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10 *Court Use only above this line.*

11 UNITED STATES DISTRICT COURT
12 FOR THE WESTERN DISTRICT OF WASHINGTON
13 AT SEATTLE

14 BERTRAM SACKS,

15 Plaintiff,

16 vs.

17 OFFICE OF FINANCIAL ASSETS
18 CONTROL, UNITED STATES
19 DEPARTMENT OF THE TREASURY,

20 Defendant.

21 NO. 04-108C

22 **OPPOSITION TO MOTION TO DISMISS**

23 **NOTE ON MOTION CALENDAR:**
24 **MAY 14, 2004**

25 **I.**
26 **INTRODUCTION AND SUMMARY**

27 The federal Office of Foreign Assets Control (“OFAC”) seeks to impose a civil penalty
28 upon Bert Sacks. Mr. Sacks challenges the validity and amount of OFAC’s civil penalty
29 through this action, which OFAC now seeks to dismiss under Rule 12(b)(6).

30 For present purposes, this Court must accept Mr. Sacks’s allegations as true. The facts,
31 as alleged, are that OFAC promulgated regulations to forbid American citizens from either
32 *sending* or *bringing* medicine, medical supplies, food, and other necessities of life to Iraqi
33 civilians. OFAC’s regulatory imposition of sanctions remained in effect for more than ten
34 years. Sanctions have contributed to the deaths of approximately a half million Iraqi children

1 under the age of five, and have been condemned as genocidal by UN officials and international
2 legal scholars.

3 In November 1997, Mr. Sacks brought medicine and other medical supplies to civilian
4 hospitals and clinics in Iraq. In response, OFAC ordered Mr. Sacks to pay a \$10,000 civil
5 penalty, which OFAC is now attempting to collect. But OFAC never filed suit on its claim to
6 recover the civil penalty, so the claim is barred by the five-year statute of limitations. OFAC
7 summarily dismisses the statute of limitations as “irrelevant” because OFAC intends to enforce
8 the penalty outside the court system. OFAC thus asserts the power to harass Mr. Sacks extra-
9 judicially with a stale claim, a power OFAC doesn’t have.

10 OFAC then seeks to distract this Court’s focus by recasting this case as one involving
11 Mr. Sacks’s right to travel abroad and the federal government’s corresponding authority to
12 regulate that travel. But this case doesn’t concern OFAC’s authority to regulate international
13 travel, or Mr. Sack’s right to globetrot. Rather, it concerns OFAC’s authority to impose an
14 embargo on medicine, medical supplies and other necessities, and Mr. Sack’s freedom to send
15 or bring medicine to children and other civilians who desperately need it.

16 OFAC claims the United Nations Participation Act (“UNPA”)¹ authorizes it to
17 promulgate a regulatory embargo on food, medicine, and medical supplies because an embargo
18 is necessary to enforce UN Security Council resolutions 660 and 661. But UNPA only
19 authorizes regulations “to the extent necessary” to comply with Security Council resolutions.
20 And neither resolutions 660 nor 661 calls for an embargo on medicine and medical supplies.
21 UNPA, therefore, doesn’t authorize OFAC to impose one.

22 Moreover, the law has developed a great deal since UNPA was enacted in 1945. In
23 1977, Congress passed the International Emergency Economic Powers Act (“IEEPA”).² This
24 Act authorizes OFAC to implement certain trade sanctions in appropriate circumstances. But it

25 ¹ 22 U.S.C. § 287c.

26 ² Pub. L. 95-223, 91 Stat. 1625 (1977), codified at 50 U.S.C. 1701, *et seq.*

1 denies OFAC the authority to “directly or indirectly” prohibit (or even “regulate”): (1)
2 “donations . . . of . . . food, clothing, and medicine, intended to be used to relieve human
3 suffering;” and (2) “transactions ordinarily incident to travel to or from any country.”³

4 These restrictions reflect a number of post-1945 developments on the international
5 front. Since 1945, the international community, with the participation of the United States, has
6 enacted several treaties and declarations that identify and define various human rights. These
7 authorities, which the United States has signed, include the Universal Declaration of Human
8 Rights, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War,
9 and the Convention on the Prevention and Punishment of the Crime of Genocide. International
10 law now condemns deliberate state-sponsored denial of life’s necessities to civilians of another
11 state, especially mothers and young children. Toward that end, it prohibits (among other
12 things) the imposition of embargoes on medicine and other medical supplies. IEEPA’s
13 limitations on OFAC’s authority are consistent with, and confirm the existence of, these
14 principles of international law.

15 OFAC leapfrogs over all this subsequent legislation to the Iraq Sanctions Act of 1990.⁴
16 OFAC claims this Act ratified OFAC’s pre-existing embargo of medicine and medical supplies,
17 thereby overruling the prohibition against such embargoes embodied in IEEPA and
18 international law. But the Iraq Sanctions Act, which doesn’t supersede IEEPA’s provisions,⁵
19 didn’t approve a pre-existing embargo on medicine and medical supplies. To the contrary, it
20 ratified one that specifically exempted medicine and medical supplies from its scope.

21 **II.**
22 **ALLEGATIONS THIS COURT MUST ACCEPT AS TRUE**

23 For purposes of OFAC’s Rule 12(b)(b) motion, this Court must accept Mr. Sacks’s

24 _____
25 ³ 50 U.S.C. 1702(b)(2) & (4).

26 ⁴ Pub. L. 101-513.

⁵ *Id.* § 586C(d)(2).

1 allegations as true.⁶ The facts Mr. Sacks alleges include the following:

2 **A. OFAC Promulgates Regulations That Effectively Prohibit Sending Medicine and**
3 **Medical Supplies To Iraqi Civilians.**

4 Iraq invaded Kuwait on August 2, 1990. Within a week, President Bush issued
5 Executive Orders 12,722 and 12,724.⁷ These orders prohibited certain economic transactions
6 with Iraq. Both, however, specifically exempted humanitarian relief, including donations of
7 medicine and medical supplies, from their scope. Section 2(b) of Executive Order 12,722
8 prohibited:

9 The export to Iraq of any goods, technology . . . or services from
10 the United States, *except donations of articles intended to relieve
11 human suffering, such as food, clothing, medicine and medical
12 supplies intended strictly for medical purposes.*

11 Similarly, section 2(b) of Executive Order 12,724 prohibited:

12 The exportation to Iraq . . . of any goods, technology . . . or
13 services . . . or any activity that promotes or is intended to
14 promote such exportation, *except donations of articles intended
15 to relieve human suffering, such as food and supplies intended
16 strictly for medical purposes.*

15 At the same time, the UN Security Council issued Resolution 661.⁸ Like Executive
16 Orders 12,722 and 12,724, Resolution 661 called for certain economic sanctions on Iraq. But
17 it, too, exempted “supplies intended strictly for medical purposes” and “payments exclusively
18 for strictly medical or humanitarian purposes” from its call for sanctions.⁹

19 OFAC subsequently promulgated regulations that appeared in 31 CFR Part 575.¹⁰

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21 ⁶ Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1986). In addition, the Court must
22 construe Mr. Sacks’s complaint in the light most favorable to him, and determine whether he can prove
23 *any* set of facts that would merit relief. *Id.*

24 ⁷ Exec. Order No. 12,722, 55 F.R. 31803 (Aug. 2, 1990), *reprinted in* 50 U.S.C. § 1701 note; Exec.
25 Order No. 12,724, 55 F.R. 33089 (Aug. 9, 1990), *reprinted in* 50 U.S.C. § 1701 note.

26 ⁸ S.C. Res. 661, U.N. SCOR, 2933rd mtg, U.N. Doc. S/RES/661 (1990), *available on-line at*
www.un.org/Docs/sc.

⁹ *Id.* §§ 3(c) & 4.

¹⁰ Complaint ¶ 9.

1 These regulations were materially different from Executive Orders 12,722 and 12,724 and
2 Resolution 661 because they extended sanctions to food, medicine, and other medical supplies.
3 Section 575.205 extended the embargo to “donated foodstuffs in humanitarian circumstances,
4 and donated supplies intended strictly for medical purposes.”¹¹ Section 575.207 prohibited
5 travel to Iraq without exempting travel for the purpose of sending medicine and medical
6 supplies to the Iraqi citizens.¹² Collectively, these two forbade someone from either: (1)
7 **sending** medicine and medical supplies to Iraq through a third party; or (2) **bringing** those
8 supplies to Iraq directly. Together, (unlike the executive orders that preceded them), they
9 prevented medicine and medical supplies from being sent or brought to Iraq for civilian use.

10 After sanctions were initially announced, a coalition led by the United States ousted
11 Iraq from Kuwait during the First Gulf War, which began in January 1991. Upon the war’s
12 conclusion in March 1991, United Nations Secretary-General Javier Perez de Cuellar
13 dispatched a mission to assess the situation in Iraq.¹³ The mission reported on the extensive
14 damage to Iraqi infrastructure caused by the U.S.-led bombing campaign:

15 I and the members of my mission were fully conversant with
16 media reports regarding the situation in Iraq and, of course, with
17 the recent WHO/UNICEF report on water, sanitary, and health
18 conditions in the Greater Baghdad area. It should, however, be
19 said at once that nothing we had seen or read had quite prepared
20 us for the particular form of devastation which has now befallen
the country. The recent conflict has wrought near-apocalyptic
results upon the economic infrastructure of what had been, until
January 1991, a rather highly urbanized and mechanized society.
Now, most means of modern life support have been destroyed or

21 ¹¹ (*Id.* ¶ 11; 31 CFR § 575.205.) Section 575.205 stated that a party could request a license from OFAC
22 to bring food or medicine to Iraq. (Complaint ¶ 11; 31 CFR § 575.205.) But this licensing requirement
23 is unlawful, because the president may not “regulate” donations of food, clothing, and medicine either
24 “directly or indirectly.” 50 U.S.C. §1702(b)(2). Moreover, the regulations state no deadline or criteria
by which OFAC will to consider or grant such licenses. (Complaint ¶ 11; 31 CFR § 575.205.) OFAC
continues to refuse to answer Mr. Sacks’s requests under the Freedom of Information Act, which seek
(among other things) information concerning OFAC’s handling of applications for such licenses.
(Complaint ¶ 44.)

25 ¹² *Id.* ¶ 12; 31 CFR § 575.207.

26 ¹³ *Id.* ¶ 8.

1 rendered tenuous. Iraq has, for some time to come, been
2 relegated to a pre-industrial age, but with all the disabilities of
3 post-industrial dependency on an intensive use of energy and
4 technology.¹⁴

5 The report recommended an immediate end to the embargo on imports of food and other
6 essential supplies to prevent “imminent catastrophe.”¹⁵ Despite this plea, OFAC’s regulations
7 remained in effect for many years to come.

8 **B. Economic Sanctions Help Lead To the Deaths of Hundreds of Thousands of**
9 **Children.**

10 Economic sanctions on Iraq have had widespread lethal consequences on the civilian
11 population of Iraq. These consequences have been visited with particular ferocity on young
12 children.

13 Economic sanctions prevented Iraq from rebuilding water treatment plants destroyed in
14 the First Gulf War.¹⁶ (Water treatment facilities were fairly widespread in Iraq until many were
15 bombed during the First Gulf War, along with virtually all of the country’s electrical-generating
16 plants that powered Iraq’s water and sewage treatment facilities.¹⁷) The resulting lack of
17 potable water led to the widespread outbreak of severe diarrhea among young children.¹⁸
18 Although this is often fatal in the absence of medical treatment, OFAC’s regulations prevented
19 people like Mr. Sacks from bringing medicine there to treat it.¹⁹

20 Each month, economic sanctions helped cause the deaths of three to six thousand
21 children in Iraq less than five years of age.²⁰ In 1992, the New England Journal of Medicine

22 ¹⁴ *Id.*

23 ¹⁵ *Id.*

24 ¹⁶ *Id.* ¶ 18.

25 ¹⁷ *Id.*

26 ¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* ¶ 19.

1 put the figure at 5,862 deaths per month for the first eight months of 1991 alone.²¹

2 In 2000, UNICEF issued a report entitled “UNICEF in Iraq.”²² The report warned:
3 “Mounting evidence shows that the sanctions are having a devastating humanitarian impact on
4 Iraq.”²³ It quoted a 1997 report by the UN Human Rights Committee, which stated, “the effect
5 of sanctions and blockades has been to cause suffering and death in Iraq, especially to
6 children.”²⁴

7 According to UNICEF Director Carol Bellamy, sanctions reversed a decades-long
8 decline in infant mortality in Iraq.²⁵ Ms. Bellamy cites UNICEF reports that between 1991 and
9 1998, this reversal contributed to the deaths of half a million children under the age of five.
10 One such UNICEF report appears at <http://www.unicef.org/reseval/pdfs/irqu5est.pdf>.²⁶ It
11 contains graphs such as the following, which depict the upsurge in child mortality in Iraq after
12 1990, the year economic sanctions were first imposed:

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20 ²¹ *Id.*; see A. Ascherio, et al., *The Effect of the Gulf War on Infant and Child Mortality in Iraq*, 327 NEW
21 ENG. J. MED., No. 13, at 931 (Sept. 24, 1992). The article concludes that a three-fold increase in
22 childhood mortality resulted from the Gulf War and the sanctions that followed. An abstract of this
23 article is available on the web-site for the New England Journal of Medicine at
24 www.nejm.org/cgi/content/short/327/13/931.

25 ²² *Id.* ¶ 20.

26 ²³ *Id.*

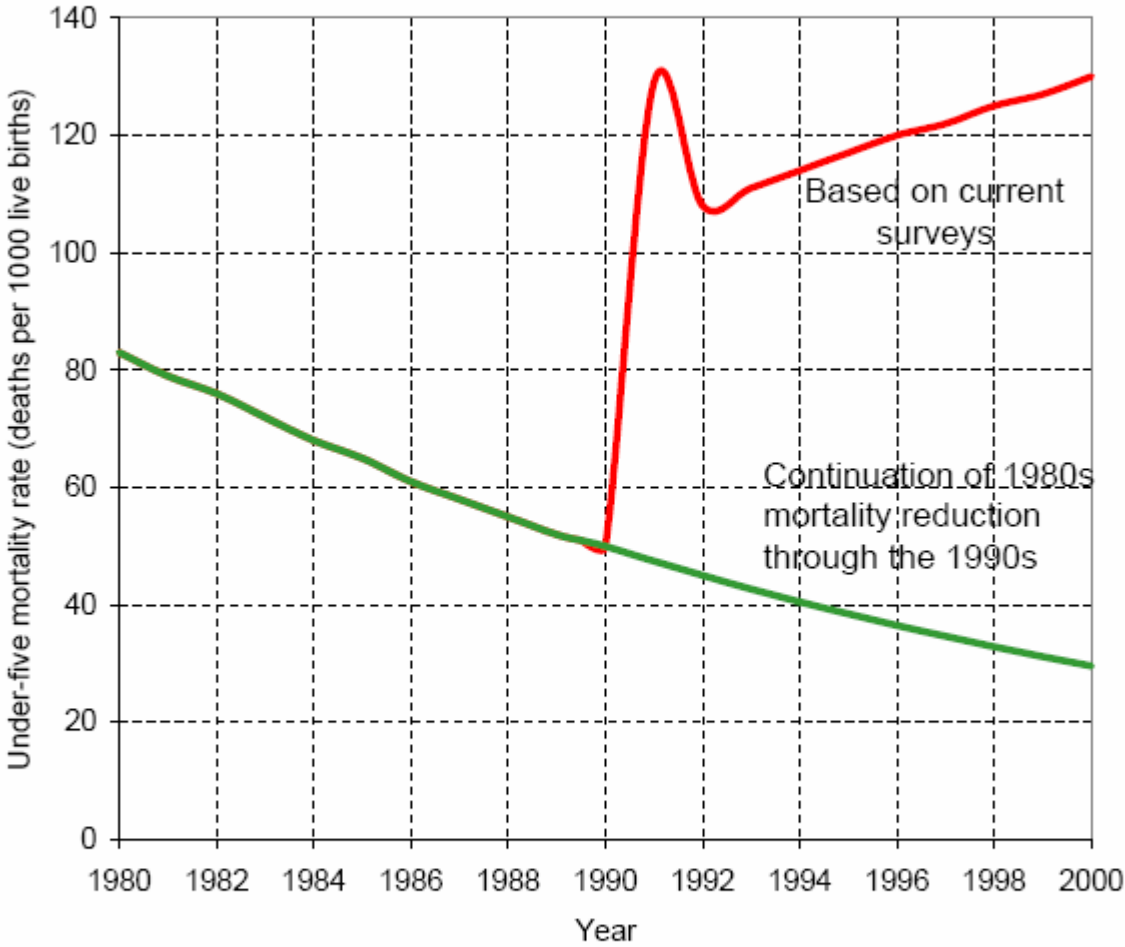
²⁴ *Id.*

²⁵ *Id.* ¶ 21.

²⁶ *Id.*

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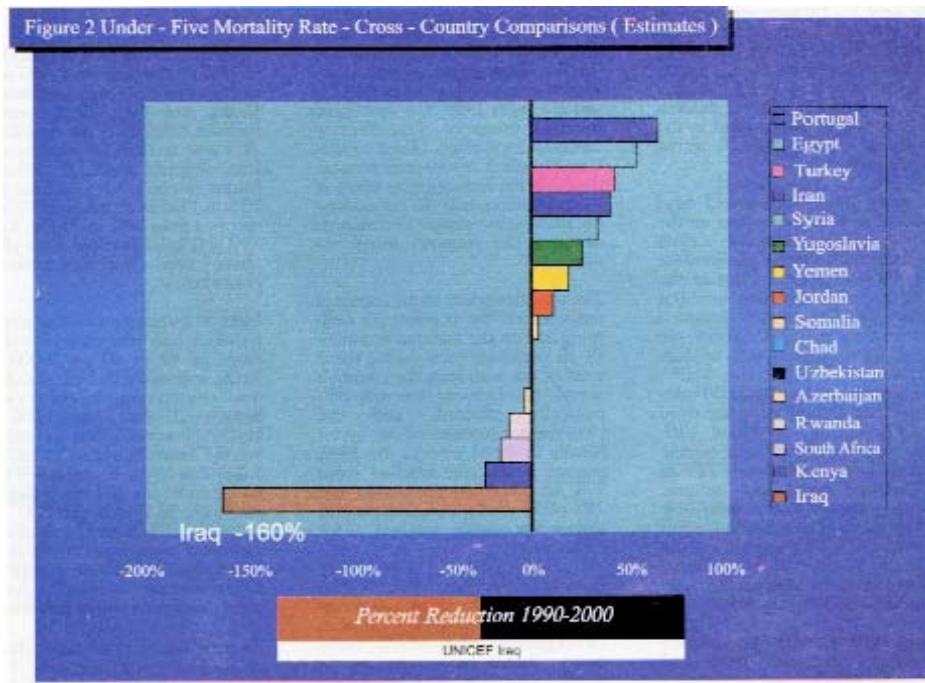
Chart 2: Iraq - under-five mortality rate disparities



The chart shows the large disparity between the mortality rates based on recent surveys and what would have been the situation if the mortality trend in the 1980s had been continued through the 1990s.

In 2003 UNICEF published another report, entitled “The Situation of Children in

1 Iraq.²⁷ Page 13 of that report states that a country like Iraq, which had an infant mortality rate
 2 of 40-60 deaths per 1,000 live births in 1990, should have achieved a rate of 20-30 by 2003.²⁸
 3 Instead, the infant mortality rate in southern and central Iraq climbed to 107 deaths per 1,000
 4 live births by 1999.²⁹ The under-five mortality rate, meanwhile, rose from 56 deaths per 1,000
 5 live births in 1985-89 to 131 in 1995-99.³⁰ Page fourteen of the report contains the following
 6 chart, which compares the 160% increase in childhood mortality in Iraq to the (generally
 7 improving) trend in other countries:



19 UNICEF attributes the increase in childhood mortality in Iraq to economic sanctions.³¹

20 The situation has not improved since the end of the Second Gulf War.³² When Mr.
 21 Sacks filed this action, UNICEF's website (<http://www.unicef.org/infobycountry/iraq.html>)

22 ²⁷ *Id.* ¶ 22; see http://www.unicef.org/publications/pub_children_of_iraq_en.pdf.

23 ²⁸ Complaint ¶ 22.

24 ²⁹ *Id.*

25 ³⁰ *Id.*

26 ³¹ *Id.*

³² *Id.* ¶ 24.

1 reported:

2 Even before the most recent conflict began, many children were highly
3 vulnerable to disease and malnutrition. One in four children aged under the age
4 of five is chronically malnourished. One in eight children dies before their fifth
5 birthday.³³

6 The U.S. embargo on medical and other necessities remained in effect even after reports
7 of the resulting humanitarian catastrophe reached the ears of senior U.S. officials. Indeed,
8 members of the executive branch publicly deemed these widespread deaths of infants and
9 children in Iraq to be “worth it.”³⁴ In 1996, former Secretary of State (and then U.S
10 Ambassador to the UN) Madeleine Albright was asked: “We have heard that a half million
11 children have died. I mean, that's more children than died in Hiroshima. And, you know, is the
12 price worth it?”³⁵ She responded, “I think this is a very hard choice, but the price--we think the
13 price is worth it.”³⁶

14 Attempts to ameliorate this suffering through the “oil-for-food” program failed to
15 eliminate widespread sanctions-related infant and child mortality.³⁷ The first two directors of
16 the oil-for-food program resigned from the UN in protest.³⁸

17 The first director, Denis Halliday, resigned in September 1998 after serving as United
18 Nations Assistant Secretary General and Humanitarian Coordinator in Iraq.³⁹ He explained:

19 Malnutrition is running at about 30 percent for children under 5 years old. In
20 terms of mortality, probably 5 or 6 thousand children are dying per month. This
21 is directly attributable to the impact of sanctions, which have caused the
22 breakdown of the clean water system, health facilities and all the things that

21 ³³ *Id.*

22 ³⁴ *Id.* ¶ 25.

23 ³⁵ *Id.*

24 ³⁶ *Id.* Ms. Albright later expressed regret for this statement, but has continued to insist that sanctions are
25 justified notwithstanding the “starvation” and “horrors” experienced by the Iraqi people. *Id.*

26 ³⁷ *Id.* ¶ 26.

³⁸ *Id.* ¶ 27.

³⁹ *Id.*

1 young children require. . . . I do not want to administer a program that results in
2 these kind of figures.⁴⁰

3 A month after resigning, Mr. Halliday warned: “We are in the process of destroying an entire
4 society. It is as simple and terrifying as that.”⁴¹

5 Mr. Halliday was succeeded by Hans von Sponeck, who served as UN Assistant
6 Secretary General and Humanitarian Coordinator for Iraq.⁴² Mr. Von Sponeck served until
7 February 2000, when he, too, resigned, stating, “I increasingly became aware that I was
8 associated with a policy of implementing an oil-for-food program that could not possibly meet
9 the needs of the Iraqi people.”⁴³ He cautioned, “If we continue this policy when we fully
10 recognize its consequences, we move toward genocide.”⁴⁴

11 UNICEF reports confirm that the oil-for-food program “stopped the humanitarian
12 situation from deteriorating, but did not greatly improve conditions for most Iraqis.”⁴⁵ This is
13 partly because revenue has not been sufficient to comprehensively rehabilitate the country’s
14 infrastructure.”⁴⁶ UNICEF’s 2003 report, cited above, concluded:

15 [S]ince the introduction of the Oil for Food Programme, the
16 nutritional status of children has not improved. One in five
17 children in the south and centre of Iraq remain so malnourished
that they need special feeding, and child sickness rates continue
to be alarmingly high.⁴⁷

18 **C. Bert Sacks Brings Medicine and Other Medical Supplies to Civilian Hospitals in**
19 **Iraq, and OFAC Retaliates.**

20 Bert Sacks responded to this humanitarian catastrophe by bringing medicine and

21 ⁴⁰ *Id.*

22 ⁴¹ *Id.*

23 ⁴² *Id.* ¶ 28.

24 ⁴³ *Id.*

25 ⁴⁴ *Id.*

26 ⁴⁵ *Id.* ¶ 29.

⁴⁶ *Id.*

⁴⁷ *Id.*; see UNICEF, THE SITUATION OF CHILDREN IN IRAQ, at 11 (2003).

1 medical supplies to Iraq. There he distributed them to patients, many of them children, in
2 civilian hospitals.⁴⁸ In November 1997, Mr. Sacks helped bring roughly \$40,000 worth of
3 medicine into Iraq.⁴⁹

4 After this trip which received national media coverage, OFAC sought to punish Mr.
5 Sacks.⁵⁰ In December 1998, OFAC sent a written “Prepenalty Notice” to Mr. Sacks and
6 others.⁵¹ In Count 6 of the Prepenalty Notice, OFAC made the following charge:

7 Between on or about November 21-30, 1997, Messrs.
8 Handelman, Mullins, Sacks, and Zito, engaged in currency travel-
9 related transactions to/from/within Iraq absent prior license or
10 other authorization from OFAC. These currency transactions
11 included, but are not limited to, the purchase of food, lodging,
12 ground transportation, and incidentals.⁵²

13 OFAC proposed a \$10,000 penalty and invited written comments.⁵³

14 Mr. Sacks responded by admitting he brought \$40,000 worth of medical supplies to Iraq
15 and explaining why:

16 We all recognize, I hope, that the \$40,000 of medicines we
17 brought to Iraq --- despite the lives it saved --- was essentially a
18 symbolic act: it lasted the 22 million people of Iraq about 15
19 minutes, given their pre-sanctions needs of \$1,000,000 of
20 imported medicines per day. Further, we brought nothing
21 towards the \$10,000,000 of food imports Iraqis need per day.
22 And we brought nothing towards the \$22,000,000,000 of
23 essential repairs for the life-supporting infrastructure needed to
24 stop the water-borne epidemics in Iraq. These numbers long ago
25 convinced me that the human crisis in Iraq cannot be solved by
26 humanitarian aid --- but only by an end of economic sanctions.

The decision to turn to civil disobedience to end sanctions, in
public defiance of the laws you are entrusted with enforcing, was
not a natural one for me. I first spent two years of research,
writing, and contacting people about the situation, but this failed

22 ⁴⁸ Complaint ¶ 13.

23 ⁴⁹ *Id.*

24 ⁵⁰ *Id.* ¶ 38.

25 ⁵¹ *Id.*

26 ⁵² *Id.*

⁵³ *Id.*

1 to cast any significant public attention on the thousands of Iraqi
2 children who were dying every month because of the bombed
3 civilian infrastructure (unsafe drinking water) and sanctions (lack
of food and medicines). In deciding to publicly violate sanctions,

4 [One was] knowing that 150 years ago it was the highest law of
5 the United States of America that runaway slaves from the South
6 were legally “stolen property” of their owners. Anywhere in this
7 country, an American was breaking the law to help such a slave
escape via the “underground railroad.” The people I greatly
admire from this terrible era in our history were not law-abiding
citizens, but those who broke the law to help slaves. . . .⁵⁴

8 OFAC waited until May 2002 to respond to Mr. Sacks’s letter. That month, it sent a
9 written “Penalty Notice” to Mr. Sacks.⁵⁵ In it, OFAC claimed:

10 You admitted the [Prepenalty] Notice’s allegation in Count 6 that
11 you exported goods to Iraq absent prior OFAC approval and also
12 stated that you decided to violate the U.S.-Government’s
13 economic sanctions against Iraq as an act of civil disobedience.
14 OFAC notes that you have admitted to Count 6 alleged in the
Notice. The allegations included your currency travel-related
transaction to/from/within Iraq absent prior license or other
authorization from OFAC. . . . Accordingly, OFAC finds that
15 you have violated the Regulations as alleged in Count 6 of the
Notice.

16 The Penalty Notice concluded that a \$10,000 penalty was appropriate.⁵⁶

17 Mr. Sacks responded to the notice and noted (correctly) that he had not admitted the
18 charges set forth in Count 6; he had only admitted to bringing medicine to Iraq.⁵⁷ As Mr. Sacks
19 explained:

20 Count 6 [in your letter to us of December 3, 1998] deals only
21 with “travel-related transactions . . . the purchase of food, lodging,
ground transportation and incidentals.” I have never admitted to,
nor supplied information about, any such transactions.⁵⁸

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23 ⁵⁴ *Id.* ¶ 16.

24 ⁵⁵ *Id.* ¶ 41.

25 ⁵⁶ *Id.*

26 ⁵⁷ *Id.* ¶ 42.

⁵⁸ *Id.*

1 In August, 2003, an organization named Ocwen Federal Bank wrote Mr. Sacks to
2 advise that OFAC had retained it to collect the civil penalty.⁵⁹ This suit followed.

3 **III.**
4 **DISCUSSION**

5 **A. OFAC's Claim Is Time-Barred**

6 The facts as alleged establish that OFAC's claim is time-barred. OFAC seeks to
7 enforce a civil penalty. OFAC's claim accrued when Mr. Sacks went to Iraq in November
8 1997. 28 U.S.C. § 2462 provides:

9 Except as otherwise provided by Act of Congress, an action, suit
10 or proceeding for the enforcement of any civil fine, penalty, or
11 forfeiture, pecuniary or otherwise, shall not be entertained unless
12 commenced within five years from the date when the claim first
13 accrued.

14 Therefore, the limitations period for bring suit expired in November 2002. OFAC has yet to
15 bring suit to enforce a civil penalty. Its suit is now time-barred.

16 OFAC's entire discussion of the statute of limitations is confined to footnote 7 of its
17 motion. Nowhere in that footnote does OFAC dispute that the statute of limitations has run.

18 Instead, OFAC summarily dismisses the statute of limitations as "irrelevant" because
19 "OFAC is not at this time seeking to enforce its penalty in this Court."⁶⁰ The implication is that
20 OFAC is free to pursue its stale claim through extra-judicial means.

21 If, however, OFAC is free to impose and collect a penalty outside the courts, how is Mr.
22 Sacks to contest the validity of the claimed penalty? Or its amount? By seeking the outright
23 dismissal of Mr. Sacks's complaint, OFAC supplies its answer to these questions: Mr. Sacks
24 may not contest the penalty at all. Thus, OFAC asserts the unfettered authority to assess,
25 quantify, and collect a penalty without judicial interference or restraint. Indeed, OFAC
26 contends that it may assess and collect penalties of up to \$250,000 in this manner.⁶¹

⁵⁹ *Id.* ¶ 47.

⁶⁰ Motion at 7 n.7.

⁶¹ Motion at 5:5-6. 50 U.S.C. §1706(a) only authorizes a civil penalty of up to \$10,000. Thus, OFAC's

1 OFAC's own regulations contradict its theory. Section 575.705 provides:

2 In the event that the person named does not pay the penalty
3 imposed pursuant to this subpart or make payment arrangements
4 acceptable to the Director within 30 days of the mailing of the
5 written notice of the imposition of the penalty, the matter *shall* be
6 referred to the United States Department of Justice *for*
7 *appropriate action to recover the penalty in a civil suit in a*
8 *Federal district court.*

9 OFAC's own regulations, therefore, require OFAC to recover a penalty "in a civil suit in a
10 Federal district court."

11 OFAC identifies no authority that supports its theory, either. As the moving party on a
12 Rule 12(b)(6) motion, OFAC carries a heavy burden. That burden encompasses providing this
13 Court with authority to support its demand for dismissal. OFAC has failed to meet that burden.
14 This Court need not consider arguments OFAC hasn't deigned to support.

15 Nonetheless, OFAC's position is wrong. District courts have jurisdiction "of all civil
16 actions, suits or proceedings commenced by the United States, or by any agency or officer
17 thereof expressly authorized to sue by Act of Congress."⁶² In the case of proceedings to
18 enforce a fine or civil penalty, that jurisdiction is exclusive.⁶³ And OFAC's efforts to enforce
19 its civil penalty are subject to the Federal Debt Collection Procedures Act of 1990.⁶⁴ This Act
20 sets forth the procedures under which the federal government may enforce a "debt," which the
21 act defines to include any "amount that is owing to the United States on account of a . . . fine
22 [or] penalty."⁶⁵ The Act "provides the exclusive civil procedures for the United States – (1) to
23 recover a judgment on a debt; or (2) to obtain, before judgment on a debt, a remedy in
24 connection with such claim,"⁶⁶ except where other federal law specifies additional

25 \$10,000 civil penalty on Mr. Sacks was the maximum available.

26 ⁶² 28 U.S.C. §1345.

⁶³ 28 U.S.C. §1355

⁶⁴ Pub. L. 101-647, Title XXXVI, 104 Stat. 4933, 28 U.S.C. § 3001, *et seq.*

⁶⁵ 28 U.S.C. § 3002(3)(B).

⁶⁶ 28 U.S.C. § 3001(a).

1 procedures.⁶⁷

2 OFAC cites no federal law that allows it to collect Mr. Sacks's alleged debt through an
3 administrative proceeding or through extra-judicial self-help. Accordingly, OFAC may not
4 pursue its claim for that alleged debt outside the exclusive procedures set forth in the Federal
5 Debt Collection Procedures Act and outside the exclusive jurisdiction of the federal district
6 courts.

7 And OFAC has five years in which to do so. This renders OFAC's extra-judicial
8 collection efforts unlawful. On that basis alone, Mr. Sacks is entitled to a declaration that
9 OFAC's claims are time-barred and to an injunction directing OFAC to cease its efforts to
10 pursue those claims outside the courts.⁶⁸ But there is another basis: OFAC's regulatory
11 embargo on medicine and other medical supplies violates international law and domestic
12 statute.

13 **B. The Starting Point: OFAC's Regulations Violate International Law.**

14 Mr. Sacks's position in his complaint is straightforward enough: international law
15 prohibits states from imposing embargoes that deprive civilians, especially mothers and young
16 children, of food, medicine, medical supplies, and other necessities of life.⁶⁹ Nowhere in
17 OFAC's motion does OFAC argue otherwise.⁷⁰

18
19 ⁶⁷ *Id.* § 3001(b).

20 ⁶⁸ Other procedural challenges to OFAC's penalty exist. For example, the factual justification for
21 OFAC's penalty is an admission Mr. Sacks never made. Nor has OFAC provided any basis for the
22 amount of the proposed penalty. OFAC's motion fails to acknowledge these issues, and identifies no
reason why Mr. Sacks may not challenge OFAC's penalty on these grounds. This is yet another reason
why this Court may not dismiss this case.

23 ⁶⁹ *See, e.g.,* Complaint ¶ 37. International law admittedly contemplates that harm may befall civilians as
24 an unintended and necessary incident to otherwise lawful behavior. But it distinguishes between such
harm and the deliberate infliction of harm on civilians. This motion doesn't require elaboration on the
precise location of the line between lawful and unlawful conduct.

25 ⁷⁰ OFAC discussion of this issue is limited to a single line on page 18 of its motion. There OFAC says
26 "it does not" admit that Executive Order 12,724 (as opposed to its own regulations) violates customary
international law.

1 Nor could it. Treaty after treaty reaffirms that this is the part of the law of civilized
2 nations. So does the UN Security Council's exemption of medical supplies from economic
3 sanctions on Iraq. And so does Congress's enactment of IEEPA, which denies the executive
4 branch the authority to impose embargoes on food, medicine, and other medical supplies.

5 Consequently, as this Court considers the legal issues discussed below, it must do so
6 against the backdrop of this uncontested principle of international law. And it must do so while
7 accepting the truth of Mr. Sacks's allegation that OFAC adopted regulations whose purpose
8 and effect were to deny Iraqi civilians access to medicine and medical supplies as part of
9 economics sanctions against Iraq, sanctions that contributed to the deaths of a half million Iraqi
10 children under the age of five. In short, this Court's analysis must begin with the understanding
11 that OFAC's regulations violate international law because they constitute an attempt to deny
12 civilians, particularly mothers and young children, of food, medicine, medical supplies, and
13 other necessities of life. In the words of a 2000 working paper for the Office of the UN High
14 Commissioner for Human Rights, "The sanctions regime against Iraq is unequivocally illegal
15 under existing international humanitarian law and human rights law. Some would go as far as
16 making a charge of genocide."⁷¹

17 With those facts in mind, this brief turns to OFAC's arguments.

18 **C. UNPA Does Not Authorize OFAC's Regulations**

19 OFAC anchors its attempt to punish Mr. Sacks in UNPA and, specifically, 22 U.S.C.
20 § 287c(a). The prerequisite to executive action under UNPA is a UN Security Council
21 resolution calling upon UN members to take action.

22 On page 7, OFAC quotes extensively from section 287c(a). But OFAC omits
23 important language from its quotation. Section 287c(a) provides in relevant part that

24 _____
25 ⁷¹ MARC BOSSUYT, THE ADVERSE CONSEQUENCES OF ECONOMIC SANCTIONS ON THE ENJOYMENT OF
26 HUMAN RIGHTS (2000) ¶ 71. This report is available on-line at
[www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/c56876817262a5b2c125695e0050656e/\\$FILE/G0014092.doc](http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/c56876817262a5b2c125695e0050656e/$FILE/G0014092.doc)

1 notwithstanding other law, “whenever the United States is called upon by the Security Council
2 to apply measures which said Council has decided . . . are to be employed to give effect to its
3 decisions . . . , the president may, *to the extent necessary to apply such measures*, regulate or
4 prohibit . . . economic relations.”⁷²

5 OFAC deliberately excised the emphasized language from its quotation. Yet this
6 language is material to the issues presented in its motion. For it makes clear that OFAC does
7 not have free range to regulate international economic relations. Instead, OFAC may only act
8 “to the extent necessary” to implement a Security Council resolution.

9 OFAC claims its regulations were enacted to enforce Security Council resolutions 660
10 and 661.⁷³ Resolution 660, however, didn’t call on the United States to impose sanctions of
11 any sort. It simply condemned Iraq’s invasion of Kuwait, demanded that Iraq withdraw, and
12 called upon Iraq and Kuwait to resolve their differences.

13 Resolution 661, meanwhile, didn’t order an embargo on medicine and medical supplies.
14 To the contrary, it exempted “supplies intended strictly for medical purposes” and “payments
15 exclusively for strictly medical or humanitarian purposes” from the embargo.⁷⁴

16 Nor did Resolution 661 order travel-related restrictions. OFAC claims that section four
17 of Resolution 661 justified a ban on travel. But section four makes no mention of travel to Iraq
18 whatsoever, and neither does any other section of Resolution 661. Instead, Resolution 661
19 calls upon member states to prevent their nationals from making funds or resources available to
20 the Government of Iraq. Transferring funds to the Government of Iraq is different from
21 traveling to Iraq. Hence, prohibiting the former doesn’t prohibit the latter.

22
23 ⁷² 22 U.S.C. § 287c(a) (emphasis added).

24 ⁷³ Motion at 2:11-21 & 7:13 – 8:10.

25 ⁷⁴ In addition, the purpose of Resolution 661 is not unlimited. Its self-proclaimed purpose was “to bring
26 the invasion and occupation of Kuwait by Iraq to an end and to restore the sovereignty, independence
and territorial integrity of Kuwait.” Nothing in the resolution purports to authorize sanctions past the
date on which these objectives were accomplished.

1 These UN Security Council resolutions didn't call on the United States to impose an
2 embargo on humanitarian supplies or restrict travel. Therefore, UNPA didn't authorize OFAC
3 to promulgate regulations imposing such an embargo or such restrictions.⁷⁵ OFAC must look
4 elsewhere for authority. The only other statute potentially available is IEEPA.

5 **D. IEEPA Denies the Executive Branch Authority To Impose Sanctions That Violate**
6 **International Law.**

7 Thirty-two years after passing UNPA, Congress enacted IEEPA in 1977. The
8 intervening years were ones of great change. In 1948, the Universal Declaration of Human
9 Rights issued.⁷⁶ Article 25(1) of the Universal Declaration stated:

10 Everyone has the right to a standard of living adequate for the
11 health and well-being of himself and of his family, including
 food, clothing, housing and medical care and necessary social
 services

12 Article 25(2) provides that “[m]otherhood and childhood are entitled to special care and
13 assistance.” Civilized nations thus recognize that depriving people – particularly mothers,
14 infants, and young children – of “food, clothing, housing and medical care and necessary social
15 services” constitutes a deprivation of their human rights.⁷⁷

16 ⁷⁵ For the same reason, OFAC errs when it claims Security Council resolutions created an “obligation,”
17 within the meaning of Article 103 of the UN Charter, that overrules conflicting international law.
18 Motion at 17. Because the Security Council’s resolutions don’t call for an embargo on medicine and
19 medical supplies, there is no conflict between those resolutions and international law that prohibits such
20 an embargo. OFAC also cites no authority for its claim that when the Security Council “calls upon”
21 members to take action under Article 41 of the UN Charter, this creates an “obligation” under the UN
22 Charter within the meaning of Article 103 (much less an obligation that potentially could conflict with
23 the requirements of international law). The notion that the Security Council could overrule international
24 law by *diktat* is contrary one of the UN Charter’s stated purposes for the UN’s existence: to settle
25 international disputes “in conformity with the principles of justice *and international law.*” U.N.
26 CHARTER, art. 1, para. 1 (emphasis added).

⁷⁶ OFAC notes that the Declaration isn’t a treaty. True enough. Nonetheless, it is evidence of
customary international law, i.e., international law that hasn’t been codified in a treaty.

⁷⁷ Although the Declaration itself isn’t a treaty, many of the rights set forth in the Declaration were
subsequently enshrined in the treaties discussed in the text, as well as the Convention on the Rights of
the Child, which entered into force in 1990 and which the United States signed in 1995. Motion at
11:18. Article 24 of the Convention on the Rights of the Child “recognize[s] the right of the child to the
enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and
rehabilitation of health.” The Convention states that nations “shall strive to ensure that no child is

1 The Geneva Convention Relative to the Protection of Civilian Persons in Time of War⁷⁸
2 entered into force in 1956. Article 23 of the Geneva Convention states that even during war,
3 parties to the treaty

4 shall allow the free passage of all consignments of medical and
5 hospital stores . . . intended only for civilians of another High
6 Contracting Party, even if the latter is its adversary. It shall
7 likewise permit the free passage of all consignments of essential
8 foodstuffs, clothing and tonics intended for children under
9 fifteen, expectant mothers and maternity cases.

10 Finally, the Convention on the Prevention and Punishment of the Crime of Genocide⁷⁹
11 entered into force in 1951. This Convention was drafted in response to Nazi atrocities
12 committed during World War II,⁸⁰ and largely embodied the principles of law that were applied
13 during the post-war Nuremberg trials. The Senate ratified the convention in 1988. Article II of
14 the Convention defines genocide to include killing or causing serious bodily or mental harm to
15 members of a group as well as deliberately inflicting conditions of life calculated to bring about
16 the partial or total physical destruction of the group. Legal scholars have suggested that
17 economic sanctions against Iraq have risen to the level of genocide within the meaning of the
18 Convention.⁸¹ So, as set forth above, have senior UN officials charged with responsibility for
19 the oil-for-food program in effect during the 1990s.

20 deprived of his or her right of access to such health care services.” Accordingly, the Convention
21 requires countries to “take appropriate measures: (a) To diminish infant and child mortality; (b) To
22 ensure the provision of necessary medical assistance and health care to all children with emphasis on the
23 development of primary health care; (c) To combat disease and malnutrition, including within the
24 framework of primary health care, through, inter alia, the application of readily available technology
25 and through the provision of adequate nutritious foods and clean drinking-water, taking into
26 consideration the dangers and risks of environmental pollution; [and] (d) To ensure appropriate pre-
27 natal and post-natal health care for mothers.”

28 ⁷⁸ Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

29 ⁷⁹ Dec. 9, 1948, 78 U.N.T.S. 277.

30 ⁸⁰ S. REP. NO. 99-2, pt. I, *reprinted in* 28 I.L.M. 754, 762 (1989).

31 ⁸¹ See George Bisharat, *Sanctions As Genocide*, TRANSNAT'L L. & CONTEMP. PROBS. 379 (Fall 2001).
32 Professor Bisharat is a member of the regular faculty at the Hastings College of the Law in San
33 Francisco.

1 These treaties and international documents codify certain principles of international
2 law. They serve, moreover, as evidence of customary (i.e., uncodified) international law. One
3 of those principles is that one state may not deprive citizens of another state of life's
4 necessities, including medicine and medical supplies. Put another way, international law
5 prohibits embargoes on medicine and medical supplies intended for civilian purposes.

6 Not surprisingly, when Congress enacted IEEPA in 1977, incorporated these principles
7 of international law into the statute.⁸² Consequently, 50 U.S.C. §1702(b) contains the
8 following restrictions on executive authority:

9 The authority granted to the President by this section does not
10 include the authority to regulate or prohibit, directly or indirectly
11 --

12 (2) donations . . . of articles, such as food, clothing, and
13 medicine, intended to be used to relieve human suffering . . . ; or

14 (4) any transactions ordinarily incident to travel to or from any
15 country, including importation of accompanied baggage for
16 personal use, maintenance within any country including payment
17 of living expenses and acquisition of goods or services for
18 personal use, and arrangement or facilitation of such travel
19 including nonscheduled air, sea, or land voyages.⁸³

20 Subsection (b)(2) above extends beyond food and medicine to all other “articles” intended for
21 humanitarian purposes. In *Veterans Peace Convoy, Inc. v. Schultz*,⁸⁴ the court extended it to
22 used vehicles donated for such purposes.

23 OFAC attempts to escape the reach of these two provisions with a two-step approach.
24 First, OFAC sets up a straw man. Specifically, OFAC tries to transform this case into one that
25 concerns Mr. Sacks’s abstract freedom to travel and OFAC’s authority to regulate travel.

26

⁸² This statutory prohibition of certain actions that violate international law moots the issue whether the latter is legally binding or enforceable. The statute is binding and enforceable. Hence, there is no need to engage in an academic discussion as to whether various treaties are self-executing or create private rights.

⁸³ 50 U.S.C. §1702(b).

⁸⁴ 722 F. Supp. 1425 (S.D. Tex. 1988).

1 Then, OFAC knocks the straw man down. OFAC insists that international law and the
2 Constitution allow the federal government to regulate international travel (a proposition Mr.
3 Sacks doesn't deny).

4 OFAC's attempt fails because this case isn't about Mr. Sacks's right to go sight-seeing
5 abroad. Rather, it's about OFAC's authority to regulate or prohibit the export of medicine and
6 other medical supplies for humanitarian purposes.

7 And this is precisely what OFAC's regulations do. 31 CFR §575.205 forbids U.S.
8 citizens from *sending* medicine and medical supplies to Iraq through third parties, while 31
9 CFR §575.207 forbids U.S. citizens from *bringing* medicine and medical supplies to Iraq.
10 Together, these two regulations completely prevent medicine and medical supplies from
11 reaching innocent civilians in Iraq.

12 OFAC has no authority to do this. Section 1702(b)(2) denies OFAC the authority to
13 impose an embargo on medicine and medical supplies.⁸⁵ Indeed, that section goes even further,
14 denying OFAC the authority to "regulate . . . directly *or indirectly* . . . donations of food,
15 clothing, and medicine." Hence, OFAC can't "regulate" humanitarian donations, not even
16 "indirectly."⁸⁶ For this reason, OFAC exceeded its authority when it promulgated regulations
17 to prevent Mr. Sacks and others from either sending or bringing humanitarian supplies to Iraq.

18 **E. The Iraq Sanctions Act of 1990 Doesn't Exempt OFAC From IEEPA's**
19 **Requirements or From International Law.**

20 OFAC seeks to wriggle out of the confines of IEEPA and international law using the
21 Iraq Sanctions Act of 1990.⁸⁷ OFAC claims this Act makes Mr. Sacks's position "untenable"
22 because it represents Congressional ratification of OFAC's regulations, thereby overruling both

23 _____
24 ⁸⁵ Unlike subsection (b)(4), subsection (b)(2) *was* in effect before OFAC's regulations were
25 promulgated. This renders OFAC's arguments about the retroactive effect of 50 U.S.C. §1702(b)(4)
irrelevant.

26 ⁸⁶ This invalidates OFAC's requirement that such donations be licensed.

⁸⁷ Pub. L. 101-513, *see* 70 U.S.C. § 1701 note.

1 IEEPA's limits on executive authority⁸⁸ and prior inconsistent international law.⁸⁹

2 It's true that the Iraq Sanctions Act expressed approval of Executive Orders 12,722 and
3 12,724. But as previously noted,⁹⁰ both of these orders (unlike OFAC's regulations) exempted
4 donations of medicine and medical supplies from their scope. Thus, Congress only approved
5 sanctions that exempted medicine and medical supplies from their scope. This hardly
6 constitutes approval of sanctions that *don't* contain such an exemption.

7 Nothing else in the Iraq Sanctions Act expresses Congress's intent to unleash OFAC
8 from IEEPA's restrictions. Moreover, section 586C(d)(2) of the Act provides:

9 Nothing in this section supersedes any provision of the National
10 Emergencies Act⁹¹ or any authority of the president under the
International Emergency Economic Powers Act

11 Nor does the Act announce Congress's intent to overrule a generation of treaties concerning
12 human rights.

13 Notwithstanding the provisions of the Act, OFAC's regulations must comport with
14 IEEPA and international law. Since they don't, they are invalid and unenforceable.

15 **F. This Case Doesn't Implicate the Political Question Doctrine or the President's**
16 **Authority Over Foreign Affairs**

17 On pages 5 and 6 of in its motion, OFAC suggests that this case implicates the political
18 question doctrine, or that it involves a general taxpayer complaint (as opposed to a specific
19 challenge to a very specific penalty), or that it challenges the authority of the executive branch
20 over foreign affairs, or that it asks for a judicial declaration regarding the wisdom of sanctions.
21 OFAC doesn't flesh out any of these passing remarks, so no real response is called for. The

22 ⁸⁸ Motion at 8.

23 ⁸⁹ *Id.* at 16-17.

24 ⁹⁰ *See supra* pp. 4-5.

25 ⁹¹ The National Emergencies Act is codified immediately before the IEEPA at 50 U.S.C. §1601 *et seq.*
26 and is related to the latter act. The National Emergencies Act is the statute that confers upon the
President the authority to declare a "national emergency," which then gives the President authority to
impose sanctions under the IEEPA.

1 premise behind each of these suggestions is that Mr. Sacks is somehow asking this Court make
2 substantive decisions regarding U.S. foreign policy.

3 That premise is wrong. Mr. Sacks doesn't put the wisdom of sanctions before this
4 Court, but their legality. Congress has occupied the field and imposed limits on executive
5 authority, limits that are consistent with, and derive from, this country's obligations under
6 international law. Mr. Sacks alleges that OFAC has exceeded those limits, with lethal
7 consequences for thousands of innocents. Those allegations are susceptible to, and worthy of,
8 this Court's attention, scrutiny, and careful consideration.

9
10 **IV.**
CONCLUSION

11 As OFAC sees it, OFAC may unilaterally and extra-judicially impose fines of up to a
12 quarter million dollars on U.S. citizens. And as OFAC sees it, OFAC may prohibit the export
13 of medicine, medical supplies, and other necessities to civilians in other countries without
14 regard for the resulting loss of life.

15 Congress saw it differently. The UN High Commissioner on Human Rights saw it
16 differently. The drafters of UN Security Council resolutions concerning Iraq saw it differently,
17 as did the drafters of a generation of treaties protecting human rights. Even the drafters of the
18 executive orders upon which OFAC relies saw it differently.

19 This Court should see it differently, too. It must deny OFAC's motion to dismiss.

20 DATED this 10th day of May, 2004.

21 Respectfully submitted,

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on May 10, 2004, I electronically filed the foregoing with the Clerk
3 of the Court using the CM/ECF system which will send notification of such filing to the
4 persons listed below:

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