

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

EMPRESA CUBANA  
EXPORTADORA DE ALIMENTOS  
Y PRODUCTOS VARIOS D/B/A  
CUBAEXPORT

Plaintiff,

v.

UNITED STATES DEPARTMENT  
OF THE TREASURY, OFFICE  
OF FOREIGN ASSETS CONTROL,  
et al.,

Defendants.

Civil Action No. 1:06CV01692 (ESH)

**DECLARATION OF ADAM J. SZUBIN**

I, Adam J. Szubin, pursuant to 28 U.S.C. § 1746, do declare:

1. I am the Director of the U.S. Department of the Treasury's ("Treasury") Office of Foreign Assets Control ("OFAC"), and have been employed in this capacity since September 3, 2006. Prior to becoming the Director, I was Senior Advisor to Under Secretary Stuart Levey in Treasury's Office of Terrorism and Financial Intelligence, a position I assumed in August 2004. Before joining Treasury, I was an attorney at the Department of Justice, serving as Counsel to the Deputy Attorney General from August 2003 to August 2004, and working in the Civil Division from September 2000 to August 2003.

2. I am familiar with the mission and operations of OFAC, and I make this declaration based upon information within my personal knowledge or provided to me in my official capacity.

3. I have been made aware of the Complaint filed in this action by Empresa Cubana Exportadora de Alimentos Y Productos Varios d/b/a Cubaexport. This declaration is made in connection with Defendants' Memorandum in Support of their Motion to Dismiss, or, in the alternative, for Summary Judgment.

OFAC's Mission and Authority

4. OFAC is the office within Treasury that is principally responsible for administering U.S. economic sanctions programs. These programs are primarily directed against foreign states and nationals to implement U.S. foreign policy and national security goals. Pursuant to authority delegated by the President to the Secretary of the Treasury, OFAC acts under Presidential wartime and peacetime national emergency powers. In performing its function, OFAC relies primarily on its broad delegated powers under the Trading with the Enemy Act ("TWEA"), 50 U.S.C. App. §§ 1-44, and the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-1706. As Director of OFAC, I am responsible for the implementation, administration, and enforcement of such economic sanctions programs.

5. OFAC currently administers approximately 30 economic sanctions programs against foreign governments, entities, and individuals whose activities conflict with U.S. national security and foreign policy interests. For instance, OFAC administers sanctions programs relating to Iraq, Iran, Sudan, Burma, Cuba, Syria, North Korea, Zimbabwe, Liberia, Western Balkans, and Cote D'Ivoire. OFAC also implements sanctions programs related to drug trafficking, terrorism, and proliferation of weapons of mass destruction.

Cuba Sanctions Under TWEA

6. TWEA grants the President broad powers over property in which any foreign country or a national thereof has any interest, during times of war and otherwise as described below, including the authority to “investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest.” 50 U.S.C. App. § 5(b)(1)(B).

7. TWEA was amended on December 28, 1977, to restrict the use of its powers to times of war and to eliminate its use for peacetime emergencies. *See* Pub. L. No. 95-223, 91 Stat. 1625. However, the amending Act contained a “grandfather” clause. *See id.* at § 101(b). This clause authorized the President to continue to exercise those powers delegated under TWEA that were being exercised with respect to a country subject to sanctions as of July 1, 1977, as a result of a presidential declaration of national emergency. *Id.* To do so, however, the President must determine on an annual basis that the extension of sanctions with respect to that country “is in the national interest of the United States.” *Id.*

8. Since the enactment of Public Law 95-223, the President has consistently determined that the exercise of his authorities under TWEA with respect to Cuba is in the national interest of the United States. *See, e.g.,* Determination No. 2006-23, 71 Fed. Reg. 54399 (Sept. 13, 2006).

9. Following the expropriation of U.S. property in Cuba and other hostile acts by the Castro regime, President Kennedy imposed an embargo on all trade with Cuba, effective in February 1962. *See* Proclamation No. 3447, 27 Fed. Reg. 1085 (1962). On July 8, 1963, the Cuban Assets Control Regulations, 31 C.F.R. Part 515 (the “Regulations”), were issued, freezing all

Cuban assets located in the United States, prohibiting all transactions in which Cuba or a Cuban national has on or since the effective date of the Regulations had an interest, and further implementing the embargo on trade. *See* 28 Fed. Reg. 6974 (July 9, 1963). OFAC interprets the term “interest” when used with respect to property to mean an interest of any nature whatsoever, direct or indirect. *See, e.g.*, 31 C.F.R. § 515.312.

#### OFAC Licensing Authority

10. Under most of its sanctions programs, OFAC can issue licenses to authorize otherwise prohibited transactions. Generally, licenses are either “specific” or “general.” A specific license may be issued when a person individually requests authorization to conduct an otherwise prohibited transaction or service. *See* 31 C.F.R. § 501.801(b). A general license authorizes certain categories of transactions and/or services and is issued through publication on OFAC’s website and/or in the Federal Register and the Code of Federal Regulations. A person who meets the criteria set forth in a general license may undertake activities in reliance on the general license without submitting any request to OFAC. Persons who are uncertain whether particular facts and circumstances meet the criteria for a general license may write to OFAC requesting guidance.

11. OFAC’s licensing division reviews, analyzes, and responds to thousands of requests each year for specific licenses covering a broad range of trade, financial, and travel-related transactions, including those related to the exportation and importation of goods and services and the provision of humanitarian, banking, and financial services. It also provides written and oral guidance to the public on the application of OFAC’s regulatory programs to specific facts and circumstances. A selection of OFAC’s written responses to these interpretive requests is shared with the public on OFAC’s website.

12. Based in part on the volume of license applications received each year, the OFAC licensing division necessarily relies upon the representations made and information provided by applicants. OFAC's reliance on incoming materials is generally memorialized on the first page of a license, which typically states that the license is granted upon statements and representations made in the application and other information filed with or made available to Treasury.

13. Licenses also typically include language in a section titled "Precedence" or "Precedential Effect" noting that the authorization contained in the license is limited to the facts and circumstances specific to the application. The issuance of a license does not constitute a determination regarding undisclosed additional activities that the licensed party may wish to undertake; such activities may be the subject of a separate request for an amendment to the existing license or the issuance of a new license.

14. Because no two sanctions programs are exactly alike, and because applicants often present novel circumstances and requests, OFAC considers applications for specific licenses on a case-by-case basis in light of all facts presented.

15. The Secretary of the Treasury has delegated broad authority under TWEA to OFAC to regulate transactions in which Cuba or a Cuban national has an interest, including to license specific transactions that otherwise are prohibited by the Regulations. *See* 50 U.S.C. App. § 5(b)(1)(B); 31 C.F.R. § 515.802.

16. The denial of a license request does not preclude the reopening of an application or the filing of a further application. *See* 31 C.F.R. § 501.801(b). The applicant may at any time request further explanation of the reasons for a denial by correspondence or personal interview. *See id.*

17. Licenses (whether general or specific) may be amended, modified, or revoked at any time. *See* 31 C.F.R. § 501.803. Specific licenses typically note their revocability on the first page of the license.

OFAC Licensing of Payment for Professional Fees and Expenses Incurred In the Legal Representation of Cuba or Cuban Nationals

18. OFAC sanctions programs, including the Cuba sanctions program, typically include a general license permitting the provision of certain legal services to a designated person, or in the case of the Cuba sanctions program, to Cuba or a Cuban national. *See, e.g.*, 31 C.F.R. § 515.512. The scope of the general license does not cover all possible legal services; it is limited to certain services listed in the applicable regulations. *See, e.g., id.* The general license also does not cover payment of professional fees and reimbursement of incurred expenses, which must be specifically licensed by OFAC. *See, e.g., id.*

OFAC Licensing of Certain Transactions with Respect to Recognition of U.S. Intellectual Property In Which Cuba or Cuban Nationals Have An Interest

19. Since the time of their issuance in 1963, the Regulations have contained a provision authorizing certain transactions with respect to U.S. patents, trademarks, and copyrights. *See* 28 Fed. Reg. 6974 (July 9, 1963); 31 C.F.R. § 515.527. On October 20, 1995, OFAC amended the Regulations to revise § 515.527 and make other changes. *See* 60 Fed. Reg. 54194 (Oct. 20, 1995). Amended § 515.527 included a general license authorizing “transactions related to the registration and renewal in the United States Patent and Trademark Office or the United States Copyright Office of patents, trademarks, and copyrights in which the Government of Cuba or a Cuban national has an interest.” *See* § 515.527(a).

20. This general license was, however, materially restricted by the passage on October 21, 1998, of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 (the "Omnibus Appropriations Act"). Section 211 of the Omnibus Appropriations Act ("Section 211") states:

Notwithstanding any other provision of law, no transaction or payment shall be authorized or approved pursuant to section 515.527 of title 31, Code of Federal Regulations, as in effect on September 9, 1998, with respect to a mark, trade name, or commercial name that is the same as or substantially similar to a mark, trade name, or commercial name that was used in connection with a business or assets that were confiscated unless the original owner of the mark, trade name, or commercial name, or the bona fide successor-in-interest has expressly consented.

21. On May 13, 1999, OFAC amended the Regulations to bring them into conformity with Section 211 by designating the then-existing text of 31 C.F.R. § 515.527 as paragraph (a)(1) and adding a new paragraph (a)(2) incorporating the limitations on general licensing authority contained in Section 211. *See* 64 Fed. Reg. 25808 (May. 13, 1999).

22. The new language in § 515.527(a)(2) qualified the previously existing general license by imposing new criteria to be met before a person could act in reliance on the general license. In amending § 515.527 to implement the Congressional command in Section 211, OFAC limited the scope of the general license while retaining the authority to issue a specific license, should facts and circumstances and current U.S. foreign policy militate in favor of authorizing a transaction that does not qualify for the general license in paragraph (a)(1). OFAC has understood this interpretation to be consistent with the plain language of Section 211.

Background of OFAC's History with Cubaexport

23. OFAC has been engaged with issues related to the HAVANA CLUB trademark at least as far back as October 1995, when it received an application for a specific license authorizing assignments of the HAVANA CLUB trademark from Cubaexport to Havana Rum & Liquors, S.A. ("HR&L") and from HR&L to Havana Club Holdings, S.A. ("Havana Club Holdings").

24. On November 13, 1995, OFAC issued a specific license to Cubaexport in response to the October 1995 application.

25. On April 17, 1997, OFAC issued a Notice of Revocation revoking the November 13, 1995, license.

26. Under the Reporting, Procedures and Penalties Regulations, 31 C.F.R. part 501, persons subject to the jurisdiction of the United States participating in litigation, arbitration, or other binding alternative dispute resolution proceedings in the United States on behalf of or against persons whose property or interests in property are blocked, or when the outcome of any proceeding may affect blocked property, must (unless OFAC is a party), among other requirements, submit copies of all pleadings, motions, and memoranda submitted to a court or other adjudicatory body, and all orders, decisions, opinions, or memoranda issued by the court, to OFAC's Chief Counsel. *See* 31 C.F.R. § 501.605.

27. Among other court documents in the various legal proceedings concerning the HAVANA CLUB trademark, OFAC is, and has been, aware of findings made in a June 1999 decision by the U.S. District Court in the Southern District of New York, *see* Havana Club Holding, S.A., v. Galleon, S.A., 62 F. Supp. 2d 1085 (S.D.N.Y. 1999), and affirmed in a February 2000 decision by the U.S. Court of Appeals for the Second Circuit, *see* Havana Club Holding S.A. v. Galleon,

S.A., 203 F.3d 116 (2d Cir. 2000), concerning the connection between the Havana Club trademark and assets confiscated by the Cuban government.

Cubaexport's Request for a Specific License to Pay for Renewal of the Havana Club Trademark

28. In a letter dated February 11, 2004, the law firm Fish & Neave submitted an application requesting the renewal or extension of an existing license or, in the alternative, the issuance of a new license related to its legal representation of Cubaexport in connection with matters related to *Galleon S.A. v. Havana Club Holding, S.A.*, Trademark Trial and Appeal Board Cancellation No. 24,018. License No. CT-1943, issued February 20, 2004, authorized certain travel-related transactions involving Cuba and such additional transactions as were directly incident to professional research relevant to legal proceedings in the United States, including but not limited to conducting interviews and depositions, and creating written and other records, as described in the licensee's application. *See* Administrative Record ("AR") 99. The license further authorized the licensee, Fish & Neave, to provide legal services to, and receive payment for such services from, Cubaexport.

29. In a letter dated January 5, 2005, Ropes & Gray LLP ("Ropes & Gray") notified OFAC's Chief of Licensing of various changes to the law firm Fish & Neave, including its merger with Ropes & Gray, and requested either a renewal of License No. CT-1943, or a new license naming Ropes & Gray as the licensee and giving Ropes & Gray the same authorizations as License No. CT-1943. *See* AR 97.

30. In a response dated January 11, 2005, OFAC notified Ropes & Gray that it had not addressed some of the relevant criteria in OFAC's published guidelines and suggested that Ropes & Gray review and address the guidelines should it wish to reapply for a specific license. *See* AR 89.

31. In a letter dated January 26, 2005, Ropes & Gray provided additional information regarding the renewal of License No. CT-1943, referring in relevant part to language in the January 5, 2005, letter explaining that a complaint was then pending before the U.S. District Court for the District of Columbia against defendants Cubaexport and another Ropes & Gray client, Havana Club Holdings. *See* AR 87. The January 5, 2005, letter described the complaint as appealing the decision of the Trademark Trial and Appeal Board of the PTO dismissing cancellation proceeding number 24,108 and asserting additional claims against the defendants. *See* AR 97.

32. On March 4, 2005, OFAC issued two new specific licenses to Ropes & Gray, both expiring on March 31, 2006, and both based on the January 26, 2005, application. License No. CU-74488 authorized all transactions to enable Ropes & Gray, in connection with the legal representation of Cubaexport and Havana Club Holdings in legal proceedings in the United States related to the HAVANA CLUB trademark, as described in the application, to receive payment for such services and reimbursement for expenses related to such services from Cuban nationals. *See* AR 83. License No. CT-4558 authorized Ropes & Gray to engage in travel-related transactions involving Cuba and such additional transactions as were directly incident to professional research in connection with the legal representation of Cubaexport and Havana Club Holdings in legal proceedings in the United States related to the HAVANA CLUB trademark, as described in the application. *See* AR 85. On April 10, 2006, OFAC responded to Ropes & Gray's application dated February 27, 2006, to renew these licenses by issuing new License Nos. CU-7545 and CT-7571. *See* AR 45, 47, 54.

33. In a letter dated December 13, 2005, Ropes & Gray provided to OFAC's Chief of Licensing a copy of a letter of the same date addressed to the Commissioner for Trademarks of

the U.S. Patent and Trademark Office (“PTO”) in connection with an application filed by Cubaexport to renew U.S. Trademark Registration No. 1,031,651 of the “HAVANA CLUB & Design” trademark at the PTO. In its letter, Ropes & Gray stated that it “ha[d] prepared the renewal application and undertaken to pay the filing fee that is required in order to maintain the registration and intend[ed] to recover those expenses from Cubaexport.” Ropes & Gray noted that it had taken such steps, on Cubaexport’s behalf, pursuant to OFAC License No. CU-74488. *See* AR 56.

34. In a letter dated April 6, 2006 (the “April 6 Letter”), OFAC informed Ropes & Gray that License No. CU-74488 did not authorize the payment of a filing fee to the PTO for renewal of Registration No. 1,031,651 on behalf of Cubaexport. *See* AR 52. In the letter, OFAC explained that License No. CU-74488 was limited to the legal matter described in the application -- a complaint pending before the U.S. District Court for the District of Columbia, which was described as an appeal from the dismissal of a cancellation proceeding before the United States Trademark Trial and Appeal Board concerning the HAVANA CLUB trademark. *See* AR 52-53. In its closing paragraph, the April 6 Letter made explicit that it did not in any way prejudice the ability of Ropes & Gray to request separate authorization from OFAC to engage in transactions related to the renewal of the HAVANA CLUB trademark registration at the PTO, and that “if [Ropes & Gray] wish[ed] to request such a specific license or further guidance from OFAC,” it could do so by writing to OFAC’s Licensing Division. *See* AR 53.

35. In a letter dated April 7, 2006 (the “License Application”), Ropes & Gray requested that a license authorizing Ropes & Gray to incur and receive payment for the expense of renewing the registration be granted. *See* AR 49.

36. In a letter dated May 9, 2006, Covington & Burling, on behalf of Bacardi & Company Limited and Bacardi U.S.A., Inc., submitted arguments to OFAC in opposition to Ropes & Gray's April 7, 2006, letter. *See* AR 41.

37. Throughout June and in early July 2006, OFAC received copies of correspondence sent by Ropes & Gray, on behalf of Cubaexport, and Kelley Drye & Warren LLP, on behalf of Bacardi, to the PTO Commissioner for Trademarks regarding Cubaexport's application to renew Registration No. 1,031,651 of the HAVANA CLUB & Design trademark. *See* AR 4-40.

#### OFAC's Response to the License Application

38. Interagency coordination is a critical part of the process of administering sanctions, helping to ensure that OFAC's actions are consistent with the operational and policy interests of other agencies, as well as with the national security and foreign policy goals of the United States. As a general practice, OFAC consults with the Department of State (the "State Department") on foreign policy, referring to the State Department for its review, among other matters, license applications for which there is no established practice of issuance or denial. On May 15, 2006, OFAC referred the License Application to the State Department for its views on the issues raised therein. OFAC also contacted the PTO in connection with the License Application for clarification on the PTO's processes.

39. In a memorandum dated July 28, 2006, the State Department responded to OFAC's request for foreign policy guidance with respect to the License Application, "having weighed the facts and foreign policy concerns presented," with a recommendation that OFAC deny the License Application. *See* AR 2.

40. After considering the State Department's foreign policy guidance, the implementation of Section 211 in the Cuban Assets Control Regulations, and the facts and circumstances of this case, OFAC concluded that a specific license should not be issued to Cubaexport.

41. Accordingly, in a letter dated July 28, 2006, OFAC notified Ropes & Gray that OFAC had engaged in consultation with relevant agencies, including the State Department, had received guidance that it would be inconsistent with U.S. policy to issue a specific license authorizing transactions related to the renewal of the HAVANA CLUB trademark, and that the request in the License Application made on behalf of Cubaexport was therefore denied. *See* AR 1.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 21, 2006.

  
ADAM J. SZUBIN  
Director  
Office of Foreign Assets Control  
Department of the Treasury