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.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION TO COURT'S ORDER TO STRIKE AMENDED ANSWER

"Everyone is entitled to his own opinion, but not his own facts."

Quote attributed to the Hon. Daniel Patrick Moynihan, the "father" of the Cultural Property Implementation Act ("CPIA"), 19 U.S.C. § 2601 *et seq. See* http://en.wikiquote.org/wiki/Daniel_Patrick_Moynihan

Pursuant to Fed. R. Civ. Pro. 54(b) and Local Rule 105.10, claimant, the Ancient Coin Collectors Guild[1] (the "Guild" or "Claimant"), requests the Court to reconsider its ruling striking the Guild's Amended Answer. (Doc. No. 22.) Due process afforded under the U.S. Constitution, the governing statute, and general principles of forfeiture law, all place the burden on the government to establish a factual basis for its contention that the coins at issue were "first discovered within" and "subject to the export control" of either Cyprus or China. The Fourth Circuit's opinion in *Ancient Coin Collectors Guild v. U.S. Customs and Border*, 698 F.3d 171

[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. The Guild received the *amicus* support of six (6) different trade and educational organizations in its appeal of the dismissal of its declaratory judgment action. That should provide this Court with some indication of the importance of these issues to ordinary Americans and small businesses interested in their continued ability to trade in and collect artifacts of sort enjoyed by others world-wide, including within Cyprus and China, the two countries on whose behalf the government purports to act.

(4th Cir. 2012) (*"ACCG v. CBP"),* cannot be construed to excuse the government of its constitutional and statutory burden. Indeed, the Fourth Circuit itself understood that it could "express no view how the forfeiture process will unfold." *Id.* at 185. So, yes, while the Fourth Circuit may have effectively recognized the government's rights to its "opinion" that coins may be restricted under the CPIA[2], that cannot foreclose the Guild from contesting the incorrectly assumed "fact" that its own coins "were first discovered within" and "subject to the export control" of either Cyprus or China or excuse the government from its evidentiary burdens under 19 U.S.C. §§ 2610, 2604, 2601 (2). Because the Court's ruling appears to do just that, the Guild requests reconsideration of that decision. *See Saint Annes Development Co. v. Adelberg*, 2011 U.S. App. LEXIS 17257**6 (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).

I. Background

On April 22, 2013, the government filed a forfeiture complaint against the defendant property alleging violations of the CPIA and related regulations imposing import restrictions on Cypriot and Chinese cultural goods. On May 31, 2013, the Guild filed a verified claim of interest in the Defendant Property. On June 19, 2013, the Guild filed an answer to the forfeiture complaint. That answer denied that the defendant property was subject to forfeiture and that the

[2] The CPIA also contains significant procedural and cultural constraints on executive authority to impose import restrictions that formed the basis of Guild's prior request that this Court modify or strike down import restrictions on coins. *See* Amended Complaint, *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection et al.,* Case No. 1:10-cv-00322-CCB (filed July 15, 2010) ("*ACCG v. CBP*") (Document No. 14) ("Guild Amended Complaint"). Although the Guild continues to respectfully disagree with this Court's and the appeals court's refusals to engage on these issues, the Guild has previously acknowledged this action solely addresses the question whether the Guild must forfeit its coins to the government so they can be sent to Cyprus and China. *See* Response to Court's Inquiry Regarding Scheduling (Doc. No. 10) (July 16, 2014).

defendant property was properly designated. The Guild also asserted a number of affirmative defenses, including fact-based defenses going to the "first discovery issue." These affirmative defenses recounted the government's evident failure to accept the recommendations of the U.S. Cultural Property Advisory Committee ("CPAC") before preparing the designated list for "coins of Cypriot type."[3] Also, on June 19, 2013, the Guild served the government with interrogatories, document requests and requests for admission seeking information related to the basis for the government's claims that the defendant property should be forfeited. On June 24, 2013, the Court invited the parties to submit a schedule for discovery or dispositive motions. (Doc. No. 8.)

In response to this inquiry, the government proposed that it be allowed to file a motion to strike the Guild's answer while the Guild proposed a discovery schedule. (Docs. 9 and 10.) On July 26, 2013, the Court ruled that the government need not respond to the Guild's discovery pending resolution of the government's motion. (Doc. No. 11.) On September 17, 2013, the government filed a Motion to Strike Portions of the Claimant's Answer and Affirmative Defenses and Request for More Definite Statement. (Doc. No. 12.) Pursuant to Fed. R. Civ. P. 15 (a) (1) (B), the Guild then filed an Amended Answer (Doc. No. 13) on September 27, 2013, well within the timeframe allowed to file such a pleading without leave of court. (Doc. No. 12.)

As should be evident from the mark-up comparing the Amended Answer to the original Answer (Doc. No. 13-5), the Guild made a good faith effort to address issues that were raised in

[3] Congress contemplated that CPAC would guide CBP in preparing such "designated lists" of material subject to import restrictions. As the Senate Report indicates, "the Advisory Committee … is expected to contribute heavily to the composition of the list." S. Rep. No. 97-564, at 8 (1982). In prior litigation and in its Amended Answer here, the Guild has alleged—based on a sworn declaration of CPAC's former Chairman and other documentation—that the government ignored CPAC's recommendations against import restrictions on coins and then misled the Congress and the public about it in an official government report and press release. Here, that fact is only relevant to the issue of whether the subject property was "first discovered within" and "subject to the export control" of Cyprus or China.

the government's motion. In particular, the Guild: (1) elaborated on its possible objections to jurisdiction and venue; (2) dropped an "innocent owner" defense; (3) elaborated on defenses related to legal export of the defendant property, waiver and due process; (4) added a defense related to fair notice; and (5) sought to place the government on notice about the factual basis for the Guild's contention that the government cannot meet its burden to demonstrate that the defendant property was "first discovered within" and "subject to the export control" of either Cyprus or China.

Significantly, the Guild also attached documents to its Amended Answer that raise serious questions about the government's good faith basis in claiming that the Guild's coins were "first discovered within" and "subject to the export control" of either Cyprus or China. These include (1) an admission by Cypriot Government authorities that Cypriot coins circulated throughout the world, making it impossible to assume they were first discovered there; (2) the resignation letter of a former CPAC member that suggested low and intermediate level State Department employees regularly ignored facts about coin circulation in order to justify import restrictions; (3) a sworn statement by CPAC's former Chairman indicating that the State Department ignored CPAC's recommendations on coins and then misled the Congress and the public about it ("the Kislak Declaration"); and (4) the same former CPAC Chairman's statement at a public forum indicating that the State Department had rejected his Committee's recommendations on coins. Amended Answer (Doc. No. 13, Exhibits A- D.)

Concurrently, the Guild also filed a *pro forma* response and surreply to the government's motion noting that under Fed. R. Civ. P. 15 (a) (1) (B), the Amended Answer mooted the government's Motion to Strike. (Doc. Nos. 14 and 18.) Because the Amended Answer both addressed the government's request for a more definite statement and mooted the Motion to

Strike, it made no sense whatsoever for the Guild to respond to that superseded Motion. Nevertheless, although the Court accepted the Guild's Amended Answer, the Court also construed the government's motion as being directed at the Amended Answer, and has granted that motion, striking the Guild's amended pleading. (Doc. No. 22.) Accordingly, while the Court has also requested the parties "to submit proposed schedules for discovery and/or dispositive motions by June 27, 2014" (Doc. No. 23), given the Court's ruling, it remains unclear, what, if any issues the Court believes remain to be litigated.

II. Argument

The Supreme Court has explained in a civil forfeiture context that "[t]he right of a citizen to defend his property against attack in a court is corollary to the plaintiff's right to sue there. . . . The dignity of the court derives from the respect accorded to its judgments. That respect is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits." *Degen v. United States*, 517 U.S. 820, 828 (1996) (internal citations omitted). Here, unfortunately, the Court's ruling appears to do just that, shifting the burden of proof on "first discovery" from the government and removing any other defenses to forfeiture.[4] If this is the Court's actual intent, that renders illusory the due process the Fourth Circuit promised and gives the government license not only to ignore its own statutory and constitutional burdens, but "to be entitled to its own facts" about coin circulation to support the forfeiture of the Guild's property. The Guild respectfully requests the Court to reconsider its ruling and provide the Guild with a meaningful opportunity to defend its rights to its property.

[4] There is some question whether it is ever proper to strike a claim or answer to a forfeiture complaint for any other reason than those specifically enumerated in Supplemental Rule G (5) (c). None of those grounds apply here.

A. The Plain Meaning of the CPIA Requires the Government to Establish the Guild's Coins Were "First Discovered Within" and "Subject to the Export Control" of Either Cyprus or China.

The plain meaning of the CPIA requires the government to establish that the Guild's coins "were first discovered within" and "subject to the export control" of either Cyprus or China *before any burden shifts to the Guild.* This "plain meaning" forecloses any contrary reading of the Fourth Circuit's opinion to excuse the government from its statutory burden. *See* Memorandum (Doc. No. 22) at 2 ("[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.").

Import restrictions only apply to "designated archaeological material" under 19 U.S.C. § 2606. This "designated archaeological material" is that "covered by an agreement" and "listed" under Section 2604. 19 U.S.C. § 2601 (7). Section 2604 states that CBP and/or the Treasury Department "may list this 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 are applied *only to* the archaeological . . . material covered by the agreement . . . ; and (2) fair notice is given to importers . . . as to what material is subject to such restrictions." 19 U.S.C. § 2604 (emphasis added).

The word "only" emphasizes the requirement that "designated archaeological material" must be only that covered by the agreement, i.e., "first discovered within" and "subject to export control by, the State Party." 19 U.S.C. § 2601 (2). The word "shall" emphasizes the mandatory nature of this Congressional direction to CBP and/or the Treasury Department; there is simply no

discretion allowed. *See, e.g.*, Black's Law Dictionary 1407 (8th ed. 2004) (defining "shall" as "has a duty to; more broadly, is required to").

Indeed, Congress thought this "first discovery requirement" to be so crucial that Congress also altered the usual burden of proof in customs cases to assign it to the government in forfeiture actions brought under the CPIA. *See* Stefan D. Cassella, *Asset Forfeiture Law in the United States* § 11-2 (iii) at 456 n. 16 (Juris 2d ed. 2013). In any such forfeiture action, CPIA, 19 U.S.C. § 2610, places the burden squarely on the government[5] to establish that any "designated archaeological material" was "listed in accordance with Section 2604." As set forth above, Section 2604 in turn requires 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 they were "first discovered in" and "subject to the export control" of China or Cyprus. 19 U.S.C. § 2601 (2) (emphasis added).

Only after these fundamental requirements are met does the burden then shift to the Claimant to assert some defense in the context of a forfeiture case like that here. If the Claimant had "satisfactory evidence" of lawful exportation under 19 U.S.C. § 2606, that would normally be provided before an item is seized and the Claimant requests that the matter be referred to

[5] In most civil forfeiture actions under the customs laws in Title 19, if the government shows probable cause that the property is subject to forfeiture, the claimant has the burden to prove it is not. *See* 19 U.S.C. § 1615; *United States v. Davis*, 648 F.3d 84, 95-96 (2d Cir. 2011). Congress explicitly provided claimants a more favorable burden of proof in the CPIA:

> SECTION 2610. EVIDENTIARY REQUIREMENTS
>
> 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; . . .

19 U.S.C. § 2610.

court for adjudication. *See* Letter from Paula M. Rigby, U.S. Customs and Border Protection ("CBP"), dated August 26, 2009, at 1 ("In the past, U.S. Customs and Border Protection will detain cultural property for 90 days to provide the importer with the opportunity to produce a valid export certificate or other evidence establishing the existence of a regulatory exception . . . .) (attached hereto as Exhibit A.)

The Supreme Court has recently reemphasized that the plain meaning of a statute controls. *See City of Arlington Texas v. Federal Communications Comm'n,* 133 S. Ct. 1863, 1868 (2013) (*quoting Chevron's* "now-canonical formulation," "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress.");[6] *University of Texas Southwestern Medical Center v. Nassar,* 133 S. Ct. 2517, 2528 (2013) ("There are . . . flaws in this reading. . . . The first is it is inconsistent with the provision's plain language…Given this clear language, it would be improper to conclude that what Congress omitted from the statute is nevertheless within its scope."). This plain meaning applies even where it does not further the statute's overall aims or impedes administrative convenience. *Id.* at 2528-29; *Amalgamated Sugar Co. LLC v. Vilsak,*

[6] Justice Robert's dissent in this case contains an eloquent explanation why it is so important for courts to provide deference to agencies *only* where Congress *explicitly gives that Agency deference with respect to a particular issue:*

> Courts defer to an agency's interpretation of the law when and because Congress has conferred on the agency interpretive authority over the question at issue. An agency cannot exercise interpretive authority until it has it; the question whether the agency has interpretive authority must be decided by a court without deference to the agency. . . . One of the principal authors of the Constitution famously wrote that the 'accumulation of all powers, legislative, executive, and judiciary in the same hands, may be justly be pronounced the very definition of tyranny. . . . Although modern administrative agencies fit most comfortably within the Executive Branch, as a practical matter the exercise legislative power, by promulgating regulations with force of law; executive power, and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated the rules. The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of American government.

City of Arlington Texas, 113 S.Ct. at 1877 (Roberts, J. dissenting). The Guild respectfully submits the documents attached to the Amended Answer (Doc. No. 13, Exhibits A-D) amply demonstrate why these same concerns apply here.

563 F.3d 822, 834 (9th Cir. 2009) ("We are troubled that the USDA may have acted more out of concern for administrative convenience and self-interest, rather than with an interest in administering the Act according to statutory requirements and Congressional intent."); *National Resources Defense Council, Inc. v. FDA*, 872 F. Supp. 2d 318, 340 (S.D.N.Y 2012) (not agency's prerogative to alter statutory scheme to better that of Congress); *National Resources Defense Council, Inc. v. American Petroleum Institute*, 595 F. Supp. 1255, 1260 (S.D.N.Y. 1984) ("The agency charged with implementing the statute is not free to evade the unambiguous directions of the law merely for administrative convenience.").

Importantly, the government has never contended that the meaning of 19 U.S.C. §§ 2610, 2604, 2601 (2), when read together, is anything but plain. To the contrary, as part of its successful effort to convince this Court to dismiss *ACCG v. CBP*, the government *only maintained* that the proper place for "the first discovery issue" to be addressed is in a forfeiture action:

> Defendants submit that this litigation should be considered in the context of two distinct questions: 1) whether the regulation imposing import restrictions is valid, and 2) whether import restrictions apply to the particular coins that ACCG attempted to import into the United States.
>
> The second question is reached only if the Court first finds that the regulation is valid, and is properly addressed in a subsequent forfeiture proceeding.
> . . .
>
> **D. "<u>First Discovered Within" as Defined by the CPIA</u>**
>
> The Defendants further wish to clarify that import restrictions can only apply to objects that fit within the designated list, that were first discovered within the modern boundaries of the State with which the MOU has been concluded, and is subject to the export controls of that State. The Defendants have never suggested otherwise. See Def's Reply at 9. The CPIA itself defines "archaeological or ethnological material," in part, as:
>
> > (C). . . any object. . . which was first discovered within, and is subject to the 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 the import restrictions have been found valid and the government has moved to forfeit particular objects that are imported or attempted to be imported.

ACCG v. CBP, "Defendants' Supplemental Post-Hearing Clarifications (Doc. No. 36, filed April 1, 2011) at 1, 5.[7] (pertinent pages of which are attached hereto as Exhibit B.) Now, however, the apparent effect of the Court's ruling is to excuse the government from addressing that issue here and instead allow it to take the Guild's property without requiring it to establish first discovery. The Guild respectfully requests the Court to reconsider this ruling based not only on the undisputed plain meaning of the statute, but to hold the government accountable for its past representations to this Court.

B. Dicta in The Fourth Circuit's Opinion Cannot Excuse the Government from Establishing that the Guild's Coins Were "First Discovered Within" and "Subject to the Export Control" of Either Cyprus or China.

Dicta in the Fourth Circuit's opinion should not excuse the government from meeting its initial burden or preclude the Guild from defending its claim on the merits.

1. The Fourth Circuit's Decision Does Not Foreclose Litigation of the "First Discovery" Issue in the Context of Forfeiture Action.

As an initial matter, it is unclear why the Fourth Circuit's decision supports issue preclusion of the "first discovery issue." As set forth above, the government previously indicated that the "first discovery issue" could be litigated in a forfeiture action even if the applicable regulations were found to be "valid" in the Guild's declaratory judgment action. Those regulations were not adjudged valid *per se.* Rather, the Fourth Circuit only held that "foreign

[7] This statement helped form the basis of the Guild's Tenth Affirmative Defense, waiver.

policy considerations" precluded declaratory judgment action aimed at striking down such regulations. The Court then said that the proper venue to contest the government's seizure was a forfeiture action. By its very nature, a forfeiture action simply cannot be used to seek the same sort of wide-ranging relief the Guild sought in *ACCG v. CBP*. *See* Stefan D. Cassella, *supra*, § 7-14 at 323. Rather, as outlined in the Amended Answer, the Guild's initial focus is whether the government: (1) has confirmed that the defendant property appears on the designated lists of cultural goods subject to import restrictions; and, if so, (2) whether the government has also established that the defendant property was "first discovered within" and "subject to the export control" of either Cyprus or China, a prerequisite of CPIA, 19 U.S.C. §§ 2610, 2604 and 2601 (2), (7). Only after the government establishes these elements does any burden shift and various forfeiture defenses come into play. The Fourth Circuit's decision did not foreclose such issues. Those factual issues are for the jury in this forfeiture action.

2. There is No "Law of the Case" Because this is Not the Same Case.

Neither the government nor the Court has cited any case that supports precluding the Guild from pursuing these issues, let alone one allowing for issue preclusion in a forfeiture context where the Guild's rights to property are at risk. The government has claimed the Fourth Circuit's opinion is "law of the case."[8] Government's Motion to Strike Portions of Claimant's Answer and Affirmative Defenses and Request for More Definite Statement (Doc. No. 12) at 2. Yet, law of the case doctrine relates to issues in *the same case on remand. See Pepper v. United States*, 131 S. Ct. 1221, 1250 (2012) ("[T]he doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.") (citations and quotations omitted); *L.J. v. Wilbon*, 633 F.3d 297, 308 (4th Cir.

[8] "Collateral estoppel" forms the only other possible basis for issue preclusion. *See Westmoreland and Coal Co., Inc. v. Sharpe*, 692 F.3d 317, 331 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 2852 (2013). It also fails for the reasons set forth in the chart attached as Exhibit C.

2011) (The law of the case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. As a practical matter, then, once the decision of an appellate court establishes the law of the case, it must be followed in all subsequent proceedings in the same case. . . ."), *cert. denied*, 132 S. Ct. 757 (2011). This is, of course, an entirely different case, one where the government previously represented that the Guild would be allowed to litigate the "first discovery issue". *ACCG v. CBP*, "Defendants' Supplemental Post-Hearing Clarifications (Doc. No. 36, filed April 1, 2011) at 1, 5. (Exhibit B.)

3. "Law of the Case" Relates to Questions of Law Not Fact

"The doctrine of law of the case has no application to questions of fact, but is limited to questions of law. . . ." *See Baltimore & O.R. Co. v. Deneen*, 167 F.2d 799, 800 (4th Cir. 1948). Here, of course, the key predicates for seizure are factual questions—has the government met its burden to demonstrate that the Guild's coins were "first discovered within" and "subject to the export control" of Cyprus or China? That issue simply was never addressed on the merits in *ACCG v. CBP*.

4. "Law of the Case" Does Not Preclude Reconsideration of the Issues.

Even assuming law of the case somehow applies, the doctrine does not and cannot limit the power of a court to address the "first discovery issue" and other defenses[9] the Guild outlined in its Amended Answer here. "The ultimate responsibility of the federal courts, at all levels, is to reach the correct judgment under law." *American Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003). To be sure, the Fourth Circuit made some general

[9] The following affirmative defenses were never clearly raised in *ACCG v. CBP:* 2nd (E.U. law does not consider ancient coins to be "archaeological objects); 3rd (Special Administrative Regions of Hong Kong and Macao have no export controls); 5th (no government expert has verified coins of types that appear on the designated lists); 9th (CBP and/or Treasury have independent statutory duty); 10th (waiver and estoppel); 11th (due process); 12th (fair notice).

pronouncements about the CPIA, but their context is also important. At most, they are dicta, stated in the context of a decision affirming a dismissal of the Guild's declaratory judgment action as not justiciable on so-called foreign policy grounds. *See ACCG v. CBP,* 698 F.3d at 179. Here, though, such grounds simply do not exist. *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 litigation of the "first discovery" requirement in the context of a forfeiture action, particularly where the Guild's loss of its property rights are at issue.

Moreover, the Fourth Circuit appears to have been operating under a serious factual misapprehension. Despite specific mention of the Kislak Declaration in the Guild's opening appellate brief at 12 ("Jay Kislak, CPAC's Chairman at the time Cypriot import restrictions were imposed, stated under oath that State misled Congress and the public about CPAC's recommendations concerning Cypriot coins.") and at oral argument, the appellate court falsely believed that CPAC had concluded just the opposite. 698 F.3d at 182 ("Plaintiffs have given us no reason to question CPAC's conclusion, as adopted by State, as to where types of cultural property at issue were discovered."). Of course, it is the allegations of the Guild's Complaint[10]--which set forth the Guild's views about coin circulation and questioned whether CPAC actually

[10]*ACCG v. CBP,* Amended Complaint (Doc. No. 14, filed July 15, 2010) ¶¶ 14-18 (coin circulation); 85 (Kislak Declaration).

recommended import restrictions on coins--that should have controlled. *Robinson v. Am. Honda Motor Corp.,* 551 F.3d 218, 222 (4th Cir. 2009).

"Law of the case" or no, the interests of justice support reconsidering whether the "first discovery issue" may be litigated, particularly where "foreign policy" considerations do not apply and where it should be clear that the Fourth Circuit was operating under wrong assumptions.

C. Due Process Requires the Guild to be Given the Opportunity to Litigate Whether the Guild's Coins Were "First Discovered Within" and "Subject to the Export Control" of Either Cyprus or China.

This Court should not lose sight of Fourth Circuit's overriding concern that the Guild be allowed to contest the forfeiture in a meaningful fashion as a matter of due process:

> Congress has already provided civil forfeiture as a vehicle through which importers can challenge the seizure and detention of articles covered by CPIA restrictions. Here, forfeiture proceedings were put on hold pending the outcome of this litigation, and the Guild may still pursue various forfeiture defenses to obtain release of the articles it attempted to import.
> …
> …
> We emphasize our decision does not leave the Guild without a remedy. At oral argument and in its brief, the government represented that it will bring a forfeiture action under the statutory scheme once this litigation has concluded, Gov't Br. at 43. *There, it hardly need be said, the basics of due process require the Guild to be given a chance to contest the government's detention of property.* (emphasis added).

ACCG v. CBP, 698 F.3d at 175, 185. Such due process considerations demand that the Government bear the initial burden to demonstrate that the subject coins were "first discovered within" and "subject to the export control" of Cyprus and China.

1. "First Discovery" is a Foundational Requirement of Jurisdiction.

Even if the plain meaning of the CPIA, 19 U.S.C. §§ 2610, 2604, 2601 (2), did not place the burden on the government to prove first discovery, basic jurisdictional principles still demand

it. The CPIA enacted parts of the 1970 UNESCO Convention into U.S. law. That Convention assumes that only artifacts first discovered within the territory of a member state are subject to repatriation with the assistance of another member State. *See* UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, signed in Paris, 14 November 1970, Art. 4 ("The State Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State: …(b) cultural property found within the national territory;"), available at http://eca.state.gov/files/bureau/unesco01.pdf (last visited June 9, 2014). The national laws of Cyprus[11] and China[12] also do not purport to lay claim to artifacts found outside their own territories. For the UNESCO Convention or UNESCO State Party export controls to be triggered, there must be conclusive evidence the Guild's coins were "first discovered" there.

2. "First Discovery" is a Prerequisite Before a Forfeiture Action May Go Forward.

"First discovery" was a key issue in a recent "cultural property" case venued in the Southern District of New York where the government was required to allege with particularity why it believed the defendant property could only have been illicitly excavated in Mongolia

[11] The Cypriot Export of Cultural Goods Law No. 182(1) of 2002 was passed in anticipation of membership in the European Union ("EU"). The law requires export permits for objects exported to third countries from Cyprus; however, the law does not apply (and cannot apply) to exports within the EU. It only applies to cultural goods within Cyprus after 1 January 1995. For the English text of this law, *see* http://www.unesco.org/culture/natlaws/media/pdf/cyprus/cy_law_182_engtof.pdf (last visited June 9, 2014). When Cyprus joined the EU in 2004 it became subject to EU law, including its rules on the export of cultural goods. In its Second Affirmative Defense, the Guild has asserted that EU law, binding on Cyprus, does not consider ancient coins in trade to be archaeological objects subject to export controls which trigger the CPIA. The court may undertake consideration of this foreign law at any time. Fed. R. Civ. Pro. 44.1. The Guild hopes to be able to pursue this claim on the merits.

[12] Any cultural relic within China that was made before 1911 is prohibited from export unless explicit approval has been given. See Timothy Lau, *The Grading of Cultural Relics in Chinese Law*, Int'l J. of Cul. Prop. (2011) 18:1-35.

before the District Court would allow the case to go forward.[13] In *United States v. One Tyrannosaurs Bataar Skeleton,* 12 Civ. 4760 (S.D.N.Y. September 7, 2012) (Exhibit D), 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.

Id. at 2-3. 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.

[13] A similar issue arose in *United States v. a Tenth Century Cambodian Sandstone Sculpture, Currently Located at Sotheby's in New York, New York,* 2013 U.S. Dist. LEXIS 45903 (S.D.N.Y. March 28, 2013). There, the government alleged with particularity that a Khmer statute was taken from a specific pedestal in a jungle temple complex in order to establish "first discovery" for purposes of going forward on a forfeiture complaint.

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.)").

This Court should also reconsider this ruling because excusing the government from establishing first discovery would violate the Guild's rights to due process.

III. Conclusion

Even if the Fourth Circuit effectively recognized the government's rights to its "opinion" that coins may be restricted under the CPIA, that 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 China or excuse the government from its statutory burdens under 19 U.S.C. §§ 2610, 2604, 2601(2). 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 discovery the Guild has previously requested to go forward.

Dated: June 16, 2014

Respectfully submitted,

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