

UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND  
Northern Division

UNITED STATES OF AMERICA,

Plaintiff,

- against -

Civil No. 13-cv-01183-CCB

3 Knife-Shaped Coins, 12 Other Chinese Coins, and  
7 Cypriot Coins,

Defendants.

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MOTION TO STRIKE PORTIONS OF CLAIMANT'S ANSWER  
AND AFFIRMATIVE DEFENSES AND REQUEST FOR  
A MORE DEFINITE STATEMENT

The United States of America, by its counsel, moves pursuant to Rules 12(e) and (f) of the Federal Rules of Civil Procedure to strike certain portions of Claimant's response to the Verified Complaint, and most of Claimant's Affirmative Defenses, as barred by the Fourth Circuit's decision establishing the law of this case, or as precluded by established forfeiture law. The Government also moves for a more definite statement of those portions of Claimant's Answer that are so vague or ambiguous as to prevent the Government from preparing a response. In support of its motion, the Government says the following.

**Background**

The defendant property was seized by Customs and Border Protection in 2009. In 2010, Claimant filed a civil lawsuit challenging the enactment of the statutes and regulations underlying the Government's forfeiture action. This court rejected that challenge in 2011, the Fourth Circuit affirmed the district court in 2012, and the Supreme Court denied *cert.* in March, 2013. The Fourth Circuit's decision is reported at *Ancient Coin Collectors Guild v. U.S. Customs and Border*

*Protection*, 698 F.3d 171 (4<sup>th</sup> Cir. 2012).

On April 22, 2013, the Government filed this forfeiture action, seeking the forfeiture of the defendant property under 19 U.S.C. § 2609 and related statutes and regulations. Claimant answered the complaint on June 19, 2013. At the court's direction, the parties filed opposing suggestions for a scheduling order, and on July 26, 2013, the court conducted a conference call to resolve the differences. In the end, the court agreed with the Government's suggestion that discovery be suspended until the Government filed a motion to strike certain portions of Claimant's Answer to the Verified Complaint. Such a motion, the court said, would serve as a vehicle for determining whether the scope of the litigation, and hence the scope of discovery that the parties would be permitted to conduct, could be narrowed to those issues fairly before the court in this matter. The Government was given until September 27, 2013 to prepare its motion.

### **Summary of the Motion**

Most of Claimant's responses to the Verified Complaint raise issues that were resolved by the Fourth Circuit in its 2012 decision. In particular, in its responses to the allegations in the Complaint, and in most of its affirmative defenses, Claimant seeks to challenge the underlying basis for, and the procedures used to draft and promulgate, the regulations and procedures implementing the Convention on Cultural Property Implementation Act (CPIA). Those issues have been resolved, and the Fourth Circuit's decision now represents the law of this case. Accordingly, the court is no longer concerned with, and Claimants may not re-litigate, why or how the applicable statutes and regulations were enacted. Nor are the parties or the court concerned with whether the defendant property *should have been* designated as archaeological material covered by those statutes and regulations. The only issue is whether these particular coins *are* so

designated, such that they are subject to forfeiture in this proceeding.

Accordingly, the Government is moving to strike from the Answer any response or affirmative defense that challenges the forfeiture action on the ground that the statute and applicable regulations were not properly implemented. In addition, the Government moves to strike Claimant's attempt to re-litigate, by way of an affirmative defense, whether the Government is required to prove that the defendant property was first discovered in Cyprus and China, and to strike Claimant's attempt to assert an innocent owner defense on the ground that such a defense is not available in this case as a matter of forfeiture law.

Finally, the Government asks the court to direct Claimant to provide a more definite statement – or simply to withdraw – the responses to the Verified Complaint that are so vague and ambiguous that the Government and the court are left to guess at the basis for Claimant's position, or even what that position may be.

### **The Fourth Circuit's Decision**

In *Ancient Coin Collector's Guild* (hereafter "the Fourth Circuit decision"), Claimant raised a variety of challenges to the process by which Congress, the State Department, and the Customs Service implemented the CPIA through regulation and procedure. The Fourth Circuit, however, rejected all of those challenges either on the merits or on the ground that they raised issues regarding the conduct of relations with foreign countries that lay beyond the ken of the Judicial Branch. 698 F.3d at 175.

Claimants, the court said, were seeking "a searching review of the State Department's conclusions that 1) import restrictions on coins were requested by China and Cyprus, 2) the restricted articles were part of each state's cultural patrimony, and 3) the restrictions were

necessary to protect each state's respective cultural patrimony." 698 F.3d at 179. But the panel declined to be drawn into the debate over those issues. "The federal judiciary has not been generally empowered to second-guess the executive Branch in its negotiations with other nations over matters of great importance to their cultural heritage," the court said, nor does it have the authority to overrule the conclusion that import restrictions on coins were necessary to protect the cultural patrimonies of Cyprus and China, or to challenge Congress's decision to channel CPIA disputes through forfeiture proceedings. *Id.* Accordingly, among other things, the panel rejected Claimant's assertion that the State Department acted *ultra vires* when they imposed import restrictions on Chinese and Cypriot coins, that China never actually requested that coins be included within the scope of the cultural property import restrictions, and that the State Department and the Customs Service violated the Administrative Procedures Act when it promulgated the applicable regulations. 698 F.3d at 179-84. "Even were we to assume that State was fully subject to the APA," the court said, "none of its actions were remotely arbitrary or capricious." 698 F.3d at 184.

The panel also expressly rejected Claimant's assertion that the regulations improperly place the burden on the importer to show that the imported coins were not first discovered in their country of origin. To the contrary, the court concluded that it was "hardly illogical" to conclude that, absent evidence suggesting otherwise, Chinese and Cypriot coins were first discovered in those two countries and form part of their respective cultural heritage. 698 F.3d at 182.

Thus, the panel agreed with this court that the burden is not on the Government to show that the articles are restricted by showing that they were each discovered in China and Cyprus. Rather, "the statute expressly places the burden on importers to prove that they are importable" by

showing that the coins “left the country that has requested import restrictions before those restrictions went into effect or more than 10 years before the date of import.” 698 F.3d at 182-83, quoting *Ancient Coin Collectors Guild*, 801 F. Supp. 2d 383, 408 (D. Md. 2011).

In the end, the Fourth Circuit concluded that instead of attacking the statutes, regulations and procedures themselves or the process by which they were enacted, including the decision to designate ancient coins as archaeological material covered by their provisions, Claimant was limited to raising the defenses available to it under the forfeiture laws. That is, in the forfeiture proceeding, the Claimant remains free “to press a particularized challenge to the Government’s assertion that the twenty-three coins are covered by the import restrictions,” 698 F.3d at 185, but it is not free to use the forfeiture proceeding to re-litigate the challenges that the Fourth Circuit has already rejected.

In the forfeiture proceeding, the Government bears the initial burden of showing that these particular coins are covered by the regulations, “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.* (internal quotations and ellipses omitted). If the Government succeeds in doing so, Claimant will have the burden of showing “that its coins are not subject to the forfeiture in order to prevail.” *Id.* But the sole issue in the forfeiture proceeding will be whether these particular coins *are covered* by the import restrictions, not whether they should have been.

With that understanding of the Fourth Circuit’s decision, we turn to the defenses raised by Claimant in its Answer to the Verified Complaint.

#### **Claimant's Answer and Affirmative Defenses**

Paragraphs 7 through 17 of the Verified Complaint set forth the legal basis for the

Government's forfeiture action. In its responses, Claimant repeatedly objects to the complaint on the ground that the underlying statute and regulations were not properly implemented.

For example, in paragraph 8 of its Answer, Claimant "denies the Government complied with significant procedural and substantive constraints found in the CPIA before entering into such agreements [with China and Cyprus] or in promulgating the cited regulations . . . ." And in paragraphs 10, 11, 14, 15, and 17, Claimant denies "that the defendant property is properly designated archaeological or ethnological material." Because Claimant's defenses to the forfeiture on those grounds are barred by the Fourth Circuit's decision, the defenses should be stricken from the Answer so that it is clear that the parties are not required to conduct discovery on those issues.

Claimant's affirmative defenses likewise seek to re-litigate the challenges that were rejected by the Fourth Circuit. For example, Defenses 3, 4, 7, 8 and 11 all contest the propriety of the process by which the applicable import restrictions were enacted.

Defense 3 asserts that the import restrictions are improper because "European Union law does not consider ancient coins in trade to be 'archaeological objects' subject to export controls."

Defense 4 asserts that the restrictions are improper because Hong Kong and Macao allow for export of ancient coins that are not subject to export controls.

Defense 7 asserts that the import restrictions were "imposed without regard for the significant procedural and substantive constraints found in the CPIA."

Defense 8 asserts that the import restrictions are improper because they were "the products of bureaucratic bias and/or prejudgment and/or ex parte contact."

And Defense 11 asserts that the import restrictions were imposed against the

recommendations of CPAC and are the result of “fraud and illegality.”

Moreover, Defense 5 challenges the forfeiture on the ground that the Government is unable to prove that the defendant property was “first discovered within” and is “subject to the export control” of either China or Cyprus.

All of these defenses are based on arguments that the Fourth Circuit expressly or implicitly rejected. Accordingly, they should be stricken so that it is clear that the parties need not devote any resources to conducting discovery on these issues.

Finally, Defense 2 asserts an innocent owner defense. There is no innocent owner defense to forfeiture actions brought under the provisions of title 19 of the U.S. Code. The innocent owner defense that was enacted by Congress as part of the Civil Forfeiture Reform Act (CAFRA) is codified at 18 U.S.C. § 983(d). But Section 983(i) expressly exempts title 19 forfeitures from its provisions. *See Bennis v. Michigan*, 516 U.S. 442, 446 (1996) (innocent property owners have no protection from civil forfeiture under the Due Process Clause; unless the legislature enacts an innocent owner defense by statute, property may be forfeited based solely on its use in the commission of an offense); *United States v. Davis*, 648 F.3d 84 (2d Cir. 2011) (there is no innocent owner defense to a forfeiture brought under 19 U.S.C. § 1595a and section 983(d) does not apply because of the Customs carve-out in § 983(i)); *United States v. Broadening-Info Enterprises*, 462 Fed. Appx.93, 95 (2d Cir. 2012) (following *Davis*; because the forfeiture action was brought pursuant to 19 U.S.C. § 1595a(c), owner of merchandise had no innocent owner defense when importer misstated the value of the merchandise on the Customs documents); *United States v. Aircraft (One (1) Douglas AD-4N Skyraider Aircraft)*, 839 F. Supp. 2d 1243, 1250 n.10 (N.D. Ala. 2011) (same; following *Davis* and collecting cases); *United States v. One*

*Lucite Ball*, 252 F. Supp. 2d 1367, 1378 (S.D. Fla. 2003) (innocent owner defense in section 983(d) does not apply to forfeiture under 19 U.S.C. § 1595a); *United States v. One Tyrannosaurus Bataar Skeleton*, 2012 WL 5834899, \*7 (S.D.N.Y. Nov. 14, 2012) (there is no innocent owner defense to a forfeiture under § 1595a(c) because of the Customs carve-out).

The instant forfeiture action is brought under 19 U.S.C. § 2601. Accordingly, because there is no statutory basis for Claimant's innocent owner defense, Defense 2 should be stricken as a matter of law.

### **Request for a More Definite Statement**

Finally, several of Claimant's affirmative defenses and objections to the complaint are so vague and ambiguous that it is impossible to know what discovery would be appropriate or whether the particular matter asserted in the Verified Complaint is even in dispute.

Defense 9, for example, asserts that the complaint is barred by "the doctrines of waiver and estoppel," and Defense 10 asserts that it is barred "by the Due Process Clause of the Fifth Amendment." Claimant must either explain the factual basis for these defenses or withdraw them from its Answer.

Moreover, in its response to the allegations in paragraphs 4, 5 and 6 of the Verified Complaint, Claimant denies that the court has subject matter jurisdiction over this federal forfeiture action, denies that the court has *in rem* jurisdiction over the defendant property, and denies that venue is proper in this district. These assertions are patently frivolous and are designed solely to increase the burden on the Government and the court to establish threshold matters that are not in dispute. To avoid the waste of judicial resources, Claimant should be required to assert its factual basis for disputing these matters or acknowledge that they are not in

dispute.

**Conclusion**

For all of these reasons, the court should strike from Claimant's Answer all objections and defenses to the Verified Complaint that are foreclosed by the Fourth Circuit's decision or by forfeiture law, and should otherwise direct Claimant to provide a more definite statement of the grounds for its defenses.

Respectfully submitted,

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