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.	)	

CONSOLIDATED REPLY MEMORANDUM IN SUPPORT OF CLAIMANT'S MOTION FOR RECONSIDERATION OF COURT'S ORDER TO STRIKE AMENDED ANSWER AND ITS PROPOSED DISCOVERY SCHEDULE

Claimant, the Ancient Coin Collectors Guild (the "Guild" or "Claimant"), by and through its attorneys, hereby files this Consolidated Reply Memorandum in Support of its Motion for Reconsideration of the Court's Order to Strike the Guild's Amended Answer and its Proposed Discovery Schedule.

I. INTRODUCTION AND BACKGROUND

The Guild requests this Court to apply the plain meaning of Cultural Property Implementation Act ("CPIA"), 19 U.S.C. § 2610, as written to require the government to establish that the coins it seeks to forfeit were "first discovered within" and "subject to the export control" of either Cyprus or China. In its opening memorandum seeking reconsideration of the Court's order striking the Guild's Amended Answer (ECF No. 24-1), the Guild demonstrated that:

- The CPIA, 19 U.S.C. § 2610 governs "evidentiary requirements" in this forfeiture action. In that provision, Congress placed the burden of proof squarely on the government to establish the defendant property was listed in accordance with § 2604. Section 2604 in turn requires U.S. Customs and Border Protection ("CBP") and/or the Treasury Department to ensure "the import restrictions" "are applied only to the archaeological and

ethnological material covered by the agreement," i.e., that the material was "first discovered within" and "subject to export control by" China or Cyprus. (ECF No. 24-1 at 6-8);

- The government has never contended that these provisions, when read together, are ambiguous. In fact, the government previously maintained that that the Guild would be provided the opportunity to litigate whether the defendant property was "first discovered within" and "subject to the export control" of Cyprus or China in the context of a forfeiture action, even if import restrictions on coins were considered "valid." (*See* ECF No. 24-1, Ex. B.)

- The Fourth Circuit was careful to "express no view how the forfeiture process will unfold." (*Id.* at 2.). Indeed, it would have been improper for the Fourth Circuit to express any opinion whatsoever on the meaning of CPIA, 19 U.S.C. § 2610. This provision-- dealing with evidentiary requirements in a forfeiture action-- was not previously before the Court because at the government's request any forfeiture action was put on hold;

- Any statement that can potentially be taken to the contrary in the Fourth Circuit's opinion is dicta and not "law of the case." (*Id.* at 10-14);

- "Law of the case" or no, due process requires allowing the Guild to litigate the "first discovery issue," particularly where "foreign policy" considerations do not apply and where the Fourth Circuit was operating under wrong factual assumptions about the Cultural Property Advisory Committee's recommendations. (*Id.* at 12-17); and

- The Fourth Circuit's opinion cannot be used to justify striking defenses based on issues never raised in prior litigation between the parties. (*Id.* at 12 n. 9.)

Moreover, in its response to the Court's order regarding scheduling (ECF No. 25), the Guild demonstrated that the discovery the Guild seeks is relevant to the following basic issues in a forfeiture action under the CPIA:

- Whether all the defendant property appears on the "designated lists";

- Whether the defendant property that appears on the "designated lists" was "first discovered within" Cyprus or China;

- Whether the defendant property that appears on the "designated lists" was "subject to the export control" of Cyprus or China; and

- The details surrounding the detention and seizure of the defendant property.

In contrast, the government's consolidated opposition (ECF No. 29)—which was filed late with the consent of the Guild-- does not address any of these specific points. Instead, the government does little more than complain that the Guild is trying to re-litigate all the issues raised in its declaratory judgment action. The government then concludes, based on a self-serving reading of the Fourth Circuit's opinion and this Court's order, that the only issues before the Court are: "do the defendant coins fall within the class or category of objects designated as subject to forfeiture under the applicable regulations, and if so, can Claimants meet their burden of proof on the defense set forth in the statute." (ECF No. 29 at 5.).

Any fair recounting of the procedural posture of this matter demonstrates that the government's claims are untrue and that any delay is entirely attributable to the government's concerted efforts to avoid any meaningful review of the seizure of the Guild's coins. The Guild asserted its rights to judicial review soon after its coins were detained in April 2009, but the government did not promptly file a forfeiture action as requested. After waiting some ten months, on February 11, 2010, the Guild followed the direction of the U.S. Supreme Court in *United States v. $8,850,* 461 U.S. 555, 569 (1983), and filed its own action to compel the filing of a forfeiture action or the return of its own property. In addition, the Guild also asked for a declaratory judgment to strike down or limit the scope of import restrictions on coins.

For the bases for its request for declaratory judgment, the Guild alleged that the government: (1) confused "cultural significance" with "archaeological significance" with regard to objects that exist in multiples, like coins; (2) ignored evidence that Cypriot and Chinese coins circulated widely beyond their place of manufacture such that the "first discovery requirement" could not be met; (3) ignored or misapplied the CPIA's requirements that less drastic measures such as treasure trove laws or regulation of metal detectors be instituted before imposing

restrictions; (4) ignored or misapplied the CPIA's "concerted international response requirement;" and (5) wrongfully imposed import restrictions on coins based on their place of production rather than their find spots. (*See Ancient Coin Collectors Guild v. U.S. Customs and Border Protection, et. al.,* No. 1:10-cv-00322, Amended Complaint (filed July 15, 2010) ¶¶ 29, 35-36, 44-45, 62, 120-45, 170-77 (ECF No. 14).)

In response, the government moved to dismiss the Guild's Amended Complaint, arguing that the matter was non-justiciable. In so doing, however, the government also made a representation to this Court that the Guild would be provided the opportunity to litigate the "first discovery" issue on the merits in the context of a separate forfeiture action, even if import restrictions on coins were considered "valid." (*See* ECF No. 24-1 at 9-10, Ex. B.) This Court granted the government's motion, partly based on this representation. Now, after an appeal, the government has conveniently forgotten this representation, and even goes so far as to complain that the Guild's motion for reconsideration focusing on that issue promotes a "waste of judicial resources." (*See* ECF No. 29 at 2.)

The government's utter failure to address the substance of the Guild's motion should be viewed as a concession as to its merits. Moreover, recent Supreme Court decisions and old legislative history support the Guild's position that the government bears the burden to establish "first discovery." The Court should grant the Guild's motion for reconsideration, reinstate the Amended Answer and allow meaningful discovery. After all, the Guild's property interests are at stake.[1]

[1] 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. According to a recent government press release, "Since 2007, more than 7,150 artifacts have been returned to 27 countries, including paintings from France, Germany, Poland and Austria, 15th to 18th century manuscripts from Italy and Peru, as well as cultural artifacts from China, Cambodia and Iraq." *See HSI Returns 9 Ancient Artifacts to South Korea*, (ICE News Releases April 25, 2014), available at http://www.ice.gov/news/releases/1404/140425washingtondc.htm (last visited July 24, 2014). The Guild has reason

II. ARGUMENT

In addition to the reasons set forth previously, two recent U.S. Supreme Court decisions and the CPIA's legislative history support the proposition that the government bears the initial burden to establish that coins subject to forfeiture were "first discovered within" and "subject to the export control" of either Cyprus and China—not merely that such coins were designated "by type or appropriate classification."

A. The Supreme Court has Spoken— Plain Meaning Trumps "Foreign Policy" Claims and Any Self-Perceived Agency Mission.

As set forth more fully in the Guild's opening memorandum (*See* ECF No. 24-1 at 6-7), any claim that the government can satisfy its statutory burden merely by showing that the Guild's property was "designated" ignores Section 2610's requirement that for purposes of a forfeiture action, the government shall also establish that the material the government seeks to repatriate was "listed" "in accordance with section 2604." 19 U.S.C. § 2610 (1). Section 2604 in turn requires CBP and/or U.S. Treasury to ensure that import restrictions "are applied only to the archaeological . . . material covered by the agreement," i.e., such material that was "first discovered within" and "subject to the export control by" a particular UNESCO State Party. 19 U.S.C. § 2604 (1). Thus, whatever the rights the government may otherwise have to designate material for restriction, for purposes of a forfeiture action, the government must bear its own initial burden on "first discovery" before any burden shifts to the claimant. Had Congress thought otherwise, Congress would have included a provision requiring "proof of first discovery

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to believe most of these forfeitures occurred by default, typically because the cost of litigating a forfeiture case greatly exceeds the actual value of the artifact. Certainly, the modest value of the vast majority of historical coins would dissuade most, if not all, collectors from contesting any forfeiture action. For that reason, the Guild has pressed these issues on behalf of its members and all those interested in the lawful import of ancient coins of the sort widely traded here and abroad.

elsewhere" in Section 2606, which lists "documentation of lawful exportation." 19 U.S.C. § 2606. However, Congress did not do so for the simple reason that any such burden to demonstrate a proper listing and hence "first discovery" in a forfeiture action under the CPIA rests entirely with the government, not with the claimant, in the first instance.

Notwithstanding the CPIA's plain meaning, the government now apparently contends that it need not be held to the statute's unambiguous terms lest that somehow interfere with "the ability of the United States to honor its treaty obligations and to protect the cultural patrimony of countries from which objects of antiquity have been looted and sold to collectors." (ECF No. 29 at 1.) Leaving aside the fact that the CPIA—not unspecified U.S. treaty obligations- is what is directly at issue here, the U.S. Supreme Court has now foreclosed reliance on any such grandiose claims as a basis to ignore clear statutory intent.

First, as set forth in the Guild's opening memorandum (ECF No. 24-1 at 13.), *Zivotofsky v. Clinton,* 132 S. Ct. 1421, 1427-1431 (2012) mandates that any claim that "foreign policy concerns" trump a court's obligations to construe the law must be strictly construed based on a thoroughgoing analysis focusing on the precise issue before the court. Here, that precise issue is the burden of proof in a forfeiture action relating to so-called "cultural property" of a sort widely and legally collected here and abroad (including within Cyprus and China). It simply strains credulity to even remotely suggest that this issue is a "political question" beyond the decision-making authority of this Court. Simply, Congress has provided this Court with explicit instructions placing any burden of proof on "first discovery" on the government. Any effort to excuse the government from this statutory burden would violate both the plain meaning of the statute and the Guild's due process rights.

Second, the U.S. Supreme Court recently also eviscerated any claim that an agency's own view of its "mission" can trump the plain meaning of a statute in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014). [2] As the Court has explained,

> An agency has no power to "tailor" legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always "'give effect to the unambiguously expressed intent of Congress.'" *National Assn. of Home Builders* v. *Defenders of Wildlife*, 551 U. S. 644, 665, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007) (quoting *Chevron*, 467 U. S. at 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694). . . . .
> . . .
>
> The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice. See, *e.g.*, *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 462, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002) (agency lacked authority "to develop new guidelines or to assign liability in a manner inconsistent with" an "unambiguous statute"). . . .
>
> We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.

Utility Air Regulatory Group, 134 S. Ct. at 2445-2446. Taken together, *Zivotofsky* and *Utility Air Regulatory Group* mandate what the Guild has been saying from day one: There are no excuses-- the plain meaning of the CPIA controls. Here, that means that the government—not the Guild—bears the initial burden of establishing "first discovery."[3]

[2] The Guild filed its motion for reconsideration on June 16, 2014. The Supreme Court rendered this decision on June 23, 2014.

[3] The Guild is aware of only two other reported cases that discuss the government's burden when seizing an object under CPIA, but neither dealt with archaeological objects. *See United States v. Eighteenth Century Peruvian Oil*, 597 F. Supp. 2d 618 (E.D. Va. 2009) (illicitly exported ethnological object); In *United States v. An Original Manuscript Dated November 19, 1778*, 1999 WL 97894, 1999 U.S. Dist. LEXIS 1859 (S.D.N.Y. Feb. 22, 1999) (manuscript stolen from the inventory of a museum). However, the "discovery" rule applies to both ethological and archaeological materials and these cases show that the government considered the discovery requirement to be part of its *prima facie* case and provided expert and scholarly evidence of actual discovery to meet this burden.

B. The CPIA's Legislative History Also Supports the Guild's Views on "First Discovery."

The meaning of the CPIA is clear, and thus there is no need to resort to the use of legislative history to determine Congressional intent. However, to the extent any doubts may remain, the words of a high ranking State Department official made at the very time he was intimately involved in shepherding what became the CPIA through Congress completely undercut the government's appeal to unspecified "treaty obligations" as an excuse to avoid its burden on "first discovery."

First, the CPIA's legislative history suggests that while the CPIA does not on its face preclude the government from designating historical coins for restriction,[4] as a practical matter, any such action should be highly unusual because historical coins typically travelled far from where they were made. Indeed, Mark Feldman, State's own chief negotiator during the process of passing the CPIA, assured the Chairman of the House Ways and Means Committee Subcommittee on Trade that "it [was] hard … to imagine a case" where coins would be restricted. Here is the colloquy between Feldman, State's Deputy Legal Adviser, and Congressman Vanik (D-Ohio) during the Congressional hearing process:

> Mr. Vanik. Some coin collectors have expressed opposition to the bill because they think ancient coins, after discovery by clandestine digging in farmer's fields will be covered by the bill. They also claim that a government may declare that all ancient coins within its borders are government property as has been done by Turkey, effectively eliminating the legal exporting of coins but vastly increasing illegal exportation of coins which could be declared stolen and prohibited from importation under the bill.

[4] In earlier litigation between the parties, the Court only addressed the "first discovery issue" under a similar, limited, facial "ultra vires" review of the CPIA. *See Ancient Coin Collectors Guild v. U.S. Customs and Border Protection*, 801 F. Supp. 2d 383, 405-409 (D. Md. 2011). The issue here is different because it turns on the burden of proof under 19 U.S.C. § 2610. As set forth in the Guild's opening memorandum, the government previously represented that this issue could be addressed in the context of this forfeiture action. (*See* ECF No. 24-1 at 9-10, Ex. B.) Moreover, as set forth above, recent Supreme Court decisions preclude any claim that the perceived missions of the State Department, CBP and/or Treasury trumps the plain meaning of the CPIA.

> What is your response to these concerns and are ancient coins a type of archaeological or ethnological material which could be covered by the bill?
>
> *Mr. Feldman. Mr. Chairman, I think in theory, they may well come within the definition but we did not have coins in mind when we addressed the issue. I think as a practical matter, it would not be a serious problem. In most cases, it is impossible to establish the provenance of a particular coin or hoard of coins. Therefore, there would be no reason for the United States, in most cases, to list coins as one of the categories of objects of archaeological or ethnological interest that would be included in the agreement.*
>
> *Under this bill, Mr. Chairman, the coverage of the import controls only applies to specific categories of material that are listed in an international agreement and then further specified in regulations by the Treasury. So, in answer to that, this legislation and ratification of the convention would not have any immediate effect on coins and it is hard for me to imagine a case where we would need to deal with coins except in the most unusual circumstances.*

See "Cultural Property Treaty Legislation," Hearing before the House Subcommittee on Trade of the Committee on Ways and Means, 96th Cong., 1st session on HR 3403 at 8 (emphasis added) (Exhibit A).

Second, Feldman also spoke directly to the issue of burden of proof at a public forum on what was to become the CPIA. He stated,

> Now, if I may pass for a moment to the question of procedures and burdens of proof, which is the area of one of the great improvements in the bill. I do want to clarify a matter which involves a difference of interpretation between the art dealers and the State Department. One of the major changes made in the legislation was to alter the presumption normally applied in customs cases putting the burden of proof on the Government in most particulars. One issue where the burden of proof is placed on the Government is to demonstrate that the object fits within the proscribed list. The Government must show both that it fits in the proscribed category and that it comes from the country making the agreement. So the burden of proof of provenance is on the Government, a burden which I don't think has been appreciated by all the critics of this legislation. This means in a significant number of cases it will not be possible to require an object's return. Now this is a policy judgment. The burden of proof on provenance could have been placed on the importer, which would preclude importation where provenance could not be established. We have not gone that far; it may be that Congress, when it focuses on this issue, may decide otherwise. To put the burden of proof of provenance on the importer may be the only truly effective way of avoiding importation of objects illegally removed from their country of origin. But we in the State Department have not promoted that solution, recognizing that

> where the facts are obscure, U.S. collectors should not be precluded from competing for the material. . . . .
> . . . .
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> The only country that would have the right to claim such an object under the bill is the country where it was first discovered. It would have to be established that the object was removed from the country of origin after the date of the regulation.

Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 4 Syracuse J. Int'l L. & Com. 97 1976-1977 at 129-130 (Exhibit B). Significantly, the language of the legislation that was ultimately passed, if anything, contains even stronger language placing the burden of proof on the government with regard to both "proper listing" and "first discovery." *Compare CPIA*, 19 U.S.C. §§ 2610, 2604 with H.R. 14171 §§ 7, 2, Ex. B at 135-36, 138.

C. The Guild is Entitled to Meaningful Discovery.

This Court should not lose sight of the fact that the Guild's property rights are at risk.[5] In its initial paper, the Guild set forth in great detail—certainly far greater than what is required under the rules—why the discovery it seeks is relevant to its claims and defenses. (ECF No. 25.) Any claims to the contrary notwithstanding, all the discovery the Guild seeks is relevant to: (1) whether all the defendant property appears on the "designated lists;" (2) whether the defendant property that appears on the "designated lists" was "first discovered within" Cyprus or China; (3) whether the defendant property that appears on the "designated lists" was "subject to the export control" of Cyprus or China; and (4) what are the details surrounding the detention and seizure of the Guild's coins. (*See* ECF No. 25 at 3-6.)

[5] If the government wishes to avoid providing meaningful discovery, the government has a simple expedient: it need only dismiss its forfeiture complaint with prejudice, return the Guild's property, and pay the Guild's attorney's fees. *See* Stefan D. Cassella, Asset Forfeiture Law §§ 7-12 at 308-09; 13-7 at 534-543 (Juris 2d ed. 2013).

The government evidently does not dispute the Guild's rights to discovery related to the first issue. As to the second and third issues, the Guild has already explained that the government has the burden of proof on "first discovery" under CPIA, 19 U.S.C. § 2610, a provision that was never before the Fourth Circuit for the simple reason that *at the government's request any forfeiture proceeding was "put on hold."* [6] However, even if the Court denies reconsideration on this point and instead concludes that the Guild bears the burden of proof, the Guild *would still be entitled to the exact same discovery on these issues in order to prepare the defense of its property.*[7] Finally, the details surrounding the seizure of the Guild's property are plainly relevant. The Guild has already served on the government an interrogatory simply asking, "Identify all persons involved in the decision to detain and seize the Defendant property." (ECF No. 19-3 at 4.) Certainly, whatever the response, *any disclosure that some of the exact same mid and lower level State Department employees who prepared the designated lists also helped decide whether and when the Guild's coins would be detained and seized* would not make any such information *less relevant* to the issues before the Court.

III. CONCLUSION

New Supreme Court case law and old legislative history both confirm that the Fourth Circuit's opinion in *ACCG v. CBP* cannot foreclose the Guild from contesting the "fact" that its own coins "were first discovered within" and "subject to the export control" of either Cyprus or

[6] Section 2604's requirements of proper listing also make the Guild's concerns about "process" relevant to this forfeiture proceeding. *See AERA Energy LLC v. Salazar*, 642 F.3d 212, 221 (D.C. Cir. 2011) (political pressure invalidates agency action when it shapes, in whole or in part, the judgment of the ultimate agency decision maker), *cert denied*, 132 S. Ct. 252 (2011).

[7] The facts set forth in the Amended Answer and the accompanying exhibits demonstrate that any conclusive presumption the Guild's coins were first discovered within Cyprus and China is not justified. Moreover, any ruling that the Guild cannot contest "first discovery" would raise the specter of an unconstitutional "irrebutable presumption." *See Hawkins v. Agricultural Marketing Service*, 10 F.3d 1125, 1132-1134 (5th Cir. 1993); *Riddick v. D'Elia*, 626 F.2d 1084, 1087-1089 (2nd Cir. 1980); *Miller v. Carter*, 547 F.2d 1314, 1317-1319 (7th Cir. 1977), *aff'd*, 434 U.S.365 (1978).

China or excuse the government from its statutory burdens under 19 U.S.C. §§ 2610, 2604, 2601. Nor should the Fourth Circuit's ruling preclude the Guild's affirmative defenses to forfeiture, particularly those never raised in *ACCG v. CBP*. For all the foregoing reasons, the Guild respectfully requests that the Court grant its motion for reconsideration, reinstate the Amended Answer, and allow the meaningful discovery the Guild has previously requested to go forward.

Dated: July 29, 2014

Respectfully submitted,

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