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.	)	

CLAIMANT'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The claimant, the Ancient Coin Collectors Guild ("the Guild" or "Claimant"), moves for summary judgment, and asks the Court to order the return of its property and the payment of its attorney's fees and costs. The government seeks to take that property, certain ancient Cypriot and Chinese coins, worth $275.00. The Guild lawfully purchased these coins in the United Kingdom ("U.K.") from Spink, a well-established numismatic dealer. Spink exported the coins in conformity with U.K. and European Union (E.U.) law. Yet, on arrival to Baltimore, the government seized the coins, based at least in part upon 19 C.F.R. §12.104, a regulation that on its face contradicts the plain meaning of the governing statute, the Convention on Cultural Property Implementation Act ("CPIA"), 19 U.S.C. § 2601 *et seq.* and its requirement that the

government is only entitled to restrict entry of articles of "archaeological interest" "first discovered within" and "subject to export control" of a specific foreign country.

Preliminary rulings made on June 3, 2014 (ECF No.22) ("the June 3, 2014 Order") and again on February 11, 2016 (ECF No. 63) suggest that the Court believes that the Fourth Circuit's decision in a related case captioned, *Ancient Coin Collectors Guild. v. U.S. Customs and Border Protection,* 698 F.3d 171 (4th Cir. 2012) ("the Fourth Circuit opinion"), forecloses arguments predicated on this fundamental contradiction. So, in consideration of those rulings, the Guild first requests the Court to rule consistent with the June 3, 2014 Order that the Guild has rebutted the government's *prima facie* case for forfeiture with expert testimony.

The Guild also requests the Court to rule—again consistent with the June 3, 2014 Order—that the government has failed to meet its initial burden to establish that some of the defendant property even appears on the "designated list" of Chinese coin types subject to detention and seizure.

Finally, the Guild respectfully requests that Court reconsider its prior rulings that appear to excuse the government from providing expert testimony or other evidence to show as part of its *prima facie* case that the defendant coins were "first discovered within" and "subject to the export control" of China or Cyprus. Even assuming the Guild cannot challenge the so-called "designated lists," dicta in the Fourth Circuit opinion—which is predicated on a serious factual error-- provides no reason to shift the burden of proof established by Congress or excuse the government from providing proper notice to the public about the conduct forbidden or required under CPIA, 19 U.S.C. §§ 2601, 2604, 2610. Indeed, all the Guild really asks for here is for the Court to hold the government to its prior representations about the respective burdens of proof in

a CPIA forfeiture action and to reaffirm an earlier ruling that government regulations cannot change existing law.

II. BACKGROUND

A. The Convention on Cultural Property Implementation Act

The CPIA, 19 U.S.C. §§ 2601 *et seq.* was intended by its sponsors to be the definitive statement of U.S. policy regarding the importation of archaeological and ethnological materials. In 1983, Congress passed the CPIA to enact the 1970 UNESCO Convention into U.S. law. Broadly speaking, the 1970 UNESCO Convention contemplates that signatories will help enforce each other's export controls on archaeological and ethnological artifacts. However, the U.S. Senate only ratified the 1970 UNESCO Convention subject to reservations intended to preserve the "independent judgment" of the United States regarding "the need and scope of import controls." S. Rep. No. 97-564, at 6 (1982) (Declaration of Peter K. Tompa ("Tompa Dec."), Exhibit ("Ex.") A.).

To ensure this "independent judgment," Congress decided against providing the President unbridled authority to enter into Memorandums of Understanding ("MOUs") and instead imposed significant procedural and substantive constraints on that authority which were intended to result in narrowly tailored restrictions limited to archaeological material of cultural significance "first discovered within" and "subject to the export control" of a specific 1970 UNESCO Convention state party. *See* Mark Feldman, *The UNESCO Convention on Cultural Property: A Drafter's Perspective,* Art and Cultural Heritage Law Newsletter, at 5 (ABA Section of International Law Summer 2010) (Tompa Dec., Ex. B.).

Moreover, the CPIA set up a panel of experts, the Cultural Property Advisory Committee ("CPAC"), to assist the President or his designee in their decision-making. *See id.* § 2605 *et seq.*

The CPIA contemplates that the executive branch will not treat CPAC's recommendations lightly. Under the CPIA, 19 U.S.C. § 2602 (g) (2), if the President or his designee enters into or extends a MOU, they are required to report to Congress. That report must: (a) describe the actions taken; (b) indicate whether there were any differences between those actions and CPAC's recommendations; and (c) state, if so, the reasons for those differences. *Id.*

The CPIA also limits the authority of U.S. Customs and Border Protection ("CBP") to promulgate regulations imposing import restrictions. If import restrictions are recommended, CBP must designate the material restricted by type or classification, making certain that the list is sufficiently specific and precise to ensure that the restrictions are *only applied* to the material covered by any agreement to impose import restrictions. *Id.* § 2604 (1). Congress also contemplated that CPAC would guide CBP in preparing such "designated lists" of material subject to import restrictions. As the Senate Report indicates, "[T]he Advisory Committee … is expected to contribute heavily to the composition of the list." S. Rep. No. 97-564, at 8 (1982), Tompa Dec., Ex. A.

B. The CPIA, Coins, and the Decision to Test the Government's Regulations

For some twenty-five (25) years, consistent with this legislative intent,[1] historical coins were exempted from import restrictions. In 2007 and 2009, however, the State Department and CBP changed course and first imposed import restrictions on "coins of Cypriot type" and "coins" "from China." (*Ancient Coin Collectors Guild v. U.S. Customs and Border* Protection ("the DJ Action"), Amended Complaint ¶¶ 37, 40, 74, 84, Tompa Dec., Ex. E.) As a result, ancient Cypriot or Chinese coins became subject to detention, seizure and repatriation, despite the fact

[1] The CPIA's legislative history indicates that Mark Feldman, State's chief negotiator, represented to Congress that "it would be hard … to imagine a case" where coins would be would be restricted. (*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, Tompa Dec., Ex. C.)

that such coins were, and still are, sold worldwide and avidly collected in both Cyprus and China. (*Id.* ¶¶ 35-36, 89-90.)

Subsequent analysis of FOIA and open source documents raised serious questions whether State and CBP complied with the CPIA in changing existing precedent against import restrictions on coins. (*Id.* ¶¶ 37-90.) Moreover, Jay Kislak, a past CPAC Chairman, made a significant admission that calls into question the integrity of the process. In particular, Mr. Kislak stated in a declaration filed in a FOIA lawsuit that State authorized import restrictions on Cypriot coins against CPAC's recommendations, and then misled the Congress and the public about it.[2] (*Id.* ¶ 85.) As a result, the Guild decided to import a group of ancient Cypriot and Chinese coins worth $275.00 to test the regulations in court. (*Id.* ¶91.) The commercial invoice that accompanied the coins reflected the seller's lack of knowledge about the coins' provenance. While the invoice identified the coins as being minted in either Cyprus or China, it also indicated that each had "No recorded provenance. Find spot unknown." (Tompa Dec., Ex. N.) Although CBP then detained and seized the coins (Tompa Dec., Exs. P, Q, and R), the government never instituted a forfeiture action. Accordingly, after waiting approximately ten (10) months, the Guild instituted its own action to compel the filing of a forfeiture action or the return of its property. (The DJ Action, Amended Complaint ¶¶ 94-101, Tompa Dec., Ex. E.)

C. The Declaratory Judgment Action

The Guild's DJ Action sought to test the legality of import restrictions imposed on certain Chinese and Cypriot coins. At the request of the government, any forfeiture action was put on hold. As a result, that litigation focused exclusively on whether the government's decision-making was subject to judicial review under the APA or, alternatively, under the doctrine of

[2] Mr. Kislak's Declaration ("Kislak Dec.") and its exhibits are attached to the Tompa Dec., Ex. F.

"non-statutory" or *ultra vires* review. Accordingly, the Court was asked to construe the following CPIA provisions: Sections 2601 ("Definitions"); 2602 ("Agreements to Implement Article 9 of the Convention"); 2604 ("Designation of Materials Covered by Agreements or Emergency Actions"); and 2605 ("Cultural Property Advisory Committee").

Both this Court and the Fourth Circuit declined to undertake the review the Guild requested. *Ancient Coin Collectors Guild. v. U.S. Customs and Border Protection,* 801 F. Supp. 2d 383 (D. Md. 2011), *aff'd,* 698 F.3d 171 (4th Cir. 2012) ("*ACCG v. CBP"*). Specifically, this Court concluded that none of the State's actions were subject to APA review because the responsible State official, acting under presidential authority, could not be considered an "agency" for APA purposes. 801 F. Supp. 2d at 402-404. This Court then also declined to undertake APA review of CBP's actions as derivative of State's. *Id.* The Court did, however, identify two (2) discrete issues for a *ultra vires* review, including the issue of whether State had the authority to bar the import of coins with "unknown find spots." *Id.* at 408.

Consistent with its limited review, the Court ultimately narrowly held that "[I]mport restrictions on Chinese and Cypriot coins, which have the effect of barring the import of coins with unknown find spots, do not exceed the State Department's authority under the CPIA." *Id.* It is that ruling—as limited as it is—that forms the genesis of the government's claims now that the Guild's claims and defenses in this forfeiture action are "foreclosed."

This Court also made another ruling that is even more important for our purposes here: the Court acknowledged that "Congress only authorized the imposition of import restrictions on objects that were 'first discovered within, and [are] subject to the export control by the State Party." *Id.* at 407 n. 25. As a result, the Court only decided not to rule against the government

on the validity of a related regulation, 19 C.F.R. § 12.104 (a), based upon a last minute concession:

> Under the regulations, that requirement seems to apply only to the importation of a 'fragment or part' of an object of archaeological or ethnological interest. This appears to have been an oversight in the drafting, or codification, of the original regulations in 1985, and has persisted in the C.F.R. ever since…. *[T]he court need not decide whether the conflict between 19 U.S.C. § 2601 (2) and 19 C.F.R. § 12.104 (a) requires that the regulation be set aside, because the government concedes that the "first discovered within" requirement applies to all CPIA import restrictions.*

ACCG v. CBP, 801 F. Supp. 2d at 407 n. 25 (emphasis added).

Although the Fourth Circuit also recognized that the government was only entitled to restrict articles of "archaeological interest" "first discovered within" and "subject to export control" by the specific UNESCO State party, that Court took a hands-off approach to the question of judicial review. 698 F.3d at 179-181. Specifically, the Fourth Circuit held that anything but the most cursory review of State's procedural compliance with the CPIA, based largely on the government's own recitation of that process found in the Federal Register, "would draw the judicial system too heavily and intimately into negotiations between the Department of State and foreign countries."[3] *Id.* at 175, 179-81. The Court then affirmed this Court's decision, but predicated on the assumption that the Guild would be fully afforded its due process rights to defend its property in this forfeiture action. *Id.* at 185.

Significantly here, another part of the Fourth Circuit's opinion rests on a serious mistake of fact. As part of its analysis, the Fourth Circuit also dismissed the Guild's argument that State

[3] The Guild questions the continued vitality of the Fourth Circuit's hands-off approach in light of the Supreme Court's rulings in *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (requiring application of the "political question test" where the government raises foreign policy considerations to avoid judicial review) and *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (holding that the President's "recognition authority" is exclusive, but recognizing Congress' power to regulate commerce).

and CBP "acted *ultra vires* by placing restrictions on all coins of certain types without demonstrating that all coins of those types were 'first discovered within' China or Cyprus." *Id.* at 182. However, in so doing, the Appellate Court wrongly assumed that CPAC agreed with the government's decision-making:

> CPAC and the Assistant Secretary did consider where the restricted types may generally be found as part of the review of the Chinese and Cypriot requests. CBP listed the articles in question in the Federal Register by "type" —- but only after State and CPAC had determined that each type was part of the respective cultural patrimonies of China and Cyprus. 74 Fed. Reg. 2,839-42 (Chinese coins); 72 Fed. Reg. 38,470-73 (Cypriot coins). Among the members of CPAC are three "experts in the fields of archaeology, anthropology, ethnology, or related areas" and three "experts in the international sale of archaeological, ethnological, and other cultural property." 19 U.S.C. § 2605(b)(1). Plaintiffs have given us no reason to question CPAC's conclusion, as adopted by State, as to where the types of cultural property at issue were discovered. To the contrary, it was hardly illogical for CPAC to conclude that, absent evidence suggesting otherwise, Chinese and Cypriot coins were first discovered in those two countries and form part of each nation's cultural heritage.

Id. at 182.[4] As set forth in the attached Declaration of former CPAC Member Robert Korver, however, nothing could be further from the truth. (Declaration of Robert Korver ¶¶ 6-9 (May 22, 2016) ("Korver Dec.").[5] In fact, CPAC explicitly disapproved of import restrictions on Cypriot coins, and the State Department also precluded CPAC from any making recommendations about coins when a MOU with China was being considered. (*Id.*)

[4] The Fourth Circuit should not have made this finding at all. In an appeal of a grant of a motion to dismiss, it is the allegations of the Guild's Complaint--which set forth the Guild's views about coin circulation and questioned whether CPAC actually recommended import restrictions on coins--that should have controlled. *Robinson v. Am. Honda Motor Corp.*, 551 F.3d 218, 222 (4th Cir. 2009).

[5] It also is troubling that the government has allowed the Courts to assume wrongly that CPAC approved import restrictions on Cypriot and Chinese coins. *See United States v. Blueford*, 312 F.3d 962, 968 ("[I]t is decidedly improper for the government to propound inferences that it knows to be false, or has very strong reason to doubt…"). *Berger v. United States*, 295 U.S. 78, 88 (1935) (An attorney for the government is a "representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

D. The Forfeiture Action: Pleading and Discovery

As set forth above, at the government's request, any forfeiture proceeding was put on hold while the DJ Action was litigated. Finally, on April 22, 2013, the government filed a forfeiture complaint against the defendant property alleging violations of the CPIA and related regulations. On May 31, 2013, the Guild filed a verified claim of interest in the Defendant Property and on June 19, 2013, the Guild filed an answer to the forfeiture complaint. However, instead of requiring the government to respond to written discovery that had been served, the Court allowed the government to file a Motion to Strike. (ECF Nos. 11 and 12.)

Pursuant to Fed. R. Civ. P. 15 (a) (1) (B), the Guild then filed an Amended Answer (ECF No. 13) on September 27, 2013, well within the timeframe allowed to file such a pleading without leave of court. (ECF No. 12.) Although the Court accepted the Guild's pleading, the Court nonetheless construed the government's motion as being directed at the Amended Answer. The Court then granted that motion, striking the entire Amended Answer. (ECF No. 22.)

The Court's June 3, 2014 Order addressed the Guild's perceived effort to relitigate the DJ Action. In so doing, the Court first stated that the Fourth Circuit's opinion "forecloses any further challenge to the validity of regulations." (*Id.* at 1.) Again citing the Fourth Circuit's opinion, the Court then provided the parties with a road map of what issues would be litigated here:

As the Circuit explained in discussing the anticipated forfeiture action:

> *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.*

If the government meets its burden, the Guild must then demonstrate that its coins are not subject to forfeiture in order to prevail. See id. § 1615.

Ancient Coin Collectors, 698 F.3d at 185. Further, the court explained that:

> *Here, CBP has listed the Chinese and Cypriot coins by type, in accordance with 19 U.S.C. U.S.C. § 2604, and CBP has detained them, in accordance with 19 U.S.C. § 2606. The detention was lawful as an initial matter, and the Guild had an opportunity at the time of detention to present evidence that the coins were subject to one of the CPIA exemptions.*

Id. at 183. The burden is on the importer to show that:

> *the article in question was either (1) lawfully exported from its respective state while CPIA restrictions were in effect; (2) exported from its respective state more than ten years before it arrived in the United States; or (3) exported from its respective state before CPIA restrictions went into effect.*

(June 3, 2014 Order at 1-2.)

The Court subsequently granted the Guild leave to file a Second Amended Answer (ECF No. 35) which the Guild did on February 25, 2015. (ECF No. 36.) The parties then engaged in limited discovery under the Court's June 3, 2014 Order. The Court further limited that discovery in its January 11, 2016 Order (ECF No. 63.) and in its June 1, 2016 Order (ECF No. 71.).

What discovery the Guild was allowed to take offered little hard information about *the actual rationale for the detention and seizure of the Guild's coins.* Gerald Stroter, a supervisory import specialist, testified the coins were detained "based on the invoice, the appearance of the articles related to the invoice, and the restrictions that covered articles from places and time periods that were described on the invoice." (Deposition of Gerald Stroter at 33:6 to 14 (Oct. 6, 2015) ("Stroter Dep."), Tompa Dec.Ex. I.) Stroter understood that the restrictions related to coins that "originated" from China or Cyprus, perhaps "hundreds" or "thousands" of years ago. (*Id.* at 33:16 to 34:9.) However, Stroter was instructed not to answer whether he also considered

whether the coins were "first discovered within" and were "subject to the export control" of either China or Cyprus. (*Id.* at 70:8 to 72:2.)

The two (2) remaining government depositions were even less illuminating. Augustine Moore, the CBP Baltimore Port Director, recalled few specifics, and appears to have relied entirely on the judgment of her subordinates. (Deposition of Augustine Moore at 45:1 to 73:10 (April 6, 2016) ("Moore Dep."), Tompa Dec, Ex. J.) Carlly Luckman was designated as the government's Rule 30 (b) (6) witness on the "detention and seizure of the defendant property" and "the identification of the defendant property as being subject to import controls…" (Deposition of Carlly Luckman (May 12, 2016) ("Luckman Dep.") Ex. 1, Tompa Dec., Ex. K.) However, she could only speak generally about the "process" that would have been followed, and not the specifics of why the Guild's coins were detained and seized. (*Id.* at 53:7 to 75:15; 96:2 to 98:11; 135:2 to 136:16.) Like Stroter, Luckman appeared confused; she was not able to say whether import restrictions on coins "from China" related to coins "made" or "found" there. (*Id.* at 68:9 to 79:6.) And while she acknowledged that the CPIA controlled over any contrary regulations, like Stroter, she was also ordered not to answer any question related to whether the restricted coins "from" China had to be "first discovered" there. (*Id.* at 89:5 to 98:11; 111:12 to 114:10; 140:1 to 146:2.)

E. The CPIA and Regulatory Provisions at Issue Here

The Guild hoped its DJ Action would help elucidate government decision-making that resulted in the imposition of import restrictions on ancient coins. This action, in contrast, focuses on whether the particular Chinese and Cypriot coins the Guild imported for standing purposes should now be forfeited. Not surprisingly, different statutory provisions are at issue in this forfeiture action than were at issue previously. These include 19 U.S.C. §§ 1615 ("Burden of Proof

in Forfeiture Proceedings"), 2606 ("Import Restrictions"), 2609 ("Seizure and Forfeiture"), and 2610 ("Evidentiary Requirements").

Section 1615 sets forth the "burdens of proof" generally applicable in forfeiture proceedings in customs matters. Under that provision, after the government establishes "probable cause," the burden of proof then shifts to the claimant. In contrast, §§ 2606, 2609 and 2610 are specific to the CPIA. Section 2606 describes the "satisfactory evidence" an importer may present to avoid seizure of his property. Section 2609 states, "All provisions of law relating to seizure, forfeiture, and condemnation for violation of customs laws shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this chapter, insofar as provisions of law are applicable to, and not inconsistent with, the provisions of this chapter." Section 2610 sets forth the respective burdens of proof for forfeiture proceedings under the CPIA. In that provision, Congress placed the burden of proof squarely on the government to establish the defendant property was listed in accordance with the requirements of § 2604.

The applicable regulations are found at 19 C.F.R. § 12.104 *et seq.* As set forth above, 19 C.F.R. § 12.104 (a) contradicts 19 U.S.C. § 2601 (2)'s requirement that "archaeological material of a State Party" relates to all articles of "archaeological interest" "first discovered within" and "subject to export control" by the specific UNESCO State party. Moreover, this error is repeated in a CBP Guidance entitled, "*What Every Member of the Trade Community Should Know About: Works of Art, Collector's Pieces, Antiques, and Other Cultural Property* at 18 (CBP May 2006) ("CBP Guidance") (Tompa Dec., Ex. O.)

III. ARGUMENT

The Court's June 3, 2014 Order governs this matter. Pursuant to that order, the Guild is entitled to rebut the government's *prima facie* case by establishing the Defendant Property was

either: (1) lawfully exported from its respective state while CPIA restrictions were in effect; or (2) exported from its respective state before CPIA restrictions went into effect. (June 3, 2014 Order at 1-2.) The Guild has proffered unrebutted expert testimony on these points that entitle it to summary judgment.[6] Moreover, the government has failed to establish its minimal burden to show that certain Chinese coins have been restricted at all. Finally, the Guild respectfully requests the Court to reconsider its prior rulings related to the burden of proof and fair notice. These claims are based on the Fifth Amendment's Due Process clause which trumps any dicta found in the Fourth Circuit opinion. Indeed, all the Guild really asks here is for the Court to hold the government accountable for its prior representations about the burden of proof in a CPIA forfeiture action and for the Court to further reaffirm its prior ruling that government regulations cannot change existing law.

A. Unrebutted Expert Testimony Supports Summary Judgment.

Even assuming that that plaintiff has already made out a *prima* facie case for forfeiture, the Guild has proffered expert testimony that rebuts the government's case. The Guild has proffered the testimony of Douglas Mudd, a numismatic expert, and Michael McCullough, an expert in the international trade of cultural artifacts. (*See* Declarations of Douglas Mudd (April 5, 2016) ("Mudd Dec.") and Michael McCullough (May 19, 2016) ("McCullough Dec.")). This expert testimony establishes that the defendant property was either "lawfully exported from its respective state while CPIA restrictions were in effect" as a matter of law or demonstrates by a

[6] The standards for summary judgment are well-known. The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "Conclusory or speculative allegations do not suffice, nor does a mere scintilla of evidence in support of [the nonmoving party's] case." *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir. 2002) (internal quotation marks omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotation marks omitted).

preponderance of the evidence that it was "exported from its respective state before CPIA restrictions went into effect." (June 3. 2014 Order at 2.)

Significantly, this expert testimony is unrebutted in the record before the Court; the government never sought to take the depositions of the Guild's experts or name its own rebuttal experts. Accordingly, this unrebutted testimony supports summary judgment on the Guild's behalf. *See United States v. Three Burmese Statues,* 2008 U.S. Dist. LEXIS 48474*8 (W.D. N.C. June 24, 2008) ("Where the opposing party presents no evidence sufficient to make an issue of the expert's credibility, such as contrary opinion evidence or evidence tending to undermine the credibility or qualifications of the expert, and where the trier of fact would not be at liberty to disregard arbitrarily the unequivocal, uncontradicted, and unimpeached testimony of the expert witness, the expert's testimony may form the basis for summary judgment.").

1. The Defendant Property Was Exported from its Respective State Before CPIA Restrictions Went into Effect.

Courts regularly rely on expert testimony in forfeiture actions, including those relating to cultural goods. *See United States v. 328 "Quintales" of Green Coffee Beans*, 21 F. Supp. 3d 122, 129 (D. P.R. 2013); *United States v. One Tyrannosaurs Bataar Skeleton,* 2012 U.S. Dist. LEXIS 165153*4 (S.D.N.Y. November 14, 2012); *Three Burmese Statues,* 2008 U.S. Dist. LEXIS 48474*7; *United States v. Eighteenth Century Peruvian Oil on Canvass,* 597 F. Supp. 2d 618, 623 (E.D. Va. 2009). Here, the unrebutted expert testimony of the Guild's numismatic expert establishes by a preponderance of the evidence that the defendant property was exported from its respective state before CPIA restrictions went into effect.[7]

[7] We know few actual details about the history of the defendant coins. The Guild purposefully imported unprovenanced collectors' coins because they are representative of most coins available in the numismatic marketplace. (Deposition of Wayne Sayles, 61:12 to 64:9 (April 12, 2016), Tompa Dec., Ex. L.) A government appraisal described them as "bulk material" "readily available on the marketplace." (Luckman Dep. 51:3 to 52:6 and Ex. 5 at USA-000175, Tompa Dec., Ex. K.). At best, all John Pett of Spink could say is that he thought it likely

The Guild retained Douglas Mudd as an expert in numismatics to opine on the circulation of the types of coins listed on the Spink invoice. Mudd's CV demonstrates that he has extensive academic and practical experience in numismatics. He has served as a collection manager at the Smithsonian Institution, and as a curator and museum director at the American Numismatic Association in Colorado Springs, Colorado. (*Id.*) He has also written and taught extensively on numismatics. (*Id.*) Mudd reviewed the Spink Invoice, a relevant Cypriot Government document (Tompa Dec., Ex. T.), as well as authoritative scholarly texts about the circulation of Chinese and Cypriot coins. (Mudd Dec., Report at 3-4.) As such, Mudd appears to be at least as qualified as a government numismatic expert who was allowed to testify in a forfeiture case involving ten (10) valuable 1933 U.S. Double Eagle gold coins. *See Lanbord v. United States Department of the Treasury,* 2009 U.S. Dist. LEXIS 40083*20-21 (E.D. Pa. May 11, 2009).

Based on Mudd's review of this material as well as his own extensive knowledge as a numismatist, he first concludes, "there is ample evidence of the wide circulation of these coins in ancient as well as modern times, well beyond the areas where they were created in large numbers and prior to the export restrictions[8] placed on them by the respective MOUs." (Mudd Dec., Report at 1.) Mudd then details these conclusions.

First, he states that Chinese cash coins—which represent all but three (3) of the Chinese coins listed on the Spink invoice—were exported in such large quantities from China since the

that a former colleague selected some low grade coins long stored in boxes. (Deposition of John Pett (Dec. 9, 2015) at 42:14 to 43:16 ("Pett Dep."), Tompa Dec., Ex. M.) The Guild's interrogatory responses also indicate that several of the Chinese coins were sourced to a Canadian dealer. (Claimant's Response to Interrogatory No. 1 at 2-4 (October 27, 2015), Tompa Dec, Ex. G.) However, the government never sought the deposition of this individual.

[8] Mudd's declaration notes that misspoke and meant to say "import" rather than "export" restrictions as MOUs authorize import restrictions on cultural goods into the United States.

7th Century that they served as models for the first coinages of Japan, Korea, Vietnam and many other East Asian nations.[9] (*Id.* at 1-2.)

Next, Mudd discusses the Cypriot coins listed on the Spink Invoice. Mudd first states that such coins would have circulated widely because Cyprus, an island, has been closely integrated into the trade networks of the Eastern Mediterranean since the 2nd millennium B.C. (*Id.* at 2-3.) Second, the numismatic expert explains that some of the Spink coins were produced by the Ptolemaic Empire, and that such coins circulated along with similar coins from other Ptolemaic mints outside of Cyprus not only in Cyprus, but Egypt, Asia Minor and the Levant as well. (*Id.* at 3.) Mudd makes similar observations with regard to the rest of the Cypriot coins on the Spink invoice. These coins, which were struck under the authority of the Roman provincial governors on the same standard as the regular coinage of the Empire, also circulated with other Roman Imperial and provincial coins throughout the Eastern Roman Empire. (*Id.*) Finally, like their Chinese counterparts, the Cypriot coins listed on the Spink Invoice also have been widely collected outside of Cyprus well before the imposition of import restrictions. (*Id.*)

This expert opinion about the circulation of the coins on the Spink Invoice supports a strong inference that those particular coins were outside of Cyprus and China well before the dates import restrictions were imposed *Langboard,* 2009 U.S. Dist. LEXIS 40083*19-20 ("Defendants argue that Bower's testimony is not helpful to the trier of fact because he opines only about what could have happened . . . and he admits having no opinion about what actually did happen . . . However, [a]n expert opinion that expresses a possibility that a fact is true and

[9] Mudd also states that earlier knife and spade coins found on the Spink Invoice also circulated outside China as currency, but not in the same large numbers. (Mudd Dec., Report at 2.) Both early Chinese knife and spade coins as well as later cash coins subsequently circulated outside of China in large numbers as collectables well before import restrictions were imposed. (*Id.* at 1 ("During the late 19th and early many Westerners, especially missionaries created collections of Chinese coins which they brought home with them when they returned to their homes.").)

otherwise comports with the *Daubert* analysis, is clearly relevant to the question of whether the fact is indeed true.") (Internal quotations and citations omitted).

Moreover, if anything, the short time gap between the imposition of import restrictions and the defendant property's import into the United States only bolsters this conclusion. The Guild's coins were imported on or about April 16, 2009. (Tompa Dec., Ex. S.) CBP imposed Cypriot import restrictions on July 13, 2007. (72 Fed. Reg.38470 (July 13, 2007), Tompa Dec., Ex. U.) CBP imposed import restrictions on Chinese cultural goods on January 16, 2009. (74 Fed. Reg. 2838 (January 16, 2009), Tompa Dec., Ex. V.) Accordingly, import restrictions on Cypriot coins were only in force for twenty-one (21) months and import restrictions on Chinese coins were only in force for three (3) months when the Guild imported the defendant coins.

This short time gap is significant. In order to deny the Guild summary judgment, the Court must—in the face of Mudd's unrebutted expert testimony—speculate that the defendant property left Cyprus and China quite recently. Instead, the Court can only reasonably conclude based on Mudd's expert testimony that it is more probable than not that the Spink coins left Cyprus and China hundreds or thousands of years ago as currency, or decades ago as collectables. Accordingly, the Guild is entitled to summary judgment on this ground.

2. The Defendant Property Was Lawfully Exported from its Respective State while CPIA Restrictions Were in Effect.

The unrebutted expert testimony of Michael McCullough, Esq. establishes that the export of the Cypriot coins at issue from the U.K. was a legal export under E.U. and Cypriot law that satisfies the requirements of the CPIA. The CPIA is satisfied in at least two respects. First, even assuming the government has established its *prima facie* case that the defendant Cypriot coins were "first discovered within" Cyprus, their export from the U.K. without an export license was legal under U.K. and E.U. law. That legal export from the E.U., binding on Cyprus, means that

these defendant Cypriot coins were not subject to "export control," and hence, must be admitted to the U.S. 19 U.S.C. § 2601 (2). Second, Germany's highest regulatory court has also ruled that E.U. law also binding on Cyprus does not consider ancient coins in trade to be "archaeological objects" subject to export control, thereby making any import of the defendant Cypriot coins into the U.S. after the date restrictions were imposed lawful as well.

The Guild retained Mr. McCullough as an expert in cultural property laws and the international exchange of cultural artifacts. Courts regularly allow such expert testimony that addresses the meaning and application of foreign law. *Groupa Protexa v. All Amer. Marine Slip,* 20 F.3d 1224, 1239 (3rd Cir. 1994); *United States v. Mitchell,* 985 F.2d 1275, 1279 (4th Cir. 1993). Specifically, such testimony has been allowed in several reported "cultural property" cases. *See United States v. McClain,* 593 F.2d 658, 667-669 (5th Cir. 1979) (expert testimony in Mexican law in criminal forfeiture case); *United States v. One Lucite Ball Containing Lunar Material,* 252 F. Supp. 2d 1367, 1372 (S.D. Fla. 2003) (court appoints expert on Honduran law in civil forfeiture action); *United States v. An Antique Platter of Gold,* 991 F. Supp. 222, 227 n. 25 (S.D.N.Y. 1997) (expert testimony on Italian law), *aff'd,* 184 F.3d 131 (2nd Cir. 1999); *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.,* 717 F. Supp. 1374, 1394 n. 15 (S.D. Ind. 1989) (expert testimony on Swiss law in replevin action related to a looted mosaic), *aff'd,* 917 F.2d 278 (7th Cir. 1990).

Mr. McCullough's CV indicates that he has extensive practical experience in art law, cultural property law and related import and export regulations. Before starting his own law firms, McCullough served as an associate counsel at Sotheby's Inc., a well-known international auction house. (McCullough Dec., CV.) He is a University lecturer in art law issues. (*Id.*) He currently serves as the Co-Chair of the ABA's Art and Cultural Heritage Law Committee. (*Id.*)

He is a past Chair of the International Trade Subcommittee of the Art Law Committee of the New York City Bar. (*Id.*) As such, McCullough appears to have qualifications at least comparable to those experts who were allowed to testify in the above cited "cultural property cases."

Based on his reading of the laws and regulations of the U.K., Cyprus, the E.U., the Court's June 3, 2014 Order and his considerable experience as a lawyer who advises clients about import and export controls on art, McCullough concludes, "[T]he groups of coins from Cyprus were lawfully exported from the state party while the CPIA restrictions were in effect. The European Union regulations, as applied in the United Kingdom, would allow for the export from the EU of certain coins from Cyprus. The export of these coins was a legal export from the European Union under the CPIA and the June 3rd Order." (McCullough Dec., Report at 2.)

McCullough details his analysis at pages 5-12 of his report. There, he explains that Cypriot law must be read in conjunction with E.U. law that authorizes sister E.U. countries to allow for the export of cultural goods of limited archaeological or scientific interest without a license. (*Id.* at 9.) In so doing, he also notes that an opinion of a German Court (The Bundesfinanzhof or Federal Fiscal Court) has concluded that ancient coins in trade may be exported without a license under European law because they are not considered "archaeological objects." (*Id. See also* German Court Opinion, Tompa Dec., Ex. W.)

McCullough then goes onto to discuss export laws in the U.K., another member of the E.U. (McCullough Dec., Report at 10-11.) After outlining the laws concerning the export of cultural objects, McCullough discusses an official government document that informs exporters that the U.K. has exercised its discretion under E.U. law to allow "numismatic items of standard type" to be exported without a license as cultural goods of limited archaeological or scientific

interest. (*Id.* 10-11.) He notes under that guidance, the exporter is responsible for determining an object's eligibility for an exemption. (*Id.* at 11.) McCullough then goes onto state that E.U. and U.K. laws on the subject are consistent with both the E.U. Treaty and Word Treaty Organization ("WTO") obligations that only allow for trade restrictions on "national treasures." (*Id.* at 11-12.) He states, "[T]he view that EU cultural property restrictions are subordinate to the trade-liberalization principles of the EU Treaty and the WTO is consistent with the way ancient coins are treated under the CGR and the MLA Guidance in the UK: only rare and important ancient coins require an export license, and common ancient coins that do not originate from illegal excavations may be exported without a permit." (*Id.* at 12.)

He then concludes, "[I]f the Cypriot Coins are of a standard type which are published in a reference work on numismatics and meet the requirements of the MLA Guidance, then they are of limited archaeological interest under UK law and could have been exported from the UK and the EU without an export license. The lawful export from the UK is a qualifying export from the respective state while the CPIA restrictions were in effect, and satisfies the requirement of the June 3rd Order." (*Id.*)

Subsequent deposition testimony only bolsters McCullough's analysis. Carlly Luckman testified as a government 30 (b) (6) witness that she had no reason to question an appraiser's conclusion that the defendant coins were "'bulk material' readily available in the marketplace and generally traded in larger quantities between dealers." (Luckman Dep. at 51:3 to 52:6 and Ex. 5 at USA-000175, Tompa Dec., Ex. K.) She also confirmed that the government does not contend that the defendant property was "looted." (*Id.* at 123:8-16.)

Spink's testimony also supports the conclusion that the coins are "numismatic items of standard type" that may be exported without a license under U.K. and E.U. law as cultural goods of limited archaeological or scientific interest:

Q. Mr. Pett, why don't you take a moment to look at that and tell me when you are finished. (Pause)

A. Okay, I have read that, having read it before but, okay, I am up to speed.

Q. Mr. Pett, have you seen this document before?

A. Yes.

Q. Can you tell me what it is?

A. It is the Guidance to Exporters of Antiquities, produced by the Museums and Libraries Archives.

Q. Can you tell me, generally, what the purpose of this document is?

A. It is a guidance to people, such as yourselves, in terms of what requires export licences and what does not.

Q. It is fair to say that you are familiar with this document as part of your position at Spink?

23 A. Absolutely.

24 Q. Looking at the invoice that we

25 looked at before and pictures of the coins that we

...

2 had before, is it fair to say that you believe

3 that the coins that were sent to the Ancient Coin

4 Collectors Guild in the United States did not

5 require an export permit, as far as the British

6 Government was concerned?

7 A. Absolutely.

(Pett Dep. at 92:3 to 93:7 and Ex. 9, *See also id.* at 85:24 to 87:13, Tompa Dec., Ex. M.) Given this testimony supporting McCullough's unrebutted expert opinion, the Court should conclude that the Guild has demonstrated that the Defendant Cypriot coins were lawfully exported from its respective state while CPIA restrictions were in effect.

3. Scholarly Evidence May be Used to Rebut the Government's *Prima Facie* Case.

The Guild anticipates that the government will attack the proposition that scholarly evidence may be used to rebut the government's case. However, any such claim (1) confuses documentation that an importer may present to CBP to avoid detention and seizure of his property with evidence a claimant may the present to a court to avoid forfeiture; and (2) contradicts the government's prior representations to this Court on how this forfeiture action would proceed.

a. The Pre-Seizure and Pre-Litigation Procedures of 19 U.S.C. Section 2606 Do Not Govern the Evidentiary Requirements for Forfeiture Proceedings Under 19 U.S.C. Sections 1615, 2609, and 2610.

The government's newly minted argument that the Guild cannot rebut the government's *prima facie* case with "scholarly evidence" rests on its reading of 19 U.S.C. § 2606, a provision that sets forth the "satisfactory evidence" CBP officers are directed to accept to allow entry of archaeological material found on restricted lists. Yet, despite the government's claims to the contrary, neither this Court nor the Fourth Circuit has ever said that the "satisfactory evidence" described in § 2606 that can be presented at the detention phase to avoid seizure represents the *exclusive* means to defend against a forfeiture proceeding in Court.

The Fourth Circuit has instead pointed to 19 U.S.C. § 1615, a provision referenced in the 19 U.S.C. § 2610's "evidentiary requirements," as the applicable provision. 698 F.3d at 185. Section 1615 in turn contemplates that a claimant in a court case will be able to use any admissible evidence or testimony to rebut any presumption that an article is subject to forfeiture. *See Peruvian Oil,* 597 F. Supp. 2d at 623. In contrast, § 2606's "satisfactory evidence" provision contemplates that an importer will provide either export documents or declarations based on personal knowledge *to avoid* seizure and a forfeiture proceeding.

The due process right afforded to claimants to utilize expert testimony to rebut the government's *prima faciae* case for forfeiture makes perfect sense when viewed in context. There are fundamental differences between and among a "detention," a "seizure," and a "forfeiture." (*See* Luckman Dep. at 22:18 to 27:3, Tompa Dec., Ex. K.) CBP has broad authority to "detain" merchandise. (*Id.*) The importer may avoid detention or seek the return of an artifact by producing "a certificate or other documentation which certifies that such exportation was not in violation of the laws of the State Party." 19 U.S.C. § 2606 (a).

Alternatively, if such documentation is not available, the importer may produce "satisfactory evidence" that establishes that the cultural good was exported from the State Party before the article was "designated" under 19 U.S.C. § 2604. 19 U.S.C. § 2606 (b), (c). If neither are produced, the article will be seized and any claimant will be afforded the opportunity to defend his or her rights to the property in Court. 19 U.S.C. § 2609. (*Accord* Luckman Dep. at 24:6 to 26:4, Tompa Dec., Ex. K.)

Once in litigation, § 2609 establishes that a claimant is entitled to the same due process rights afforded claimants in other forfeiture actions under Title 19 unless the CPIA modifies those rights in some fashion. The only relevant change in the CPIA relates to the "Evidentiary Requirements" set forth in 19 U.S.C. § 2610. That provision explicitly modifies the "burden of proof" placed on the government compared to other forfeiture actions under § 1615, but remains silent about the "burden of proof" placed on claimant. Accordingly, the "burden of proof" placed on the claimant to rebut the government's case is the preponderance of the evidence standard contemplated in § 1615, the same default standard found in all civil cases. *See United States v. 1 Parcel of Real Property,* 904 F.2d 487, 491 (9th Cir. 1990); *328 "Quintales" of Green Coffee Beans*, 21 F. Supp. 3d at 132; *United States v. Douglas AD-4N Skyraider Aircraft*, 839 F. Supp. 2d 1243, 2050 (N.D. Ala. 2011); *Peruvian Oil*, 597 F. Supp. 2d at 623 (CPIA forfeiture case); *United States v. An Original Manuscript Dated November 19, 1778 Bearing the Signature of Junipero Sera*, 1999 U.S. Dist. LEXIS 1859*15 (S.D.N.Y. February 22, 1999) (CPIA forfeiture case); *An Antique Platter of Gold,* 991 F. Supp. at 228. Any argument to the contrary that § 2606 trumps §§ 1615, 2609, and 2610 makes absolutely no sense given how the forfeiture process typically unfolds. Indeed, such a reading would render § 2610 and its "evidentiary requirements" that are meant to protect claimants' rights in CPIA forfeiture actions meaningless.

See Antonin Scalia and Bryan Garner, Reading Law: The Interpretation of Legal Texts 174-179 (Thomson/West 2012).

Moreover, even assuming some latent ambiguity exists, the "rule of lenity" requires a more "defendant friendly" definition be adopted for an ambiguous provision in the absence of contrary legislative history. *United States v 1,399,313.74 in United States Currency,* 591 F. Supp. 2d 365, 371 n. 36 (S.D.N.Y. 2008). *Accord United States v. Santos,* 553 U.S. 597, 515 (2007); *United States v. One 1973 Rolls Royce, V.I.N. SRH-16266,* 43 F.3d 794, 819 (3rd Cir. 1994) (civil forfeiture context); *United States v. One Big Six Wheel,* 987 F. Supp. 169, 179-183 (E.D.N.Y. 1997), *aff'd,* 166 F.3d 498 (2d Cir. 1999). *See also* Scalia and Garner, *supra.* at 296-362. Certainly, the government has not and cannot point to any legislative history supporting its anticipated contention that the default preponderance of the evidence standard found in civil litigation is to be replaced in a CPIA forfeiture action with stringent documentation requirements more representative of a "clear and convincing evidence" standard.

b. The Government Should be Bound by Its Prior Inconsistent Conduct and Judicial Admissions.

The government's claim that the Guild should be limited to the documentation set forth in 19 U.S.C § 2606 to defend its property against forfeiture is inconsistent with the government's previous agreement with the case management plan in this case that contemplated that both sides could name experts. (ECF No. 38.) As a result of this agreed discovery plan, the Guild expended considerable time, effort and money in naming two (2) such experts. More significantly, in the prior DJ Action, the government set forth its views on how the forfeiture process plays out under the CPIA in its "Supplemental Post-Hearing Clarifications" (*ACCG v. CBP*, ECF No. 36 (April 1, 2011), Tompa Dec., Ex. X.) Contrary to what the government states now, the government previously represented to this Court that it bore the initial burden to

establish that a designated artifact was "first discovered within" and "subject to the export control" of a relevant State Party, and that a claimant was entitled to rebut that *prima facie* case by a preponderance of the evidence standard. (*Id.*)

The government's prior acts and statements should be treated as judicial admissions that bind the government here. A "*judicial admission* is a representation that is 'conclusive in the case' unless the court allows it to be withdrawn." *Minter v. Wells Fargo Bank, NA,* 762 F.3d 339, 347 (4th Cir.2014); *Meyer v. Berkshire Life Ins. Co.,* 372 F.3d 261, 264-65 (4th Cir. 2004); *Keller v. United States,* 58 F.3d 1194, 1198 n.8 (7th Cir. 1995). Those representations to this Court undercut the government's novel claims about the effect of § 2606 on claimant's burden of proof. Such representations should estop the government from arguing that the Guild is precluded from recourse to expert testimony to defend its property from forfeiture.

4. The Government Has Not Even Tried to Meet Its Minimal Burden to Show that All the Defendant Chinese Coins Appeared on the Designated List.

The government has also failed to even meet the minimal burden imposed in the Court's June 3, 2014 Order to establish all the coins that were seized appear on the designated list. From the start, the government should have been on notice about this issue. The Spink invoice listed certain unidentified Chinese bronze cash coins.[10] (Tompa Dec., Ex. N.) The Guild's Second Amended Answer denied that all the seized Chinese coins appeared on the designated list. (ECF No. 36 ¶ 13.) Moreover, the Guild's pleading also apprised the government that its "claims are barred in whole or in part because the government has not verified through the use of expert

[10] There is a discrepancy in the total number of coins listed in the invoice and in CBP's possession. The invoice lists twenty-three (23) coins, but CBP is only holding twenty-two (22). This discrepancy appears related to one of the seven (7) unidentified coins. The Guild produced photographic evidence that suggests that the number of coins listed in the Spink invoice is correct (Tompa Dec., Exhibit Y.), but it remains unclear when one of the unidentified cash coins went missing. In any case, there is no evidence CBP ever asked the Guild's broker or Spink about the discrepancy and the matter remains a mystery.

opinion whether each Chinese coin seized is of a type that appears on the designated list for China." (*Id.* at Seventh Affirmative Defense.)

The Guild expressed further doubts about cash coins emblazoned with four (4) Chinese characters being restricted in its Response to Interrogatory No. 22. (Tompa Dec, Ex. G.) Finally, the Guild specifically identified these cash coins –which were assigned numbers 7-11 and 14-15 by the parties--as possibly falling outside of current restrictions in its answer to the government's Request for Admission No. 2. (Tompa Dec., Ex. H.) Yet, despite these forthright efforts to place the government on notice, the government did absolutely nothing to establish that these particular coins are in fact restricted, and hence, subject to possible forfeiture.

Based on his testimony, Stroter, CBP's import specialist, only determined that all the Chinese coins *might* be subject to restriction. (Stroter Dep. at 53:2 to 56:20, Tompa Dec., Ex. I.) Moreover, both Moore, Stroter's supervisor, and Luckman, the government 30 (b) (6) witness, appeared unacquainted with the issue. (Moore Dep. at 64:14 to 66:21, Tompa Dec., Ex. J; Luckman Dep. at 81:13 to 84:8, Tompa Dec., Ex. K.) Finally, the government never retained an expert or produced any information whatsoever to establish that these coins are in fact restricted. Accordingly, because the government has failed to meet even its minimal burden to show these coins appear on the designated list, summary judgment should be entered with regard to coin numbers 7-11, 14-15 and they should be returned to the Guild.

5. The Law, Prior Representations to this Court and Due Process All Require the Government Be Held to its Proofs.

The Guild also respectfully requests the Court to reconsider its prior rulings related to the burden of proof and fair notice. Preliminary rulings in this case suggest that the Fourth Circuit's opinion holds that the government can make out its *prima facie* case merely by demonstrating that the defendant coins appear on a designated list. However, the evidentiary burdens in a CPIA

forfeiture case were not properly before the Fourth Circuit. Moreover, any dicta on this issue – predicated on the Fourth Circuit's mistaken belief that CPAC approved of import restrictions on coins-- cannot possibly bind this Court. Accordingly, the Guild respectfully requests that the Court reconsider its prior ruling on burden of proof and fair notice and enter summary judgment on the Guild's behalf on these grounds. Indeed, all the Guild really asks is for the Court to hold the government to its prior representations about the burden of proof in a CPIA forfeiture action and to reaffirm its prior ruling that government regulations cannot change existing law.

a. The Fourth Circuit's Statements About this Forfeiture Action Cannot Be "Law of the Case," and in Any Event, the Interests of Justice Require the Court's Rulings on the Burden of Proof to be Reconsidered.

(i) The Fourth Circuit's Statements About This Forfeiture Action Cannot Be Law of the Case

The Fourth Circuit's musings about this forfeiture action cannot bind this Court. The Fourth Circuit was careful to "express no view how the forfeiture process will unfold." 698 F.3d at 185. 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. That provision-- dealing with evidentiary requirements in a forfeiture action-- was not before the Court because at the government's request any forfeiture action was put on hold.

(ii) The Interests of Justice Require the Court To Reconsider its Previous Rulings.

Even if somehow the Fourth Circuit's statements are "law of the case," they should be reevaluated. *American Canoe Ass'n v. Murphy Farms, Inc.,* 326 F.3d 505, 515 (4th Cir. 2003) ("The ultimate responsibility of the federal courts, at all levels, is to reach the correct judgment under law."). The Korver Declaration conclusively demonstrates that the Fourth Circuit made an erroneous assumption that CPAC approved of the Cypriot

and Chinese designated lists because CPAC concluded such coins were "first discovered there." 698 F.3d at 183. In fact, CPAC specifically disapproved of import restrictions on Cypriot coins, and was also precluded from making recommendations about coins when a MOU with China was being considered. (Korver Dec. ¶¶ 6-7.) Accordingly, CPAC's actual recommendations simply do not support the proposition that the designated lists should be considered sacrosanct. (*Id.* ¶ 9.)

b. The CPIA's Plain Meaning, Legislative History, the UNESCO Convention, the Laws of Cyprus and China as well as the Government's Prior Representations to this Court Require the Government to Establish "First Discovery" Before the Burden Shifts to the Guild on Rebuttal.

Once decision-making in this forfeiture case is freed from dicta from the DJ Action, it should become readily apparent that the CPIA requires the government to establish that the defendant coins were "first discovered within" and "subject to the export control" of either Cyprus or China for the government to make out a *prima facie* case regardless of whether the designated list is considered "valid." The government had the opportunity to make out such a *prima facie* case or otherwise contest the testimony of the Guild's experts, but failed to do so. Under the circumstances, the Court can and should also grant the Guild summary judgment on this issue as well.

(i) The CPIA's Plain Meaning Requires the Government to Establish "First Discovery" Before the Burden Shifts to the Guild on Rebuttal.

The CPIA's plain meaning requires the government to establish that the Guild's coins "were first discovered within" and "subject to the export control" of a State Party for which restrictions are granted *before any burden shifts to the claimant.* 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; 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"). *Accord* Scalia and Garner, *supra.* at 114 ([W]hen the word *shall* can be reasonably read as mandatory, it ought to be so read.").

Indeed, Congress thought these requirements 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. Stefan D. Cassella, Asset Forfeiture Law in the United States § 11-2 (iii) at 456 n. 16 (Juris 2013). In any such forfeiture action, 19 U.S.C. § 2610 places the burden squarely on the government 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). [11]

Accordingly, to make out a *prima facie* case for forfeiture under the CPIA, the government must establish that an object of archaeological interest: (1) is of a type that appears on the designated list; (2) was first discovered within and subject to the export control of the UNESCO State Party for which restrictions were granted; and (3) that it was illegally removed from the State Party after those restrictions were granted. Section 2610's wording "Notwithstanding the provisions of Section 1615 of this title" also suggests that the government must make out its case by a "preponderance of the evidence standard" rather than by the "probable cause standard" found in Section 1615. In any case, as set forth further below, because the government failed to submit *any* evidence on this point the Guild is entitled to judgment even if a "probable cause" standard were applied as to the government's *prima facie* case.

(ii) The CPIA's Legislative History Also Confirms that the Government Must Establish "First Discovery" Before the Burden Shifts to the Guild on Rebuttal.

The Guild's views are in accord not only with the plain meaning of the CPIA, 19 U.S.C §§ 2601, 2604 and 2610, but also the State Department's own understanding of the burden of proof at the time passage of the CPIA was being discussed:

> 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…. The Government must show both that it [the artifact] fits in the proscribed category and that it comes from the country making the agreement. So the burden

[11] It should also be noted that Fourth Circuit's recitation of the CPIA's burden of proof under 19 U.S.C. § 2610 omitted any reference to Section 2604's requirement that import restrictions may only be applied to archaeological material covered by an agreement, i.e., that the material was "first discovered within" and "subject to export control by" China or Cyprus. *ACCG v. CBP,* 698 F.3d at 185.

> of proof of provenance is on the Government…. This means in a significant number of cases it will not be possible to require an object's return.
>
> . . . .
>
> 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.

Statement of Deputy State Department Legal Adviser, Mark Feldman in *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 (Tompa Dec., Ex. D.).

(iii) Requiring that Objects of "Archaeological Interest" Be "First Discovered Within" and "Subject to the Export Control" of a Specific UNESCO State Party is Also Consistent with the UNESCO Convention and the National Laws of Cyprus and China.

The 1970 UNESCO Convention assumes that only artifacts first discovered within the territory of a member state and therefore subject to the member states' export control are subject to repatriation. *See* 1970 UNESCO Convention, 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 July 12, 2016). Moreover, the national laws of Cyprus and China also do not purport to lay claim to artifacts found outside their own territories. (*See* McCullough Dec., Report at 3-7.) And, indeed, Cyprus itself has only sought the return of ancient Cypriot coins from another UNESCO State Party, Italy, after some showing was made that the coins had been exported illegally from Cyprus. (*See* Tompa Dec., Ex. Z.) Thus, the Guild's view of how the burden proof

should operate here is consistent not only with the CPIA's plain meaning, but with basic international jurisdictional concepts upon which the CPIA is founded.

(iv) The Government Has Previously Acknowledged that in a CPIA Forfeiture Action the Government Must First Establish that Objects of "Archaeological Interest" Must Be "First Discovered Within" and "Subject to the Export Control" of a Specific UNESCO State Party Before the Claimant is Required to Rebut the Government's *Prima Facie* Case.

As set forth above, the government set forth its views on the "first discovered within" requirement, and how that provision applied in a forfeiture proceeding in its "Supplemental Post-Hearing Clarifications." (Tompa Dec., Ex. X.) The Court should hold the government to its prior representations on its own burden of proof in a CPIA forfeiture action.

c. Due Process Requires the Court to Reconsider its Ruling.

Finally, any effort to alter the burden of proof assigned by Congress raises serious Fifth Amendment Due Process concerns. Questions of burdens of proof in forfeiture actions are for Congress to establish and not for the Court. *See United States v. Santoro,* 866 F.2d 1538, 1544 (4th Cir. 1989). Here, Congress placed the burden of proving "first discovery" and "export control" in the first instance on the government and not the Guild, and any effort to shift that burden of proof against Congress' direction violates the Guild's due process rights. *See Warden v. Franklin*, 471 U.S. 307, 314 (1985); *Sandstrom v. Montana,* 442 U.S. 510, 523-24 (1979). *Accord Jenkins v. Smith,* 38 F. Supp. 2d 417, 422 (D. Md. 1999), *aff'd sub nom. Jenkins v. Hutchinson,* 221 F.3d 679 (4th Cir. 2000).

In the DJ Action, the government represented to the Court that it accepted this burden. In contrast, the Court's June 3, 2014 Order excusing the government from its burden was predicated on the Fourth Circuit's factually mistaken "hands-off" approach to the creation of

designated lists.. Here, however, the Court is obliged to rule on the Guild's constitutional due process claims set forth in the Second Amended Answer. *See ACCG v. CBP,* 801 F. Supp. 2d at 411. *Accord Bancoult v. McNamara,* 445 F.3d 427, 435 (D.C. Cir. 2006)) ("[C]laims based on the most fundamental liberty and property rights of this country's citizenry, such as the Takings and Due Process Clauses of the Fifth Amendment, are justiciable, even if they implicate foreign policy decisions. [A] challenge to the constitutionality of the manner in which an agency sought to implement an earlier policy pronouncement by the President could be justiciable, even if other challenges to the policy or its implementation might be barred.") (internal quotations and citations omitted.); *Comm. of U.S. Citizens Living in Nicaragua v. Reagan,* 859 F.2d 929, 934 (D.C. Cir. 1988) ("[T]he Supreme Court has repeatedly found that claims based on [due process] rights are justiciable, even if they implicate foreign policy decisions."); *Al-Aulaqi v. Panetta,* 35 F. Supp. 3d 56, 68-69 (D.D.C. 2014); *Aviation and General Ins. Co. v. United States,* 2015 U.S. Claims LEXIS 656,*24-27 (Fed. Cl. May 26, 2015). Thus, prior rulings cannot "foreclose" the Guild's Fifth Amendment Due Process claims based on the burden of proof set forth in the CPIA. (ECF No. 36, Second and Eighth Affirmative Defenses).

d. The CPIA's Plain Meaning Controls Over Contrary Regulations and Guidance and the Government Should Be Held to Its Prior Representations to the Court.

Assuming the Guild's Fifth Amendment Due Process claims are judiciable, all the Guild asks is for the Court to reiterate that the CPIA controls over contrary regulations and/or guidance and further hold the government to its prior representations on the burden of proof. If it does so, the Court should also enter judgment for the Guild because the government has produced absolutely no evidence to suggest that it even considered whether the defendant coins were "first

discovered within" and "subject to the export control" of Cyprus or China before the Guild's coins were seized.

The government's own Rule 30 (b) (6) witness acknowledged that the CPIA's words control over contrary regulations and guidance. (*See* Luckman Dep. at 111:12 to 114:10; 140:1 to 146:2, Tompa Dec., Ex. K.) Yet, 19 C.F.R. 12.104 (a), the CBP regulation the Court found contrary to the plain meaning of the CPIA back in 2011, has never been corrected and an equally false guidance to the trade and the public remains outstanding. *Compare ACCG v. CBP*, 801 F. Supp. 2d at 407 n. 25 with 19 C.F.R. 12.104 (a) and the CPB Guidance. (Tompa Dec., Ex. O.) Moreover, dicta in the Fourth Circuit's opinion based on the false assumption that CPAC supported import restrictions on Cypriot and Chinese coins should not be allowed to change the government's burden of proof established by Congress, particularly where, as here, the government itself previously represented to this Court that it bore an initial burden to demonstrate "first discovery."

If the Court holds the government to its proofs, it must also enter judgment on the Guild's behalf. Simply, the government has failed to provide any evidence whatsoever to contradict the testimony of the Guild's experts let alone to make out a proper *prima facie* case for forfeiture.

IV. CONCLUSION

The Guild has either rebutted the government's *prima facie* case and/or the government has failed to meet its own burden. Accordingly, the Court should grant the Guild Summary Judgment, order the return of the Guild's coins, and require the Government to pay the Guild's attorney's fees and costs.[12]

[12] *See* Cassella, *supra.* § 13-7 at 539 (Juris 2013) ([A]ttorney's fees are available in *any* civil forfeiture proceeding, regardless of the statute on which the forfeiture action is based).

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Respectfully submitted,

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