IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND
Northern Division

UNITED STATES OF AMERICA, Plaintiff, v. Three Knife-Shaped Coins, Twelve Chinese Coins, and Seven Cypriot Coins, Defendants.	)))))))))	Civil No. CCB-13-1183

CLAIMANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO THE GOVERNMENT'S CROSS-MOTION

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I. INTRODUCTION

The claimant, the Ancient Coin Collectors Guild ("the Guild" or "Claimant"),[1] replies in support of its Motion for Summary Judgment and in opposition to the government's Cross-Motion. The scales of justice are tilted heavily in the Guild's favor. The Guild's Motion for Summary Judgment finds support in this Court's June 3, 2014 Order (ECF No. 22) ("the June 3, 2014 Order"), the plain meaning of the Convention on Cultural Property Implementation Act, 19 U.S.C § 2601 *et seq.* ("CPIA"), the Fifth Amendment due process clause of the U.S.

[1] The Guild is a nonprofit 501 (c) (4) organization. It has twenty-two (22) affiliate member organizations and advocates for the interests of thousands of ancient coin collectors and hundreds of small businesses of the numismatic trade. Its website may be found at http://www.accg.us/home.aspx. In defending its property from forfeiture, the Guild is acting on behalf of thousands of ancient coin collectors and hundreds of small businesses of the numismatic trade that only seek to hold the government accountable to the CPIA's strict requirements. Certainly, the modest value of the vast majority of historical coins would dissuade most, if not all, collectors from contesting any forfeiture action.

Constitution, applicable case law, the rules of statutory construction, legislative history, sworn statements from Presidential appointees on the Cultural Property Advisory Committee ("CPAC"), admissions by a high-ranking State Department lawyer, representations the government previously made to this Court about the burden of proof in a forfeiture action even where import restrictions have been found "valid," the 1970 UNESCO Convention, European Union ("E.U.") export regulations, World Treaty Organization ("WTO") rules, the national laws of Cyprus and China, and unrebutted expert testimony. In contrast, the government's papers rely almost exclusively on spinning the Fourth Circuit opinion as result determinative even though that decision was rendered in an entirely different context and that Court was careful to "express no view on how this forfeiture proceeding will unfold." *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection*, 698 F.3d 171, 185 (4th Cir. 2012).

In particular, in its Memorandum in Support of its Motion for Summary Judgment ("Guild MSJ Mem."), the Guild:

- Rebutted any *prima facie* case for forfeiture with expert testimony. Import restrictions were only in effect for twenty-one (21) months for Cypriot coins and three (3) months for Chinese coins when the defendant coins were imported. Large numbers of Cypriot and Chinese coins circulated outside their respective countries for thousands of years, first as currency, then as collectables. There is no reason to think based on the information developed in discovery that these particular coins are the products of recent, illicit digs. It is more probable than not that the coins left Cyprus and China well before import restrictions were imposed. Or, alternatively, even if the Cypriot coins left Cyprus after the date import restrictions were imposed, their entry into the United States would be legal under U.S. law because they were exported in conformity with Cypriot, U.K. and E.U. law. (Guild MSJ Mem. at 15-27.);

- Demonstrated that the government has failed to establish that certain Chinese coins that were seized (Nos. 7-11 and 14-15) are found on the designated lists authorizing import restrictions. Accordingly, they must be returned to the Guild. (Guild MSJ Mem. at 28-29.); and

- Demonstrated that due process rights afforded by Congress require the Court to reconsider its preliminary ruling about the burden of proof and require the government to establish every element of its *prima facie* case. Specifically, before archaeological

> materials may be forfeited, the government must establish: (1) that they are of types that appear on a designated list of artifacts subject to import restrictions; (2) that they were first discovered within and hence were subject to export control by a specific UNESCO State Party for which such restrictions were granted; and (3) that they were illegally removed from that State Party after U.S. import restrictions went into force. Preliminary rulings in this case that suggest that the government may make out a *prima facie* case for forfeiture solely by establishing the first element of this showing shift the burden of proof established by Congress to a claimant's detriment and hence sanction a *per se* violation of the Guild's due process rights. Moreover, to the extent the government's actions in seizing the Guild's property are based on regulations and guidance that contradict the governing statute's "first discovered within" and "subject to export control" requirements, due process is also offended because the Guild and other similarly situated importers have not been given fair notice of the conduct that is forbidden or required before their property may be seized and be subject to forfeiture. (Guild MSJ Mem. at 29-37.)

Unfortunately, rather than addressing the serious issues the Guild raises on the merits, the government instead largely relies on mischaracterizing the Guild's positions, gratuitous insults directed at both the Guild and the Presidential appointees on CPAC, straw man arguments and peevish claims that the Guild is seeking to relitigate its prior declaratory judgment action.[2] Some of these claims are downright disingenuous. For example, despite asserting that the Guild is "not entitled to summary judgment in its favor as to coins 7-11 and 14-15," the government nevertheless then quickly concedes, "[r]egardless, the government has begun the process of returning these coins—and only these coins—to the Guild, mooting the Guild's arguments as to these coins." (Memorandum in Support of the United States of America's Cross-Motion for Summary Judgment and Opposition to Claimant's Motion for Summary Judgment ("Government

[2] Earlier on the very same day the government filed its cross-motion, surrogates for the State Department's Cultural Heritage Center associated with the Antiquities Coalition, an archaeological advocacy group that promotes "public private partnerships" with authoritarian Middle Eastern governments like that of Egypt, took to social media to criticize the Guild and its efforts to ensure that coin collectors and the small businesses of the numismatic trade receive the due process rights afforded by Congress. Coincidentally or not, their attacks pressed home the government's theme that the Guild merely seeks to relitigate the prior declaratory judgment action.

MSJ Mem.") at 22.) As set forth more fully below, the Guild requests the Court to order the return of its property and the payment of its attorney's fees and costs.[3]

II. BACKGROUND

The government's current position that it has made out a *prima facie* case for forfeiture merely by establishing that the coins it seized appear on a designated list is completely at odds to its prior views on the subject.

A. The Government's Prior View on How a Forfeiture Action Should Proceed.

In the declaratory judgment action, the government set forth its views on the "first discovered within" requirement, and how that provision applied in a forfeiture proceeding in its "Supplemental Post-Hearing Clarifications Regarding Delegated Authority, APA Considerations With Recent Fourth Circuit Development, Ancient Coins Found within Modern Boundaries, and Reports to Congress Under the Cultural Property Implementation Act. (*ACCG v. CBP*, ECF No. 36, dated April 1, 2011, relevant pages of which are attached to the Declaration of Peter K. Tompa ("Tompa Decl."), Exhibit X, ECF No. 72-5 at 287-289.) Contrary to what the government states now, the government recognized then that it held the burden of establishing "first discovery" and that the Guild was entitled to rebut the government's case by a preponderance of the evidence.

[3] *See* Stefan D. Cassella, Asset Forfeiture Law in the United States § 13-7 at 539 (Juris 2013) ([A]ttorney's fees are available in *any* civil forfeiture proceeding, regardless of the statute on which the forfeiture action is based). This award is mandatory as long as the party "substantially prevails." *Id.* at 536. In one recent case, the government paid $425,000.00 to the attorneys for the Saint Louis Museum of Art for their work in representing the claimant in a forfeiture action against a mummy mask brought on behalf of the Egypt's authoritarian government. Jenna Green, *Feds Lose Fight Over Ancient Mummy Mask*, The National Law Journal (Oct. 21, 2014), *available at* http://www.nationallawjournal.com/home/id=1202674136582/Feds-Lose-Fight-Over-Ancient-Mummy-Mask?mcode=1202615432992&curindex=1&slreturn=20160803112528 (last visited Sept. 3, 2016).

As the government stated at the time,

D. "First Discovered Within" as Defined by the CPIA

The Defendants further wish to clarify that import restrictions can only apply to objects that fit within one of the categories on the designated list, that were first discovered within the modern boundaries of the State with which the MOU has been concluded, and that are subject to the export controls of that State. The Defendants have never suggested otherwise. See Def's Reply at 9. The CPIA identifies "archaeological or ethnological material", in part, as:

> (C)…any object…which was first discovered within, and is subject to export control by, the State Party [that is, the country with which the United States has entered into an MOU or bilateral agreement].

19 U.S.C. § 2601 (2) (C). However, the question of place of discovery of any particular objects that are imported, or attempted to be imported, into the United States is relevant only once import restrictions have been found to be valid and the government moves to forfeit particular objects that are imported or attempted to be imported.

E. Prospective Forfeiture Action

If the Court determines that the import restrictions are valid, then the forfeiture action can proceed. While it is premature to analyze such an action at this time, it is possible to outline the procedural aspects of forfeiture.

The procedural aspects particular to forfeiture under the CPIA are well laid out in *U.S. v. Eighteenth Century Peruvian Oil on Canvass Painting,* 597 F. Supp. 2d 618, 622-23 (E.D. Va. 2009). The Court stated, "in a CPIA forfeiture action, the United States bears the initial burden to show that the seized property is listed in accordance with 19 U.S.C. § 2604 and properly subject to import restrictions of 19 U.S.C. § 2606. Once the Government makes this initial showing, the burden of proof then shifts to the Claimant to establish, by a preponderance of the evidence, that the property is not subject to forfeiture, or to establish any applicable affirmative defense." *Id.* at 623.

The Court then explained in greater detail that the government establishes its *prima facie* case by demonstrating that the materials at issue appear on the designated list and were exported from a State that has a bilateral agreement with the United States. In that case, the government established these facts, in part through the use of expert testimony (including an affidavit submitted by a U.S. Department of Justice attorney). However, exactly what level of expert testimony is required

> should be considered in the forfeiture proceeding, keeping in mind that the government must meet its burden only by the standard of probable cause. Once the government makes its *prima facie* case, the burden shifts to the importer to rebut this evidence or to establish that it is entitled to an affirmative statutory exemption by a preponderance of the evidence.

(*Id.*) As set forth more fully below, the government takes an entirely different tack here.

B. The Government's Current View of How a Forfeiture Action Should Proceed.

The government's current view about how a forfeiture action under the CPIA should proceed puts a premium on expediency. As long as the government has "probable cause" to believe that an artifact is of a type on a designated list, it may not only be detained and seized, but forfeited if the importer does not present the "satisfactory evidence" described in 19 U.S.C. § 2606, i.e. either export documentation or declarations under oath showing that a restricted object of archaeological interest was out of the country for which restrictions were granted before the date of the restrictions. (Government MSJ Mem. at 12-13, 16 n.4.)

C. The Guild's View of How a Forfeiture Action Should Proceed.

As set forth here and in the Guild's prior papers, Claimant's view about how this forfeiture action should proceed is informed by the Court's June 3, 2014 Order, the CPIA's plain meaning, the Fifth Amendment due process clause of the U.S. Constitution, the rules of statutory construction, legislative history, sworn statements from Presidential appointees on CPAC, admissions by a high-ranking State Department lawyer, the above representations the government previously made to this Court about the burden of proof in a forfeiture action, the UNESCO Convention, E.U. export regulations, WTO rules, the national laws of Cyprus and China, and unrebutted expert testimony. The Guild's view is far more consistent with the government's initial view of how a forfeiture action should

proceed under the CPIA than it is with the government's current view. So far as objects of "archaeological interest" are concerned, the government bears the initial burden to establish by a preponderance of the evidence[4] that: (1) the item is of a type that appears on the designated list; (2) the item was first discovered within and subject to the export control of the UNESCO State Party for which restrictions were granted; and (3) that it was illegally removed from the State Party after the date those restrictions were granted. Once the government meets its burden, the burden then shifts to the importer to rebut this evidence or to establish that the importer is entitled to a statutory exemption by a preponderance of the evidence. The Guild further submits that either party may use any admissible evidence to meet its burden, including expert testimony based on scholarly evidence.

III. Argument

A. The Court Should Not Undermine the CPIA's Carefully Crafted Statutory Scheme.

The CPIA's carefully crafted statutory scheme meant to focus import restrictions and to protect importers should not be undermined based on the Fourth Circuit's misunderstanding of CPAC's views and judicial deference afforded in an entirely different context that did not raise the same due process concerns at issue here.

The Guild's papers have already established three (3) fundamental problems with the assertion that the government need only establish that the coins it seized are of types that appear on a designated list to make out a case for forfeiture:

[4] 19 U.S.C. § 2610's wording "Notwithstanding the provisions of Section 1615 of this title" suggests that the government must make out its case by a "preponderance of the evidence standard" rather than by the "probable cause standard" found in Section 1615. This analysis finds further support in "the rule of lenity." *See* Scalia and Garner, Reading Law: The Interpretation of Legal Texts § 49 at 296-302 (Thompson/West 2012); *United States v. Santos*, 553 U.S. 597, 515 (2007) (noting that rule of lenity applied to construe penal statutes against the government since the early days of our Republic).

1. Such an assertion depends on a misreading of the CPIA and its provisions relating to the burden of proof in a forfeiture action. (Guild's MSJ Mem. at 31-33);
2. Such an assertion depends on a misunderstanding of CPAC's views that should not have been made in the first place (*Id.* at 7, 10.); and
3. Such an assertion depends on granting the government exceptional deference where such deference cannot trump the due process rights afforded by Congress in a CPIA forfeiture action. (*Id.* at 35-37.)

Each concern merits further discussion here despite the government's failure to address these points directly in its papers.

1. The CPIA's Plain Meaning Focuses Restrictions and Protects Importers.

The Court's June 3, 2014 Order quotes verbatim the Fourth Circuit's views about the government's *prima facie case* in a forfeiture action. (ECF No. 22.) However, the Fourth Circuit's recitation of the CPIA's burden of proof under 19 U.S.C. § 2610 omits any reference to Section 2604's requirement that import restrictions "may be applied only to the archaeological … material covered by an agreement," i.e., that the material was "first discovered within" and "subject to export control by" China or Cyprus. *Ancient Coin Collectors Guild*, 698 F.3d at 185.

Such statutory shortcuts are wholly inappropriate here where the Guild's due process rights are at stake. The government's claim that it may establish its rights to take the Guild's property merely by demonstrating that the coins that were seized are of types that appear on a "designated list" depends on re-writing a number of important CPIA provisions designed to focus import restrictions and to protect the rights of importers. (*Compare* Government MSJ Mem. at 11-21 *with* Exhibit A, Comparison of Congress' and the Government's Re-Written Version of CPIA, 19 U.S.C. §§ 2601, 2604, 2606, 2609 and 2610.) The fact is, however, before

any forfeiture, Congress has required the government to establish not only that "archaeological material of a State Party" is of a type that appears on a designated list, but also that any such objects of "archaeological interest" were "first discovered within" and "subject to the export control by" the applicable State Party[5] and that any such archaeological material was exported from that State Party "after the designation of such material." 19 U.S.C. §§ 2601, 2604, 2606, 2609 and 2610. Assuming the government establishes its *prima facie* burden, 19 U.S.C. §§ 1615, 2609, 2610 still allows a claimant to demonstrate by the preponderance of the evidence that the property is not subject to forfeiture. Thus, even if the government can establish that "archaeological material of a State Party" is of a type that appears on a designated list that does not end the inquiry. Rather, the CPIA also imposes important limitations on the government's ability to seize and forfeit cultural goods based on considerations of time and place. These explicit restrictions on government discretion relate both to the government's *prima facie* case and any rebuttal.

In short, before archaeological material may be seized and forfeited there must be some showing that it was both first discovered within a specific UNESCO State Party (making it subject to that country's export control) and that it left that specific UNESCO State Party after the date import restrictions were imposed. Allowing seizure and forfeiture solely based the identification of coins as being of types found on a "designated list" supposedly created based on where archaeological material is "generally found" is statutorily insufficient. *See* 698 F.3d at 182

[5] The term "first discovered within" has a somewhat narrower meaning for objects of "archaeological interest" at issue here than for objects of "ethnological interest." Objects of "archaeological interest" must be "normally discovered as a result of scientific excavation, clandestine or accidental digging or exploration on land or underwater." *See* 19 U.S.C. § 2601 (2). Scalia and Garner explain that "Ordinarily, judges apply text-specific definitions with rigor." Scalia and Garner, Reading Law: The Interpretation of Legal Texts § 36 at 225-233 (Thompson/West 2012). The *Eighteenth Century Peruvian Oil* case involved an ethnographic artifact not an archaeological one so the requirement that the object "was first discovered within" the UNESCO State Party seeking restrictions did not include this additional qualification that relates to objects of "archaeological interest."

("CPAC and the Assistant Secretary did consider where the restricted types may generally be found as part of the review of the Chinese and Cypriot requests. CBP listed the articles in question in the Federal Register by "type" —- but only after State and CPAC had determined that each type was part of the respective cultural patrimonies of China and Cyprus. 74 Fed. Reg. 2,839-42 (Chinese coins); 72 Fed. Reg. 38,470-73 (Cypriot coins).") [6] Only archeological material "specifically found" in a particular State Party can also be "subject to export control by" that same State Party. 19 U.S.C. §§ 2601, 2604, 2606, and 2610. *Accord* Scalia and Garner, Reading Law: The Interpretation of Legal Texts § 26 at 174 (Thompson/West 2012)("[E]very word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored."). Finally, the relevant "time" trigger is the date of export from that State Party, and *not* the date of import into the United States. 19 U.S.C. §§ 2606. Hence, neither the government nor the Court can simply assume that just because archaeological material of a type found on a designated list was imported into the United States after the date import restrictions were imposed that such material was necessarily exported from the State Party after that same date.

2. CPAC Recommended Against Import Restrictions on Coins.

The declarations of two past CPAC members, Past Chair Jay Kislak and Robert Korver, conclusively establish that State Department officials disregarded CPAC's recommendations against placing import restrictions on Cypriot coins and then misled Congress and the public about their advisory committee's true recommendations. (Guild MSJ Mem. at 7, 10.) Moreover,

[6] The Fourth Circuit should not have found facts about what CPAC concluded at all. In an appeal of a grant of a motion to dismiss, it is the factual allegations of the Guild's Complaint--which set forth the Guild's views about coin circulation and questioned whether CPAC actually recommended import restrictions on coins--that should have controlled. *Robinson v. Am. Honda Motor Corp.*, 551 F.3d 218, 222 (4th Cir. 2009). In any event, it is unclear where this "generally found" standard originated. As set forth in the Guild's papers, CPAC could never have adopted such a standard because it rejected import restrictions on Cypriot coins and was not allowed to make recommendations about Chinese coins. (Guild MSJ Mem. at 10.) Moreover, the cited Federal Register notices contain no mention of such a standard.

former CPAC member Robert Korver goes onto confirm that despite Congress' mandates, CPAC was allowed no role in determining whether Chinese coins would be subject to import restrictions. (*Id.* at 10.)

Rather than fess up, however, the government doubles down. Incredibly, the government's papers go so far as to gratuitously insult and diminish the role of CPAC and its Presidential appointees, profess doubts about "CPAC's alleged conclusions," and dismiss the well-founded concerns that prompted these Presidential appointees to speak so forthrightly as a mere "sideshow."[7] (Government MSJ Mem. at 24-25.) Again, however, the government is being disingenuous. As set forth in the Guild's papers, the CPIA contemplates that CPAC will

[7] The State Department presumably misled Congress and the public about CPAC's true recommendations with regard to Cypriot coins because there was no rational, legally cognizable basis for changing then existing policy. Allegations from the Guild's Complaint in the Declaratory Judgment Action, already outlined in the Declaration of Peter K. Tompa, ECF No. 72-6 ¶¶ 37-90, provide good faith factual support for the Guild's concerns that the decision was based on prejudgment and *ex parte* contact as of July 2010. However, given the government's continued efforts to question these good faith concerns, the Guild supplements that information and provides further documentation in a Second Declaration of Peter K. Tompa. Based on this information, the Guild has a good faith belief that lobbying by connected insiders outside the process for public comment to CPAC changed U.S. policy to the detriment of the Guild and its members: (1) State Department Cultural Heritage Center staff worked behind the scenes with members of the Archaeological Institute of America ("AIA") and the Cyprus American Archaeological Research Institute ("CAARI") to engineer new import restrictions on ancient coins; (2) After CPAC rejected a last minute effort to add import restrictions on coins, advocates for import restrictions redoubled their efforts by taking the matter to Under Secretary of State Nicholas Burns who was to receive an award from a Greek Cypriot lobbying group; (3) Undersecretary of State Nicholas Burns' deputy wrote to Burns' subordinate, Assistant Secretary of State Dina Powell, in support of import restrictions on coins one day after Burns received an award from a Greek and Greek Cypriot advocacy group; (4) State Department staff only provided the decision maker, Assistant Secretary of State Dina Powell, a false choice of either allowing a current Memorandum of Understanding with Cyprus to lapse or extending it with new restrictions on coins; (5) At the time Powell made the decision, there was at least an appearance of conflict of interest because she had already accepted a job with Goldman Sachs, an investment bank with business relationships with Greece (and likely Cyprus); (6) At Goldman Sachs, Powell was apparently recruited by and works directly for the spouse of Deborah Lehr, the President of the Antiquities Coalition, an AIA Trustee, and a member of the AIA's "Cultural Heritage Policy Committee"; (7) In promulgating restrictions on specific coin types in response to Powell's decision restricting coins in general, there was no effort to determine what, if any, particular coins of Cypriot type circulated exclusively within Cyprus. Instead, Customs and State simply conflated where coins are made with where they are found; and (8) the State Department then misled Congress and the public about CPAC's true recommendations about coins. Simply, discovery or no, the Guild has a good faith belief that the process has been corrupted; there is a legitimate question whether the "independent judgment" Powell exercised under the CPIA was based on the facts, the recommendations of CPAC and the provisions of governing law, or whether her decision was unduly influenced by job prospects, *ex parte* contacts with advocates for the archaeological lobby, or an award bestowed on her superior.

have an important role in ensuring that the executive branch preserves the "independent judgment" of the United States regarding "the need and scope of import controls." (Guild MSJ Mem. at 5-6, citing S. Rep. No 97-524, ECF No. 72-5.) CPAC's recommendations- including advice to U.S. Customs and Border Protection ("CBP") about the content of designated lists- are not to be taken lightly. (Guild MSJ Mem. at 6.)

At a bare minimum, serious questions raised about the integrity of the process set forth above in Footnote 7 and the accompanying Second Declaration of Peter K. Tompa suggest that the government should be strictly held to its proofs before the Guild's property is forfeited.

3. Due Process Requires the Government to be Put to its Proofs.

Once again, the government has no response to the serious due process concerns the Guild has raised (Guild MSJ Mem. at 35-37.) other than to mischaracterize them and to claim that the Fourth Circuit has already decided all the issues. (Government MSJ Mem. at 23-28.)

a. The Guild Has Raised Two (2) Due Process Claims.

The Guild has raised two (2) related Fifth Amendment due process claims applicable to the government's efforts to forfeit the Guild's coins:

1. Due process precludes altering the burden of proof to the Guild's detriment; and
2. Due process also precludes seizure and forfeiture based on regulations and guidance that contradict the plain meaning of the CPIA.

Although the government may claim otherwise in hopes of encouraging the Court to avoid reconsidering its preliminary rulings,[8] holding for the Guild on either of these due process

[8] The Court may reconsider its prior rulings even at this late date. *See Saint Annes Development Co. v. Adelberg*, 2011 U.S. App. LEXIS 17257*7 (4th Cir. August 17, 2011) ("The power to reconsider or modify interlocutory rulings is committed to the discretion of the district court, and that discretion is not cabined by the heightened standards of reconsideration governing final orders.") (internal quotations and citations omitted).

claims could not preclude the State Department from imposing import restrictions on coins or CBP from listing coins on a designated list. Rather, ruling for the Guild would hopefully encourage both the State Department and CBP to do a far better job in focusing any such restrictions solely on coins "first discovered within" and "subject to the export control by" specific UNESCO State Parties, i.e., what the CPIA already requires.[9]

i. Due Process Precludes Altering the Burden of Proof.

The Second Affirmative Defense[10] states,

> The Due Process Clause of the Fifth Amendment precludes any effort to alter the burden of proof established by Congress and thereby prejudice the Claimant's rights to defend its property from forfeiture. Plaintiff's claims are barred in whole or in part because the government has not made out a *prima facie* case for forfeiture under 19 U.S.C. § 2610, which must be read in conjunction with §§ 2601, 2604. Those provisions require the government to establish that the defendant property was 'first discovered within' and 'subject to the export control' of either Cyprus or China before any burden shifts to Claimant.

(ECF No. 36, Second Affirmative Defense.) The gravamen of this claim is that allowing the government to establish its *prima facie* case merely by showing the defendant coins are of types that appear on the designated list eliminates important time and place limitations on the government's ability to seize and forfeit defendant property.[11] (*See supra.*) The effect of this

[9] There already appears to be some movement in this direction. Recent import restrictions imposed in response to looting associated with Syria's civil war take pains to limit otherwise breathtakingly broad restrictions to artifacts "unlawfully removed from Syria on or after March 15, 2011." 81 Fed. Reg. 53916-53921 (Aug. 15, 2016). As an aside, the date in question—set forth by statute—relates to the date the Syrian civil war began. In contrast, CPIA restrictions are not retroactive, i.e., they come into force the date restrictions are announced to the public in the Federal Register.

[10] Though not strictly "affirmative defenses" as such, the Guild pleads these claims clearly so both the government and the Court would be on notice of the Guild's intention to pursue these arguments in defense of its property. *See generally* Wright & Miller, 5 Fed. Prac. & Proc. § 1274 (2004).

[11] It also raises the specter that import restrictions on coins as construed by the government constitute an embargo that would divest this Court's jurisdiction. (ECF No. 36 ¶¶ 5-6. *See also* Eric Smthweiss, *A Race to the Courthouse?: Jurisdiction over Customs Admissibility Decisions*, 21 Tul. J. Int'l & Comp. L. 291, 307-308 (Spring 2013) (questioning this Court's prior analysis of this issue).)

shift is to impose the *probatio diabolica* or devil's proof on coin collectors as most historical coins lack the necessary provenance information for legal import once restricted. (*See* Deposition of Wayne Sayles, 61:2-64:9 (April 12, 2016), Tompa Decl., Ex. L, ECF 72-5 at 212-216.) More importantly for our purpose here, excusing the government from making out each element of its *prima facie* case also alters the burden of proof established by Congress to the detriment of the Guild and similarly situated coin collectors and hence constitutes a *per se* violation of their due process rights.

ii. Due Process Requires Fair Notice of Conduct that is Forbidden or Required.

The Guild's Eighth Affirmative Defense states,

> Plaintiff's claims are barred in whole or in part because regulations barring import of "coins of Cypriot type" or coins "from China" fail to provide the importer fair notice of the conduct that is forbidden or required under 19 U.S.C. §§ 2601, 2604 and 2610.

(ECF No. 36, Eighth Affirmative Defense.)

The Guild's Eighth Affirmative Defense finds ample precedential support. The U.S. Supreme Court held in *Federal Communications Comm'n v. Fox Television Stations, Inc.,* 132 S. Ct. 2307, 2012 U.S. LEXIS 4661 (June 21, 2012), that due process requires "fair notice" of applicable regulations. In that case, the Supreme Court held that because the FCC failed to give Fox Television Stations or ABC, Inc. fair notice that fleeting expletives and momentary nudity could be found to be actionably indecent, the FCC's standards as applied to these broadcasts were vague. *Id.* In so doing, the Court observed,

> A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. See *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"); *Papachristou*

> v.*Jacksonville*, 405 U. S. 156, 162, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972) ("Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids'" (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 453 S. Ct. 618, 83 L. Ed. 888 (1939) (alteration in original))). This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. See *United States* v.*Williams*, 553 U. S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008). It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Ibid.* As this Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved. See *id.*, at 306, 128 S. Ct. 1830, 170 L. Ed. 2d 650.
>
> Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. See *Grayned* v. *City of Rockford*, 408 U. S. 104, 108-109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

132 S. Ct. at 2317-18. *Accord County of Suffolk v. First American Real Estate Solutions,* 261 F.3d 179, 194 (2nd Cir. 2001) ("Due process requires that before a criminal sanction of significant civil or administrative penalty attaches, an individual must have fair warning of the conduct prohibited by the statute or the regulation that makes such a sanction possible."); *United States v. Approximately 64,695 Pounds of Shark Fins,* 520 F.3d 976 (9th Cir. 2008) (Government seizure of shark fins improper because neither applicable statute nor regulations provided notice to Defendant that shark fins could be seized from a vessel because it would be considered a fishing boat); *United States v. General Elec. Co. v. United States Environmental Protection Agency,* 53 F.3d 1324, 1328 (D.C. Cir. 1995) (case relates to environmental regulations concerning the disposal of PCB's; court observes that "fair notice" requirement has now been thoroughly incorporated into administrative as well as criminal law); *Jamal v. Kane,* 105 F. Supp. 3d 448, 459 (M.D. Pa. 2015) ("Legislation falls short of this mandate when it "fails to

provide a person of ordinary intelligence fair notice of what is prohibited."); *United States v. Burgess,* 1987 U.S. Dist. LEXIS 11227 (N.D. Ill. Dec. 1, 1987) (historical discussion of "fair notice" requirement back to Blackstone's criticism of Caligula "who (according to Dio Cassius) wrote his laws in a very small character, and hung them up on high pillars, the more effectively to ensnare the people.").

Instead of addressing the Guild's claim on the merits, the government resorts to a straw man argument to claim "the Guild negated its own fair notice argument" because it purposefully imported Cypriot and Chinese coins to test regulations in court. (Government MSJ Mem. at 26-27.) Of course, the government should already be well aware of the Guild's "fair notice argument" from the Guild's initial papers (ECF No. 72-1 at 35-36, citing its affirmative defenses.), prior briefing on the issue (ECF No. 54 at 22-23.), and the Guild's Eighth Affirmative Defense. (ECF No. 36, Eighth Affirmative Defense.) As this Court has already observed, one of the applicable regulations, 19 C.F.R. §12.104, conflicts with the CPIA's provisions that only authorize import restrictions on objects of archaeological interest "first discovered within" and "subject to the export control" of a specific UNESCO State Party. *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection,* 801 F. Supp. 2d 383, 407 n. 25 (D. Md. 2011). Moreover, this confusion carries over to a document directed at the public, entitled *What Every Member of the Trade Community Should Know About: Works of Art, Collector's Pieces, Antiques, and Other Cultural Property* 17-18 (U.S. Customs and Border Protection May 2006) (Tompa Decl., Ex. O.). Thus, the Guild believes that the applicable regulations fail to provide importers with fair notice as required by both 19 U.S.C. §§ 2601, 2604, 2610 and due process.

b. Due Process Trumps Deference Based Political Question Doctrine.

The Guild has already established that the mere fact that certain of its coins are of types that appear on the designated list cannot form the sole basis for seizure and forfeiture. Statutorily, allowing the government to seize and forfeit the Guild's coins would read out important time and place limitations on seizures and forfeitures. It also alters the burden of proof mandated by Congress to the Guild's detriment and hence violates the Guild's due process rights.

The government does not address the Guild's arguments on the merits for a simple reason. It cannot. A forfeiture action is an entirely different sort of animal than a declaratory judgment action. Here, constitutional due process claims come to the fore which trump any claim that political question doctrine[12] somehow excuses the government from establishing each element of its *prima facie* case. *See ACCG v. CBP*, 801 F. Supp. 2d at 411. *Accord Bancoult v. McNamara*, 445 F.3d 427, 435 (D.C. Cir. 2006) ("[C]laims based on the most fundamental liberty and property rights of this country's citizenry, such as the Takings and Due Process Clauses of the Fifth Amendment, are justiciable, even if they implicate foreign policy decisions. [A] challenge to the constitutionality of the manner in which an agency sought to implement an earlier policy pronouncement by the President could be justiciable, even if other challenges to the policy or its implementation might be barred.") (internal quotations and citations omitted.);

[12] Even if the Guild did not raise constitutional concerns, this Court would be obliged to reconsider its prior rulings because a forfeiture action raises far different issues than a declaratory judgment action that seeks to strike down import restrictions. *See Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012). *Zivotofsky* teaches that Courts must assess any "foreign policy" considerations impacting justiciablity solely with regard to the issues directly before the Court. *Zivotofsky*, 132 S. Ct. at 1427 ("This misunderstands the issue presented. Zivotofsky does not ask the courts to determine whether Jerusalem is the capital of Israel. He instead seeks to determine whether he may vindicate his statutory right, under § 214 (d), to choose to have Israel recorded on his passport as his place of birth"). Surely, the government cannot seriously maintain that "foreign policy considerations" preclude requiring the government to make out each element of its *prima facie* case, particularly where the Guild's loss of its property rights are at issue.

Comm. of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 934 (D.C. Cir. 1988) ("[T]he Supreme Court has repeatedly found that claims based on [due process] rights are justiciable, even if they implicate foreign policy decisions."); *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 68-69 (D.D.C. 2014) (court concludes that the political question doctrine does not bar its review of plaintiffs' complaint and that plaintiffs have stated a claim that defendants violated plaintiff's due process rights.); *Aviation and General Ins. Co. v. United States*, 2015 U.S. Claims LEXIS 656,*24-27 (Fed. Cl. May 26, 2015) (court rejects justiciability challenge to Fifth Amendment taking claim). Thus, prior rulings based on the Fourth Circuit's factually mistaken "hands-off" approach cannot "foreclose" the Guild's Second and Eighth Affirmative Defenses that set forth its Fifth Amendment Due Process claims based on the burden of proof set forth in the CPIA. (ECF No. 36, Second and Eighth Affirmative Defenses).

D. The Government Failed to Make Out a *Prima Facie* Case.

The government was given every opportunity to make out all the elements of its *prima facie* case with fact or expert testimony, but failed to do so even though the government itself acknowledged its burdens and the likely need for expert testimony in a prior representation to this Court. (*See Supra.;* Guild MSJ Mem. at 31-35.)

The government must establish some nexus between the property to be forfeited and the forbidden activity defined by the statute. *United States v. $506,231 in United States Currency*, 125 F.3d 442, 451-52 (7th Cir. 1997). Expecting the government to do so with expert testimony is hardly novel. *See United States v. 328 "Quintales" of Green Coffee Beans*, 21 F. Supp. 3d 122, 129 (D. P.R. 2013) (government's and claimant's experts contest origin of coffee beans); *United States v. One Tyrannosaurs Bataar Skeleton*, 2012 U.S. Dist. LEXIS 165153*4 (S.D.N.Y. November 14, 2012) (government

uses expert testimony to establish that Bataar skeleton almost certainly came from the Nemegt Formation in Mongolia and was most likely excavated between 1995 and 2005); *Three Burmese Statues*, 2008 U.S. Dist. LEXIS 48474*7 (government's experts identify statues as Burmese); *United States v. Eighteenth Century Peruvian Oil on Canvass,* 597 F. Supp. 2d 618, 623 (E.D. Va. 2009) (CPIA case; government experts state painting originated in Peru). Indeed, as set forth above, the government itself acknowledged the need for such expert testimony in its prior representation to this Court. (Tompa Decl., Ex. X, ECF No. 72-5 at 287-289.)

Here, because the government's fact witnesses could not clearly explain the rationale for the detention and seizure of the Guild's coins (Guild's MSJ Mem. at 12-13.), the government's failure to name any experts (much less depose the Guild's experts) should be fatal to the government's case. As set forth more fully above and in the Guild's prior papers, merely establishing the coins the government seized are of types on the designated list[13] is statutorily insufficient. Even assuming import restrictions are "valid," the government must also establish that the subject property was "first discovered within" and hence "subject to export control by" a particular UNESCO State Party and that the property left that country after the date import restrictions were imposed. The government simply failed to do so here and hence the Guild must be granted summary judgment.

[13] The government makes much about this Court's prior statements about the "clarity and specificity of the [Spink] invoice." (Government MSJ Mem. at 12 *quoting Ancient Coin Collectors Guild,* 801 F. Supp. at 400 n. 12.) However, that statement was rendered in the context of discussing the nature of the controversy before the Court and the parties' agreement that at least some of the coins appeared on the designated lists. *Id.* Here, of course, for purposes of this forfeiture action, the Guild has denied all the Chinese coins that appear on the Spink invoice are subject to import restrictions, and despite misgivings the government is returning Chinese coins numbered 7-11 and 14-15 to the Guild. (Government MSJ Mem. at 21.) Moreover, the Guild has argued forcefully here and in its initial papers that the fact coins found on the invoice are of types found on the designated lists establishes but one element of the government's *prima facie* case.

E. The Guild Rebutted Any Government *Prima Facie* Case with Expert Testimony.

While the government sat on its hands, the Guild, a small non-profit advocacy group, retained two (2) experts at some expense to rebut any *prima facie* case for forfeiture. Specifically, the Guild has proffered the testimony of Douglas Mudd, a numismatic expert, and of Michael McCullough, an expert in the international trade of cultural artifacts, to address these issues. (*See* Declarations of Douglas Mudd (April 5, 2016) ("Mudd Declaration"), ECF 72-3 and Michael McCullough (May 19, 2016) ("McCullough Declaration"), ECF 72-4.) This expert testimony establishes that the defendant property was either "lawfully exported from its respective state while CPIA restrictions were in effect" as a matter of law or demonstrates by a preponderance of the evidence that it was "exported from its respective state before CPIA restrictions went into effect." (June 3. 2014 Order at 2, ECF No. 22.) *See also Peruvian Oil,* 597 F. Supp. 2d at 623 ("Once the Government makes the initial showing, the burden then shifts to the claimant to establish, by a preponderance of the evidence that the property is not subject to forfeiture, or to establish applicable affirmative defenses.").

This Court is well acquainted with the standards for admission of expert testimony. *Foster v. Legal Sea Foods, Inc.,* 2008 U.S. Dist. LEXIS 57117*25-28 (D. Md. 2008) (Blake, J.). Federal Rule of Evidence 702 governs the issue. *Id.* at 25. The proponent must establish the testimony's admissibility by a preponderance of the evidence standard. *Id.* The Judge, acting as gatekeeper, must keep in mind two overarching but competing goals. *Id.* "First, Rule 702 was intended to liberalize the introduction of relevant expert testimony and thus encourages courts to rely on vigorous cross-examination and contrary evidence to counterbalance expert opinions of uncertain veracity…Simultaneously, however, a trial court must mind the high potential for expert opinions to mislead, rather than enlighten, the jury." *Id.* "Qualified" experts "must have

'knowledge, skill experience, training or education' in the subject area…." *Id.* Even where an expert is qualified, however, his underlying methodology must also satisfy Rule 702, *i.e.* that methodology must satisfy a two prong test for (1) reliability and (2) relevance. *Id.*

The government challenges both experts, asking this Court to disallow the use of their opinions for purposes of rebutting the government's case. Yet, in so doing, the government does not contest the qualifications of the Guild's experts. Nor does the government contest the methodologies the Guild's experts used to reach their conclusions. Rather, the government claims that both opinions are "irrelevant" because they do not represent a "particularized challenge" to forfeiture but rather an "impermissible challenge" to the validity of the regulations. (Government MSJ Mem. at 18, 20.) Neither argument has merit. Accordingly, the Court should hold that the Guild has rebutted any *prima facie* case for forfeiture with this expert testimony.

1. Douglas Mudd Offers Relevant Expert Testimony

In order to give credence to its arguments, the government mischaracterizes Mudd's expert testimony, claiming that it only relates to "the general circulation of Chinese and Cypriot coins" and that it "constitutes a challenge to the validity of the regulations." (*Id.* at 15-16.) In fact, Mudd's opinion is "particularized" to the coins on the Spink invoice and is relevant to the issue whether those particular coins were "exported from their respective states before CPIA restrictions went into effect." Such an opinion fully complies with the requirements of Rule 702 because it "will help the trier of fact to understand the evidence or to determine a fact at issue." *Accord Washington v. Kellwood Co.,* 105 F. Supp. 3d 293, 307-08 (S.D.N.Y. 2015).

"[D]oubts about whether an expert's testimony will be useful should generally be resolved in favor of admissibility unless there are strong factors such as time or surprise favoring exclusion." *Id.* at 308 (quotations and citations omitted.). Here, there are no such factors

favoring exclusion and Mudd's opinion should be admitted. While it is true that Mudd opines that Cypriot and Chinese coins circulated outside where they were made, his opinion was particularized to the types of coins found on the Spink Invoice. (ECF No. 72-3 at 6-7.) Furthermore, that opinion did not only relate to coin circulation, but to the immense quantity of coins of the types listed on the Spink invoice found outside Cyprus or China before the date import restrictions were imposed. (*Id.*) For Mudd's testimony to be considered relevant and hence admissible, the Court need only conclude that such testimony will assist the trier of fact in determining whether the coins on the Spink invoice were "exported from their respective states before CPIA restrictions went into effect." *Kellwood Co.*, 105 F. Supp. 3d at 307-307.

The government raises a red herring when it asserts that expert testimony allowed in a forfeiture action *must only* relate "to the specific property at issue and not its general type or category." (Government MSJ Mem. at 17.) Just because the government cites cases where the Court allowed expert testimony specifically related to the property at issue, it does not logically follow that testimony of a more general nature must be precluded, and indeed, none of the cases the government cites stand for that proposition.

At page 17 of its memorandum, the government cites a ruling in *United States v. One Tyrannosaurus Bataar Skeleton*, 2012 U.S. Dist. LEXIS 165153 (S.D.N.Y. Nov. 14, 2012), in support of its claims, but leaves out the context for that decision, perhaps because an earlier ruling in that case actually *supports* the Guild's position. In *One Tyrannosaurs Bataar Skeleton*, the government only produced expert testimony specific to the property at issue after the Court took the government to task about the assumption it was asking the Court to make about where a dinosaur skeleton that was alleged to have been stolen was found. As the court stated,

> There is also a serious question of whether the government has alleged sufficiently detailed facts supporting a reasonable belief that the Defendant

> Property originated in the nation of Mongolia and was removed in violation of Mongolian law. The Bataar is said to be native to Nemegt Basin in the Gobi Desert in Mongolia. The Nemegt Basin is in the Ömnögovi province of Mongolia which borders with China. There is nothing before this Court which speaks to whether 70 million years ago it would have been implausible for the Bataar to have roamed the bordering territory, including present-day China, or whether geological formations in China (or other nearby nations) would have been conducive to preservation of such skeletons. The government represented that, thus far, substantially complete skeletons of Bataars have not been found outside of Mongolia but did not dispute claimant's counsel's representation that bones of Bataars—less than a full skeleton-- have been found elsewhere.
> . . .
>
> The Verified Complaint in this action is more than a mere pleading; it was the evidentiary showing upon which the writ of arrest in rem was premised. Rule E of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions ("Supplemental Rules") requires the complaint to state "the circumstances from which the claim arises with such particularity that the . . . claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading." Rule G(2)(f) of the Supplemental Rules requires that the verified complaint "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial." In reliance, in part, upon the rules, the claimant has moved to dismiss the Verified Complaint.

United States v. One Tyrannosaurs Bataar Skeleton, 12 Civ. 4760, Mem. Op. at 2-3 (S.D.N.Y. September 7, 2012) (Second Declaration of Peter K. Tompa ("Second Tompa Decl."), Ex. N.). In light of these considerations, the Court provided the government the opportunity to amend its forfeiture complaint rather than ruling on the Claimant's motion to dismiss. *Id.* at 4. Only after the government did so to allege that expert testimony established that the dinosaur skeleton at issue *could have only come from Mongolia based on its distinctive markings,* did the Court allow the matter to go forward. *United States v. One Tyrannosaurs Bataar Skeleton*, 2012 U.S. Dist. LEXIS 165153*4 (S.D.N.Y. November 14, 2012) ("According to paleontological experts, the Defendant Property is a Bataar skeleton that almost certainly came from the Nemegt Formation [in Mongolia] and was most likely excavated between 1995 and 2005. (Id. ¶¶ 42, 44.) This

conclusion is based, among other things, on the distinctive coloring of the Defendant Property. (Id. ¶¶ 43, 59, 65.)").

If anything, *One Tyrannosaurus Bataar* only stands for the proposition that the government must establish "first discovery" as part of its *prima facie* case. In contrast, for our purposes here, experts often develop general information into opinions that are then admissible to help the trier of fact decide the ultimate issue in the case. *See United States v. Saccocia,* 58 F.3d 754, 776 (1st Cir. 1995) ("[One defense] expert, Dr. James Woodford, criticized the testing protocol because the [drug dog] sniff tests were not verified by chemical field tests. Woodford also testified as to the widespread contamination of United States currency with illegal drugs and the tenuous nature of the link between a canine alert and a conclusion that particular currency derived from narcotics trafficking ("If there were drugs on that money, it doesn't mean that it is drug money.").); *United States v. $12, 840 in United States Currency*, 510 F.Supp.2d 167, 171-172 (D. Mass. 2007) (discussion of the use of general testimony about percentage of currency contaminated with trace amounts of cocaine to support the proposition that a drug dog alert, standing alone, is insufficient to support probable cause for forfeiture).

Given the government's arguments, the decision of the court in *Langboard v. United States Department of the Treasury*, 2009 U.S. Dist. LEXIS 40083 (E.D. Pa. 2009), *aff'd on other grounds,* 2016 U.S. App. LEXIS 13879 (3rd Cir. Aug. 1, 2016) (*en banc*), is of particular relevance here. In that case, a forfeiture action involving valuable 1933 $20 gold coins, the court allowed both the government's and the claimant's experts to testify even though only the government's expert testimony directly related to the specific property at issue.

In particular, the Court approved the testimony of David Bowers, a numismatic expert, over government objection, even though his testimony did not relate "to the specific property at

issue" but to the general practice at the time for releasing U.S. gold coins into circulation. *Id.* at *11-22. In so doing, the Court stated,

> We turn next to the question of whether Bowers's opinion is reliable. Namely, whether his methodology is sound and provides good grounds for his conclusions. *See Schneider*, 320 F.3d at 404. In his report, Bowers explains that he based his conclusions on: 1) Treasury Department records, 2) the Annual Report of the director of the Mint, 3) reports in the journal *The Numismatist*; and 4) his experience of over fifty years studying gold coins, the Philadelphia Mint's history and policies, and the field of numismatics. (Bowers Report 4.) We find that the historical documents and reports upon which Bowers relied are the sort of sources that an expert numismatist would rely upon when proffering an opinion of this nature. Bowers summarizes his opinion as follows:
>
> Based on my intensive studies of the United States Treasury Department, its gold coin, gold coin policies, and records, it is abundantly clear that anyone interested in obtaining a 1933 $ 20 (or a 1933 $ 10) could have done so upon application either at the Philadelphia Mint or the Treasury Department.
>
> …
>
> Finally, we examine whether Bowers's opinion "fits" with the issues in this case. That is, whether his opinion will help the jury to better understand the evidence or to determine one of the disputed issues in this matter. *In re TMI Litig*, 193 F.3d at 663. As we mentioned above, one of the central questions in this case is whether the 1933 Double Eagles at issue could have been obtained through legitimate means. Bowers's opinion that the coins could have been obtained by a member of the public "upon application either at the Philadelphia Mint or the Treasury Department," if believed, tends to weaken Defendants' argument that the coins could not have been obtained legally. (*Id*. at 6.) Accordingly, Bowers's opinion would help the jury understand the evidence and determine whether they indeed believe that the coins were stolen.
>
> Defendants argue that Bowers's testimony is not helpful to the trier of fact because he "opines only about what could have happened . . . and he admits having no opinion about what actually did happen." (Defs.' Mot. to Exclude Bowers 16.) However, as the Third Circuit has held, "[a]n expert opinion that expresses a possibility that" a fact is true "and otherwise comports with the *Daubert* analysis, is clearly relevant to the question of whether" that fact is indeed true. *United States v. Ford*, 481 F.3d 215, 221 (3d Cir. 2007). In other words, "[w]here an expert's hypothetical explanation of the possible or probable causes of an event would aid the jury in its deliberations, that testimony satisfies *Daubert's* relevancy requirement." *Smith v. Ford Motor Co.*, 215 F.3d 713, 719 (7th Cir. 2000); *see also Ambrosini v. Labarraque*, 101 F.3d 129, 136, 322 U.S. App. D.C. 19 (D.C. Cir. 1996) (finding relevant an expert's opinion that a contraceptive could have caused certain birth defects and stating that the opinion need only be

> helpful to the jury and need not "satisfi[y] the [party's] burden on the ultimate issue at trial"). Therefore, because Bowers's opinion is relevant to the jury's determination of whether the coins were obtained legally, we find that it meets the "fit" requirement in this case.

Id. at *11-22.

Here, the testimony of the Guild's numismatic expert is even more helpful to the trier of fact than the testimony allowed in *Lanboard.* When Mudd's opinions are considered along with what *we do know* about the specific coins at issue,[14] the testimony establishes that the coins at issue were "exported from its respective state before CPIA restrictions went into effect." (June 3. 2014 Order at 2, ECF No. 22.) Simply, the Guild has rebutted any *prima facie* case given not only the large numbers of Cypriot and Chinese coins found today outside their countries of manufacture as established in the Mudd expert testimony, but the following facts developed during discovery:

- The short time gap between the imposition of import restrictions and when the defendant property was imported. (Guild MSJ Mem. at 19.);
- The government is not contending the coins were "looted." (*Id.* at 22.);
- The Cypriot coins were evidently held for some period of time in boxes at Spink. *Id.* at 16-17 n. 7.); and
- At least some of the Chinese coins came to Spink via Canada. (*Id.*)

Given what we do know about the coins, it is more probable than not that they were outside their countries of manufacture long before Cypriot and Chinese import restrictions were imposed.

[14] Typically, depositions of fact witnesses will take place *well before* expert reports are rendered. Here, because of a discovery dispute, under the terms of the Court's case management order, Mudd and McCullough issued their reports *before* fact depositions were taken. Both experts hoped to supplement their reports with additional information from the government (*See* Mudd Declaration ¶2; McCullough Declarations ¶ 3.), but the Guild's request for that discovery was denied. (ECF No. 63.)

2. Michael McCullough Offers Relevant Expert Testimony.

For purposes of the Guild's motion for summary judgment,[15] Michael McCullough, Esq., the Guild's expert in the international trade of cultural artifacts, opines that the export of the Cypriot coins at issue from the U.K. was a legal export under E.U. and Cypriot law that satisfies the requirements of the CPIA and the Court's June 3, 2014 Order. The CPIA is satisfied in at least two respects. First, even assuming the government has established its *prima facie* case that the defendant Cypriot coins were "first discovered within" Cyprus, their export from the U.K. without an export license was legal under U.K. and E.U. law. That legal export from the E.U., binding on Cyprus, means that these defendant Cypriot coins were not subject to "export control," and hence, must be admitted to the U.S. 19 U.S.C. § 2601 (2). Second, Germany's highest regulatory court has also ruled that E.U. law also binding on Cyprus does not consider ancient coins in trade to be "archaeological objects" subject to export control, thereby making any import of the defendant Cypriot coins into the U.S. from the E.U. after the date restrictions were imposed lawful as well.

The government again resorts to straw man arguments in its effort to contest McCullough's expert testimony. The government states, "by arguing that that coins falling within the type and category of coins constituting the defendant property were legally exportable under U.K. and E.U. law, the Guild argues that the coins should have never been included in the designated lists in the first place." (Government MSJ Mem. at 19.) This is patently untrue.

[15] The government mischaracterizes the Guild's positon on the export of Chinese coins from Hong Kong or Macao. (Government MSJ at 18 n.5.) The Guild has not "abandoned" the argument as the government has claimed. McCullough had hoped to supplement his report with discovery about the scope of the lawful trade from Hong Kong and Macao, but the Court denied the Guild's discovery requests related to this issue. (See McCullough Declaration ¶ 3.) Accordingly, while the Guild believes McCullough's expert opinion on Chinese law is sufficient to defeat summary judgment, the Guild does not believe that it has enough information to move for summary judgment with respect to the defendant Chinese coins on this issue.

McCullough takes into account the Court's June 3, 2014 Order and its assumption that import restrictions are valid. (ECF 72-4 at 6.) McCullough's opinion (ECF 72-4 at 5-21.) does not purport to relate to all Cypriot or all Chinese coins on the designated list. Rather, it relates solely to Cypriot coins exported from the E.U. and Chinese coins exported from either Hong Kong or Macao. Thus, McCullough's report does not speak to imports of Cypriot coins on the designated list from places like Turkey or imports of Chinese coins from places like Japan or Indonesia.

The government's more serious claim that "the export control status of the Cypriot coins in the U.K. has no bearing on whether the coins lawfully left Cyprus" is also misplaced. McCullough opines that exports of the Cypriot coins on the designated list from the U.K. (a fellow E.U. member) are legal under U.S. law because *even assuming* the coins originated in Cyprus, they could have first been legally exported from Cyprus without a license to the U.K. (*Id.* at 6.) Once there, the U.K. (again under E.U. law also binding on Cyprus) has exercised its discretion to treat such coins as items of limited archaeological or scientific interest which may be exported to third countries (outside the E.U.) without a license. (*Id.* at 9-13.) Simply, in the unlikely event the Cypriot coins at issue left Cyprus in the twenty-one (21) months after import restrictions were imposed, the coins could have first left Cyprus for the U.K lawfully. From there, they were exported lawfully to the U.S. without a license as items of limited archaeological or scientific interest. Without being "subject to export control" under 19 U.S.C. § 2601 (2), § 2606 cannot come into play.

Moreover, the export of coins from the U.K. was proper even assuming § 2606 somehow applies as the government claims. (Government MSJ Mem. at 20.) The government's assertion that the "respective state" for such documentation is Cyprus at best finds only implicit support in the Fourth Circuit opinion. More to the point, here, however, ambiguities in the CPIA, combined

with the "rule of lenity," mean that U.K. Export guidance along with information gleaned from the Spink invoice that the coins in question were coins of standard type, in trade, without any known provenance should be treated as a "certificate or other documentation" satisfying this provision. (Tompa Decl. Ex. M, ECF No. 72-5 at 233-236.) In this regard, it is important to note that the CPIA only requires a "certificate or other documentation" from the "State Party." 19 U.S.C. § 2606. The term "State Party" is only defined as "any nation which has ratified, accepted, or acceded to the Convention." 19 U.S.C. § 2601 (9). Thus, under the CPIA, that term could reference either Cyprus or the U.K., which is also a UNESCO State Party. *See* List of State Parties to the 1970 UNESCO Convention, UNESCO Website, available at http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E&order=alpha (last visited September 14, 2016).

Finally, while the Guild submits that it is entitled to judgment because the CPIA's requirements are met, the Guild also notes that as a public policy matter recognizing the U.K. guidance would facilitate the lawful trade in cultural goods in a situation that could not have been specifically contemplated by the CPIA, which predates the E.U.'s 1992 export control rules by almost a decade. Under the circumstances, either "international comity" or the "act of state" doctrine should apply to protect the lawful trade in ancient coins contemplated under those E.U. laws and regulations that bind both Cyprus and the U.K. *See generally, Hilton v. Guyot*, 159 U.S. 113, 164, 16 S. Ct. 139, 40 L. Ed. 95 (1895) (International comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation."); *See also Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) ("'Comity" summarizes in a brief word a complex and elusive concept -- the degree of deference that a domestic forum must pay to the act of a foreign government not

otherwise binding on the forum."); *World Wide Minerals, Ltd. v. Rep. of Kazakhstan*, 296 F.3d 1154, 1164-65, 353 U.S. App. D.C. 147 (D.C. Cir. 2002) (The act of state doctrine "is applicable when 'the relief sought or the defense interposed would [require] a court in the United States to declare invalid the official act of a foreign sovereign performed within' its boundaries."). While it remains unclear why the government is so cavalier in dismissing the E.U.'s and U.K.'s authority to facilitate the trade in ancient coins of limited archaeological and scientific interest, there is every reason for the Court to act to uphold these rules, particularly to avoid a forfeiture in a situation where the export from the U.K. cannot be offensive to Cyprus under E.U. law.

IV. CONCLUSION

The Guild's Motion for Summary Judgment finds support in this Court's June 3, 2014 Order, the plain meaning of the CPIA, the Fifth Amendment due process clause of the U.S. Constitution, applicable case law, the rules of statutory construction, legislative history, sworn statements from Presidential appointees on CPAC, admissions by a high-ranking State Department lawyer, representations the government previously made to this Court about the burden of proof in a forfeiture action even where import restrictions have been found "valid," the 1970 UNESCO Convention, E.U. export regulations, WTO rules, the national laws of Cyprus and China, and unrebutted expert testimony.

The Guild has either rebutted the government's *prima facie* case and/or the government has failed to meet its own burden. Accordingly, the Court should grant the Guild Summary Judgment, order the return of the Guild's coins, and require the Government to pay the Guild's attorney's fees and costs.

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Respectfully submitted,

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A. Congress' Version of CPIA, 19 U.S.C. §§ 2601, 2604, 2606, 2609 and 2610

19 USC § 2601

For purposes of this chapter—

. . .

(2) The term "archaeological or ethnological material of the State Party" means—
(A) any object of archaeological interest;
. . .
which was first discovered within, and is subject to export control by, the State Party. ..

(7) The term "designated archaeological or ethnological material" means any archaeological or ethnological material of the State Party which—

(A) is—
(i) covered by an agreement under this chapter that enters into force with respect to the United States,…
and

(B) is listed by regulation under section 2604 of this title.

19 USC § 2604

After any agreement enters into force under section 2602 of this title, or emergency action is taken under section 2603 of this title, the Secretary, in consultation with the Secretary of State, shall by regulation promulgate (and when appropriate shall revise) a list of the archaeological or ethnological material of the State Party covered by the agreement or by such action. The Secretary may list such material by type or other appropriate classification, but each listing made under this section shall be sufficiently specific and precise to insure that
(1) the import restrictions under section 2606 of this title are applied only to the archeological and ethnological material covered by the agreement or emergency action; and
(2) fair notice is given to importers and other persons as to what material is subject to such restrictions.

19 USC § 2606

(a) Documentation of lawful exportation

No designated archaeological or ethnological material that is exported (whether or not such exportation is to the United States) from the State Party after the designation of such material under section 2604 of this title may be imported into the United States unless the State Party issues a certification or other documentation which certifies that such exportation was not in violation of the laws of the State Party…

19 USC § 2609

Any designated archaeological or ethnological material or article of cultural property, as the case may be, which is imported into the United States in violation of section 2606 of this title or section 2607 of

this title shall be subject to seizure and forfeiture. All provisions of law relating to seizure, forfeiture, and condemnation for violation of customs laws shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this chapter, insofar as provisions of law are applicable to, and not inconsistent with, the provisions of this chapter.

19 USC § 2610

Notwithstanding the provisions of section 1615 of this title, in any forfeiture proceeding brought under this chapter in which the material or article, as the case may be, is claimed by any person, the United States shall establish—

(1) in the case of any material subject to the provisions of section 2606 of this title, that the material has been listed by the Secretary in accordance with section 2604 of this title…

B. Government's Re-Written Version of CPIA, 19 U.S.C. §§ 2601, 2604, 2606, 2609 and 2610

19 USC § 2601

For purposes of this chapter—

. . .

(2) The term "archaeological or ethnological material of the State Party" means—

(A) any object of archaeological interest;

. . .

~~which was first discovered within, and is subject to export control by,~~of the State Party. ..

(7) The term "designated archaeological or ethnological material" means any archaeological or ethnological material of the State Party which—

~~**(1)**~~ **(A)** is—

(i) covered by an agreement under this chapter that enters into force with respect to the United States,…

and

~~**(2)**~~ **(B)** is listed by regulation ~~under section 2604 of this title~~.

19 USC § 2604

After any agreement enters into force under section 2602 of this title, or emergency action is taken under section 2603 of this title, the Secretary, in consultation with the Secretary of State, shall by regulation promulgate (and when appropriate shall revise) a list of the archaeological or ethnological material of the State Party covered by the agreement or by such action. The Secretary may list such material by type or other appropriate classification~~, but each listing made under this section shall be sufficiently specific and precise to insure that~~.

~~**(1)** the import restrictions under section 2606 of this title are applied only to the archeological and ethnological material covered by the agreement or emergency action; and~~

~~**(2)** fair notice is given to importers and other persons as to what material is subject to such restrictions.~~

19 USC § 2606

(a) Documentation of lawful exportation

No designated archaeological or ethnological material ~~that is exported (whether or not such exportation is to the United States) from the State Party after the designation of such material under section 2604 of this title~~of the State Party may be imported into the United States unless the State Party issues a certification or other documentation which certifies that such exportation was not in violation of the laws of the State Party…

19 USC § 2609

Any designated archaeological or ethnological material or article of cultural property, as the case may be, which is imported into the United States in violation of section 2606 of this title or section 2607 of this title shall be subject to seizure and forfeiture. ~~All provisions of law relating to seizure, forfeiture, and condemnation for violation of customs laws shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this chapter, insofar as provisions of law are applicable to, and not inconsistent with, the provisions of this chapter.~~

19 USC § 2610

~~Notwithstanding the provisions of section 1615 of this title, in~~In any forfeiture proceeding brought under this chapter in which the material or article, as the case may be, is claimed by any person, the United States shall establish—

(1) in the case of any material subject to the provisions of section 2606 of this title, that the material has been listed by the Secretary ~~in accordance with section 2604 of this title…~~ .