations sanctions), among others.

52. Like TWEA, IEEPA and UNPA contain provisions making certain violations of regulations promulgated under those statutes criminal offenses. *See, e.g.*, IEEPA, 50 U.S.C. § 1705(b); UNPA, 22 U.S.C. § 287c(b).

53. OFAC uses responses to RFIs to determine whether to refer cases to the Justice Department for criminal prosecution or to the Civil Penalties Division of OFAC for civil penalties prosecution. *See* 68 Fed. Reg. 4422, 4425 (Jan. 29, 2003) (stating, in introduction to proposed Appendix to Part 501, “If the evidence suggests willful violations of substantive prohibitions or requirements, OFAC may refer those cases to other federal law enforcement agencies for criminal investigation.”).

54. Criminal prosecutions take place under the regulatory regimes enforced by OFAC. *See* Testimony of then-OFAC Director R. Richard Newcomb, House Financial Services Subcommittee on Oversight and Investigations (June 16, 2004) (“Since 1995, there have been approximately 68 cases that resulted in criminal enforcement action for TWEA and the International Emergency Economic Powers Act (‘IEEPA’) violations.”)

55. Plaintiff’s present counsel, the Center for Constitutional Rights, has previously challenged final penalties imposed by OFAC for alleged failures to respond to RFIs.

56. Two such challenges led to separate federal court actions, *Frank v. Snow*, 04-cv-00957 (D.D.C.) (filed June 10, 2004), and *Sanders v. Snow*, 05-cv-00471 (D.D.C.) (filed Mar. 7, 2005). In both instances, the Center for Constitutional Rights raised legal arguments based on the *Leary* case to OFAC in an attempt to resolve the matters.

57. In *Frank*, OFAC dismissed the \$10,000 penalty in exchange for Ms. Frank’s agreement to dismiss the claims in the complaint. Similarly, in *Sanders*, OFAC agreed to dismiss the \$10,000 penalty against one of the plaintiffs, on the condition that he dismiss his claims against OFAC.

58. Despite being on notice of the illegality of these penalties (and the unenforceability of the threat of such penalties set forth in the standard RFI form), OFAC

continued to pursue such penalties against Plaintiff Zachary Sanders' and, upon information and belief, against others.

FIRST CAUSE OF ACTION

U.S. CONST. amend. V

(Fifth Amendment privilege against self-incrimination)

59. Plaintiff repeats and realleges the allegations contained in the preceding paragraphs with the same force and effect as though fully set forth herein.

60. The penalty imposed against Plaintiff by Defendants is unlawful because it punishes failure to obey a requirement to perform a potentially self-incriminating act, thereby violating Plaintiff's rights under the Fifth Amendment to the United States Constitution.

SECOND CAUSE OF ACTION

Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*

(Arbitrary or capricious agency action)

61. Plaintiff repeats and realleges the allegations contained in the preceding paragraphs with the same force and effect as though fully set forth herein.

62. The \$9,000 penalty imposed against Plaintiff by Defendants is arbitrary and capricious because it is completely disproportionate to the nature of the asserted violation.

THIRD CAUSE OF ACTION

U.S. CONST. amend. VIII

(Eighth Amendment ban on excessive fines)

63. Plaintiff repeats and realleges the allegations contained in the preceding paragraphs with the same force and effect as though fully set forth herein.

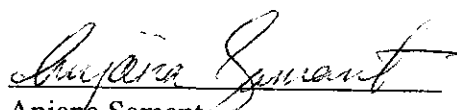
64. The \$9,000 penalty imposed against Plaintiff by Defendants violates the constitutional prohibition on excessive fines because it is grossly disproportionate to the nature of the asserted violation.

PRAAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

- a) Declare the penalty imposed against Mr. Sanders by Defendants to be arbitrary, capricious, unlawful, and/or void, and enjoin any further efforts at enforcing or collecting such penalty against Plaintiff;
- b) Declare OFAC's practice of threatening and issuing penalties for failure to comply with the demands of the Requirement to Furnish Information to be unlawful, and enjoin such practices;
- c) Award costs, including an award of attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A);
- d) Award such other relief as the Court may deem just and proper.

Respectfully submitted,


Anjana Samant

CENTER FOR CONSTITUTIONAL RIGHTS
Anjana Samant AS5163
Darius Charney DC1619
666 Broadway, 7th Floor
New York, NY 10012-2317
(212) 614-6438

SOKOLSKI & ZEKARIA, P.C.
Daphna Zekaria
305 Broadway, Ste. 402
New York, NY 10007
(212) 571-4080

COUNSEL FOR PLAINTIFF

Dated: July 16, 2009