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

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

REPLY IN SUPPORT OF THE UNITED STATES OF AMERICA'S CROSS-MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

"That which we call a rose by any other name would smell as sweet."
- William Shakespeare

Since the instant litigation began in April of 2013, the Guild has made at least fourteen filings in which they have made the same arguments: that the export of the coins was legal under EU and UK law and that the government must establish that the coins were "first discovered within" and "subject to the export control" of either Cyprus or China. *See* ECF No. 3 at ¶ 5 (Claim of Interest); ECF No. 7 (Answer to Complaint); ECF No. 13 (Amended Answer); ECF No. 18 (Surreply in Opposition to Motion to Strike); ECF No. 24 (Memorandum in Support of Motion for Reconsideration to Court's Order to Strike Amended Answer); ECF No. 25 (Response to the Court's Order Regarding Scheduling); ECF No. 30 (Consolidated Reply Memorandum in Support of Claimant's Motion for Reconsideration of Court's Order to Strike Amended Answer and Its Proposed Discovery Schedule); ECF No. 34 (Response to the Government's Request for an Order Directing Claimant to File an Answer, and for a Scheduling Order); ECF No. 36

(Second Amended Answer); ECF No. 45 (Memorandum in Support of Motion to Test the Sufficiency of the Government's Objections to Requests for Admissions); ECF No. 47 (Reply in Support of Motion to Test the Sufficiency of the Government's Objections to Requests for Admissions); ECF No. 51-1 (Motion to Compel Responses to Interrogatories and Document Requests); ECF No. 51-4 (Reply in Support of Motion to Compel Responses to Interrogatories and Document Requests); ECF No. 54 (Claimant's Opposition to Motion to Strike Second Amended Answer). At each turn, the government has opposed these same arguments. And this Court has issued multiple memorandum opinions holding the same thing: that the government is not "required to establish that the coins were 'first discovered within' and 'subject to the export control' of either Cyprus or China.'" ECF No. 22. *See also*, ECF 24 (denying motion for reconsideration); ECF No. 63 (denying Guild's requested discovery and granting government motion for protective order).

The Guild's motion for summary judgment and response in opposition to the government's motion for summary judgment advance these same tired arguments once again. The Guild sometimes frames its "first discovered within" and "subject to the export control" arguments by saying that the government must establish these elements as part of its case for forfeiture, and sometimes it hides them in expert testimony based on these assumptions. But there is no mistaking that these roses, by any other name, smell just the same. If we set aside---as we should---the Guild's request that the Court reverse its previous holdings that the government does not need to prove that the coins were "first discovered within" and "subject to the export control" of Cyprus or China, all that remains is the legal question of whether either of the Guild's expert witnesses can establish that the fifteen specific coins at issue[1] are not subject to

[1] As noted in the government's initial motion, it no longer seeks forfeiture of coins 7--11 and 14--15. The government has begun the administrative process of returning coins 7--11 and 14--15 to the Guild.

forfeiture. The Guild's experts cannot make such a showing, as their testimony refers only to the types and categories of the defendant coins generally, and not to the history of the specific defendant property. The Guild's expert testimony, if allowed, would eviscerate the CPAC's statutory scheme and would defeat the purpose of the designated list.

II. ARGUMENT

A. THE GOVERNMENT IS NOT REQUIRED TO ESTABLISH THAT THE COINS WERE "FIRST DISCOVERED WITHIN" OR "SUBJECT TO THE EXPORT CONTROL" OF CYPRUS OR CHINA BEYOND SHOWING THAT THE COINS APPEAR ON THE DESIGNATED LIST.

Incredibly, despite numerous substantive filings and three adverse memorandum opinions on this subject, the Guild continues to argue that the government must show that the Defendant Property was "first discovered within" or is "subject to the export control of" Cyprus or China as part of its prima facie case.[2] Little time will be spent on this argument. The government has already fully addressed it, not only in its own motion for summary judgment, ECF No. 76-1 at 11--12, 23--25, but also in a number of its previous filings in this litigation. *See, e.g.*, ECF No. 12 at 4--7 (Motion to Strike Portions of Claimant's Answer and Affirmative Defenses and Request for a More Definite Statement); ECF No. 46 (Response in Opposition to Claimant's Motion to Test the Sufficiency of the Government's Objections to Requests for

However, prior to releasing these coins to the Guild, CBP requires the Guild sign a "hold harmless" agreement as to these coins, which the Guild has refused to do. This process is ongoing.

[2] In its most recent filing, the Guild refers to a blog post by "surrogates for the State Department's Cultural Heritage Center associated with the Antiquities Coalition . . . criticizing the Guild" in relation to this case. ECF No. 77 at 4 n.2. This is a careless misrepresentation. The only social media post that seemed to match the Guild's description was written by a cultural heritage attorney named Rick St. Hilaire, who is not a surrogate of the State Department and appears to maintain a personal blog covering cultural property issues of interest, similar to Mr. Tompa's. *See* "One Side of the Coin: ACCG Re-Argues Previously Decided Legal Issues in Baltimore Test Case," Cultural Heritage Lawyer: A Project of Rick St. Hilaire, available at http://culturalheritagelawyer.blogspot.com/2016/08/one-side-of-coin-accg-re-argues.html (last accessed Oct. 17, 2016).

Admissions); ECF No. 48 at 10--12 (Motion for Protective Order); ECF No. 49 at 8--12 (Motion to Strike Second Amended Answer); ECF No. 51-3 at 4--5, 8 (Response in Opposition to Claimant's Motion to Compel Responses to Interrogatories and Document Requests). The government incorporates its previous arguments by reference.

Moreover, this Court has already rejected these same arguments by the Guild:

> [T]he Guild suggests that the government will be required to establish that the coins were "first discovered within" and "subject to the export control of either Cyprus or China. . . . The Guild is not correct. This argument is also foreclosed by the Fourth Circuit's opinion.

ECF No. 22 at 2 (Memorandum Opinion).

> [T]o the extent the Guild argues that the government must prove "first discovery" beyond demonstrating that the coins at issue appear on the designated list, that argument is foreclosed by the CPIA and the Fourth Circuit opinion in *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection*, 698 F.3d 171 (4th Cir. 2012). Listing by type and category is proper under the CPIA.

ECF No. 63 at 1 (Memorandum Opinion). It is undisputed that coins 1--6, 12--13, and 16--22 appear on the designated list. ECF No. 76-4 (Guild's Response to Request for Admissions). As noted, the government is no longer pursuing forfeiture of coins 7--11 or 14--15. *See* n.1, *supra*.

The Guild presents three arguments as to why the coins' undisputed appearance on the designated list should not establish the government's prima facie case. ECF No. 77 at 8--9. The Guild argues that to do so misreads the CPIA, mistakes CPAC's views, and "trump[s] the due process rights afforded by Congress in a CPIA forfeiture action." *Id.* at 9. These arguments are meritless. The Fourth Circuit held, as to its reading of the CPIA:

> Under the CPIA, the government bears the initial burden in forfeiture of establishing that the coins have been "listed in accordance with section 2604," 19 U.S.C. § 2610, which is to say that they have been listed "by type or other appropriate classification" in a manner that gives "fair notice . . . to importers," *id.* 2604.

Ancient Coin Collectors Guild v. U.S. Customs and Border Protection, 698 F.3d 171, 185 (4th Cir. 2012) [hereafter, "*ACCG* 1 Appeal"]. *See also id.* at 183 ("CBP has listed the Chinese and Cypriot coins by type, in accordance with 19 U.S.C. § 2604, and CBP has detained them, in accordance with 19 U.S.C. § 2606."). This Court further held:

> [T]o the extent the Guild argues that the government must prove "first discovery," beyond demonstrating that the coins at issue appear on the designated list, that argument is foreclosed by the CPIA and the Fourth Circuit opinion in *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection*, 698 F.3d 171 (4th Cir. 2012). Listing by type and category is proper under the CPIA.

ECF No. 63 at 1. *See also* ECF No. 76 at 11--14 (demonstrating why government has met its initial burden for forfeiture under CPIA). And despite the Guild's insistence that the government failed to address its points, the government demonstrated in its motion for summary judgment why there is no merit to the Guild's contention that the Fourth Circuit or this Court misunderstood CPAC's views. *See* ECF No. 76-1 at 24--25 (explaining Fourth Circuit's consideration and rejection of Guild's arguments regarding CPAC).

Finally, the Guild claims that it has been denied due process in two ways. First, 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" --- in other words, a repetition of the rejected argument that the government must establish "first discovered within" and "subject to export control" beyond the designated list. The Guild's first due process argument fails, as it has been precluded by previous rulings by this court and the Fourth Circuit. The Fourth Circuit held that the government may list coins by type and category, 698 F.3d 183, 185, and this Court held that the government does not need to "prove 'first discovery' beyond demonstrating that the coins at issue appear on the designated list." ECF No. 63 at 1.

This argument is another attempt to challenge the validity of the CPIA, which the Guild may not do at this juncture. ECF No. 22 at 1 ("The Fourth Circuit's opinion forecloses any further challenge to the validity of the regulations."). The Guild acknowledges that for the Court to accept its due process argument, it would need to "reconsider[] its preliminary rulings." ECF No. 77 at 13.

The Guild also claims it was denied due process because it did not have fair notice "as to the conduct that is forbidden or required under 19 U.S.C. § 2601, 2604, and 2610." ECF No. 77 at 13--15. The Guild understandably seeks to distract the Court from its own deposition testimony and admissions demonstrating that the current statutory scheme made the Guild aware of precisely which coins were subject to import restrictions and what information would be required to contest the seizure of the coins. *See* ECF No. 76-1 at 26--28 (summarizing Guild admissions negating fair notice argument); ECF No. 72-5 at 246 (letter from Paula Rigby at CBP noting that Guild "specifically disclaimed the existence of any such certificate or evidence * * * establishing the existence of a regulatory exception" to forfeiture). Considering the Guild's own case law in light of Wayne Sayles' deposition testimony, the CPIA "provide[d] a person of ordinary intelligence fair notice of what is prohibited." *Federal Communications Comm'n v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (quoting U.S. v. Williams, 553 U.S. 285, 304 (2008).[3] *See also, Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 424 (6th Cir. 2014) (citing *Fox* and holding Libertarian Party "cannot convincingly maintain that it lacked notice of what was required" when one of its legal claims was "predicated on . . . being well aware of the requirement").

[3] Notably, *Fox* considered regulations that touched upon constitutionally-protected free speech, which is a different context leading to higher scrutiny than the instant case. "In cases where the 'statute abuts upon sensitive areas of basic First Amendment freedoms,' *Grayned [v. City of Rockford]*, 408 U.S. [104,] at 108--09 . . . 'rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.' *Fox Television Stations, 132 S. Ct. at 2317*." *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 479 (7th Cir. 2012) (noting "heightened standard for the First Amendment").

Moreover, the Fourth Circuit held that the CPIA provided the required fair notice. *See ACCG* 1 Appeal, 693 F.3d at 183 (holding that CBP "listed the Chinese and Cypriot coins by type, in accordance with 19 U.S.C. § 2604"); 19 U.S.C. 2604 (requiring that material listings "be sufficiently specific and precise to insure that . . . fair notice is given to importers and other persons as to what material is subject to such restrictions").

The Guild, through its admissions and deposition testimony, has essentially conceded that it knew precisely the conduct that was forbidden by the CPIA, and it purposefully violated the CPIA in order to produce this test case. *See* ECF No. 76-1 at 26--28. It cannot now claim that it lacked fair notice of prohibited conduct. Moreover, the Fourth Circuit's opinion precludes this argument. *ACCG* 1 Appeal, 698 F.3d at 183.

B. THE GOVERNMENT HAS MADE ITS *PRIMA FACIE* CASE

The Guild maintains that the government has not made its prima facie case because it did not present "fact or expert testimony" to "establish some nexus between the property to be forfeited and the forbidden activity defined by the statute." ECF No. 77 at 19. This argument is unavailing. This Court has held that the Spink invoice "was sufficient to satisfy the Government's burden of showing that the coins were among those 'listed by the secretary' on the designated lists for China and Cyprus." *Ancient Coin Collectors Guild*, 801 F. Supp. 2d 383, 400 (D. Md. 2011) [hereafter, "*ACCG* 1 Mem. Op."]. The Guild for its part has conceded that the coins are authentic, that the Spink invoice is an accurate description of the defendant property, and that coins 1--6, 12--13, and 16--22 appear on the Designated Lists for coins from China and of Cypriot type. ECF No. 76-4 at 2--3. Given legal precedent, the Spink invoice, and the Guild's own admissions, expert testimony is not necessary to make out the elements of the government's *prima facie* case.

Moreover, the Guild inaccurately characterizes the deposition testimony of the government's fact witnesses, arguing that "the government's fact witnesses could not clearly explain the rationale for the detention and seizure of the Guild's coins." ECF 77 at 20. This argument is without merit. Perhaps unsurprisingly, the Guild omitted pages of Gerald Stroter's testimony in which he repeatedly explained the rationale for the detention and seizure of the coins.

22 Q. Okay. And you made a conclusion that this
[Page 23]
1 import should be stopped, correct?
2 A. I'm not quite sure what you mean by
3 "stopped".
4 Q. Detained.
5 A. Yes.
6 Q. Okay. And why did you do that?
7 A. Because the coins appeared to be subject
8 to the cultural property restrictions of the law.
9 Q. Based upon what?
10 A. Based upon the invoice descriptions of the
11 coins, the appearance of the coins, and the types of
12 articles covered under those restrictions.
13 Q. What I'm getting at is: Did you detain
14 them because they were manufactured in China and
15 Cyprus?
16 MS. FARBER: Objection. Assumes facts.
17 BY MR. TOMPA:
18 Q. You can answer.
19 A. They were detained because they appeared
20 to be subject to the restrictions -- cultural
21 property restrictions.
22 Q. But you had to base the conclusion on
[Page 24]
1 something, right? So what did you base it on?
2 A. I based it on the description of the
3 articles; the time period; where there was an image
4 on the article, the image on the article; and the
5 types of articles that were covered described in
6 those restrictions.
7 Q. So did you -- when you say "description of
8 the article," you're talking about on the -- on an
9 invoice, for example?

10 A. Yes.

Stroter Dep. 22:22--24:10 (attached in full as Exhibit 1).

C. THE GUILD CANNOT ESTABLISH AN EXCEPTION TO FORFEITURE

Because the Guild can establish no dispute as to any material fact relating to the government's satisfaction of its *prima facie* case as to coins 1--6, 12--13, and 16--22, the Court must determine whether the Guild has demonstrated its entitlement to an applicable defense under the CPIA. *United States v. An Original Manuscript Dated Nov. 19, 1778*, No. 96-6221, 1999 WL 97894, at *5 (S.D.N.Y. Feb. 22, 1999) (explaining that government is entitled to summary judgment on showing of probable cause that is "unrebutted by an applicable defense"). Because the government is no longer pursuing the forfeiture of coins 7--11 and 14--15, there is no longer any dispute regarding whether the coins at issue appear on the designated lists. The Guild's remaining defenses rest upon inadmissible and irrelevant expert testimony, and thus cannot establish an exception to forfeiture.

1. Scholarly evidence regarding general circulation patterns regarding types of Cypriot and Chinese coins is impermissible.

In its motion for summary judgment, the government explained why the Guild's proposed scholarly evidence regarding the general circulation patterns of the types of coins constituting the defendant property is not only an impermissible challenge to the regulations, but also fails to establish that an applicable defense to the forfeiture of the defendant property. ECF No. 76-1 at 15--18. The Guild does not attempt to claim that Mr. Mudd's testimony applies to the specific coins at issue, but rather that it "was particularized to the ***types of coins*** found on the Spink Invoice." ECF No. 77 at 23 (emphasis added). As the government fully laid out in its motion, allowing the Guild to use generalized evidence regarding the circulation of types and categories of coins to defeat forfeiture would eviscerate the purpose of the designated list because it would permit the Guild to contest forfeiture on the basis of the type and category

of the coins. ECF No. 76 at 17. To allow this would substitute the Guild's proposed expert testimony for the entire statutory scheme of the CPIA that ultimately resulted in the coins at issue being listed by "type or other appropriate classification." *ACCG* 1 Appeal, 698 F.3d at 182 (quoting 19 U.S.C. § 2604). The result would be an invalidation of the designated list.

The Guild ignores this reality, and instead presents a distorted picture of the case law touching upon expert testimony in asset forfeiture cases more generally, instead of CPIA cases specifically. For example, the Guild relies heavily on *Langboard v. United States Department of the Treasury*, 2009 U.S. Dist. LEXIS 40083 (E.D. Pa. 2009) to support its argument that Mr. Mudd's testimony about the general circulation pattern of the type of coin at issue is relevant. ECF No. 77 at 25--27. In *Langboard*, the central dispute concerned whether several 1933 Double Eagle coins were stolen. The district court determined that expert testimony as to the possibility that the coins were not stolen was permissible because it satisfied a required element of "fit"---in other words, that it would "help the jury to better understand the evidence or to determine one of the disputed issues in this matter." 2009 U.S. Dist. LEXIS 40083 at *18. Mr. Mudd's expert opinion is not relevant to a disputed issue in this matter, as it pertains not to the circulation of the specific coins at issue, but to the circulation of the "types of coins" that appear on the designated list. ECF No. 77 at 23. Mr. Mudd's proposed testimony is impermissible because it in essence challenges the validity of the regulations. ECF No. 22 at 1 ("The Fourth Circuit's opinion forecloses any further challenge to the validity of the regulations.").[4]

[4] Note as well that *Langboard* arises not under the CPIA but under the Civil Asset Forfeiture Reform Act ("CAFRA"), which "imposes on the Government a heightened burden of proof to establish its right to the property in such proceedings." *Langboard v. United States Department of the Treasury*, 783 F.3d 441, 444 (3d Cir. 2015).

The Guild continues to disregard the posture of this case in presenting its own interpretation of *United States v. One Tyrannosaurus Bataar Skeleton*, which the Guild believes to be proof that the government must, in this case, "establish 'first discovery' as part of its *prima facie* case." ECF No. 77 at 25. As this Court has held, the government does not need to prove "'first discovery' beyond demonstrating that the coins at issue appear on the designated list," because "[l]isting by type and category is proper under the CPIA." ECF No. 63 at 1. Rather, with this initial government showing made, the burden shifts to the Guild to "press a ***particularized*** challenge" to the forfeiture by demonstrating that "***its coins*** are not subject to forfeiture." *ACCG* 1 Appeal, 698 F.3d at 185. Because the Guild's generalized challenge to the origin of the "types of coins" at issue would negate the validity of the designated list, it is impermissible and is irrelevant to any disputed issue.

2. Scholarly evidence regarding U.K. and E.U. law is irrelevant and impermissible.

The Guild's proffer of expert testimony from Mr. McCullough fails for similar reasons as that of Mr. Mudd---Mr. McCullough's testimony ultimately presents a challenge to the validity of the designated lists by arguing that, in general, "Cypriot coins exported from the E.U. and Chinese coins exported from either Hong Kong or Macao" should not appear on the designated list since they are not subject to export controls. ECF No. 77 at 29. To accept Mr. McCullough's testimony is to require that the designated lists be limited to "Cypriot coins exported from the E.U. and Chinese coins exported from either Hong Kong or Macao." *Id.* The result would require the government to "impose restrictions on a coin-by-coin basis" by placing the onus on the government to determine when coins left China or Cyprus. *ACCG* 1 Appeal, 698 F.3d at 182. "Such a requirement would make the statutory scheme utterly unworkable in practice." *Id.* Instead, "once archaeological or ethnological material has been designated by "type" and included in

the list of restricted articles, it may not be imported into the United States without specific documentation showing that it is eligible for import." *Id.* at 182 (citing 19 U.S.C. § 2606).

The Guild grasps at straws when it argues that the U.K. may be the relevant "State Party" for purposes of the required documentation of a state party under the CPIA. ECF No. 77 at 29--30. *Contra ACCG* 1 Appeal, 698 F.3d at 183 (interpreting § 2606 "respective state" language as meaning "the country that has requested import restrictions"). Most confoundingly, the Guild makes this suggestion only to support its wild contention that "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." ECF No. 77 at 30. First, Spink is a private auction house and not an arm of the U.K. government, so there is no support for the Guild's suggestion that Spink's invoice could be a certificate or documentation from a state party as required under the statute. *See U.S. v. Eighteenth Century Peruvian Oil*, 597 F. Supp. 2d 618, 624 (E.D. Va. 2009) (considering documentation from state party under CPIA issued by "Republic of Bolivia, Ministry of Education and Cultures").

Finally, the Guild argues that "'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." ECF No. 77 at 30. The Guild misapplies the doctrine of international comity, which would be "inappropriate" where, as here, "there is no foreign adjudication of rights to which this court might defer." *U.S. v. One Gulfstream G-V Jet Aircraft*, 941 F. Supp. 2d 1, 10 (D.D.C. 2013) (noting that government's decision to bring asset forfeiture case "could be viewed as evidence of its judgment that the delicate balance of foreign affairs would not be disturbed by the lawsuit"). The Guild's throwaway reference to the "act of state" doctrine is similarly misplaced. "The act of state doctrine precludes domestic courts from inquiring into the validity of the public acts that a recognized foreign power committed within

its own territory." *Id.* at 11, citing *Underhill v. Hernandez,* 168 U.S. 250, 252 ("Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its territory."). The doctrine only applies when "the acts in question . . . involved public acts of the sovereign." *Republic of the Philippines v. Marcos,* 862 F.2d 1355, 1369 (9th Cir. 1988). *See also, Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1115 n.15 (5th Cir. 1985) (noting doctrine is only applicable to acts that were "invested with the sovereign authority of the state"). The act in question here is the Guild's importation of a number of ancient Chinese and Cypriot coins. "The Guild is a nonprofit 501(c)(4) organization" and is not a sovereign authority of a foreign nation. *See, e.g.*, ECF No. 77 at 2 n.1. The instant action implicates neither international comity or the act of state doctrine.

In sum, both expert opinions offered by the Guild, if accepted, invalidate the designated lists. Because the validity of the regulations is not at issue in this case, the opinions are both irrelevant and inadmissible.

III. CONCLUSION

The Guild's arguments opposing the government's motions for summary judgment are the same as those this Court has rejected time and again. For these reasons and those previously argued, the government is entitled to summary judgment as to the forfeitability of coins 1--6, 12--13, and 16--22. The Guild's motion for summary judgment should be denied, as the government has established its *prima facie* case and its entitlement to forfeiture.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 17, 2016, a copy of the foregoing Reply in Support of the United States' Cross-Motion for Summary Judgment was caused to be served by filing that document with the Clerk of the Court under the Court's CM/ECF system, which electronically transmits a copy to the registered participants, and paper copies will be mailed by first class mail, postage prepaid, to those identified as nonregistered participants.

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