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African Lion (*Panthera leo*) Trophy

**UNITED STATES DISTRICT COURT**
**FOR THE CENTRAL DISTRICT OF CALIFORNIA**
**WESTERN DIVISION**

| | |
|---|---|
| UNITED STATES OF AMERICA<br><br>Plaintiff,<br><br>vs.<br><br>ONE (1) SPORT-HUNTED AFRICAN LION (*Panthera leo*) TROPHY,<br><br>Defendant. | Case Number 2:09-cv-5030-JFW-CWx<br><br>**POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**<br>Date of Hearing: March 15, 2010<br>Time: 1:30 p.m.<br>Pre-Trial Conference Date: March 26, 2010<br>Trial Date: April 6, 2010<br>Before the Honorable John F. Walter, UnitedStates District Judge |

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## I. Introduction

On June 12, 2008, the U.S. Fish and Wildlife Service ("FWS") seized the defendant lion CITES Appendix II hunting trophy. Plaintiffs allege that Claimant, the trophy's owner, imported the trophy improperly under the CITES, which is implemented by the ESA("ESA"). Claimant personally did nothing to violate the ESA. He obtained the proper CITES export permits from the proper authority in Zambia, and imported his trophies legally. The Zambian Wildlife Authority's CITES office committed a clerical error when preparing the CITES export permit that was not repeated in the contemporaneous Zambian export permit or sanitation certificate. When the Zambian Wildlife Authority's CITES office tried to remedy its error by issuing a new permit for Claimant, the FWS refused to accept it. The FWS also refused to acknowledge the Zambian Wildlife Authority's three attempts to take full responsibility for the mistake. In fact, it has not responded to the exporting government at all. From the inception, the FWS should have initiated contact with Zambia authorities, but did not. The FWS asserts that Claimant must forfeit his lawfully acquired hunting trophy because it was allegedly "imported" in violation of the" ESA and that the trophy is illegal to possess because it was "traded contrary to CITES." Claimant's lawfully acquired trophy is not illegal to possess, because the error is curable, he was unaware of the clerical error that caused his trophy

to be seized, and he did everything within his control to rectify the situation. Claimant is an innocent owner within the meaning of the Civil Asset Forfeiture Reform Act, which entitles him to the return of his property, and forfeiture of his property would be a penalty so grossly disproportionate to the violation as to be unconstitutional under the 8th amendment. There exist substantial contested issues of both fact and law, and summary judgment in favor of Plaintiff is therefore not appropriate.

## II. Statutory Framework

### a. The Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") Resolution Conf. 12.3 (Rev. CoP14)

XIII. Regarding **Retrospective** Issue of Permits and Certificates

**RECOMMENDS** that:

a) ***Exceptions*** *from the recommendations under a) and b) above not be made with regard to Appendix-1 specimens, and be made* ***with regard to Appendix-II*** *and –III specimens only where the Management Authorities of both the exporting (or re-exporting) and the importing countries are, after a prompt and thorough investigation in both countries and in close consultation with each other, satisfied:*

1. *That the irregularities that have occurred are not attributable to the . . . importer or, . . . the relevant enforcement authority is satisfied that there is evidence that a genuine error has been made, and that there was no attempt to deceive;*

***b.*** **The implementing regulation in the United States is 50 C.F.R. 23.53 *"What are the requirements for obtaining a retrospective CITES document?***

*a) Purpose. Retrospective CITES documents may be issued and accepted in certain limited situations. . . .*

*b) The following provisions apply to . . . acceptance of a retrospective CITES document:*

1. *The exporter . . . must notify the Management Authority in the exporting or re-exporting country of the irregularities that have occurred.*

2. ***A retrospective document** may be one of the following:*

***i.*** *An amended CITES document* ***where it can be shown that the issuing Management***

***Authority made a technical error that was not prompted by the applicant.***

*Retrospective documents can only be issued after consultation between the Management Authorities in both the exporting and re-exporting country and the importing country including a thorough investigation of circumstances and agreement between them that criteria in paragraph (d) of this section have been met.*

*d) Criteria . . . When applying for a U.S. document you must provide sufficient information for us to find that your activity meets all of the following criteria:*

*1. The specimens were exported or re-exported without a CITES document or with a CITES document that contained technical errors as provided in paragraph (d)(6)(ii) of this section.*

*2. The specimens were presented to the appropriate official for inspection at the time of import and a request for a retrospective CITES document was made at that time.*

*3. The export or re-export and import of the specimens was otherwise in compliance with CITES and the relevant national legislation of the countries involved.*

> *4. the importing management authority has agreed to accept the retrospectively issued CITES document.*
>
> *5. The specimens must be Appendix II or –III wildlife or plants except as provided in paragraph (d)(7) of this section.*
>
> *6. Except as provided in paragraph (d)(7) of this section, the exporter . . . and importer were not responsible for the irregularities that occurred and have demonstrated one of the following:*
>
> *ii.* ***The Management Authority unintentionally made a technical error that was not prompted by information*** *provided by the applicant when issuing the CITES document.*
>
> **[Emphasis added.]**

## III. Facts

Claimant went on a licensed, regulated hunting safari in Zambia. *See* Statement of Uncontroverted Facts ("SOF") at pg. 75. On that Safari, he took 13 hunting trophies, including an African lion. SOF at pg. 76. On May 16, 2008, Claimant received a shipment of 13 trophies through Hunter International. SOF at pg. 96. That shipment contained 4 documents issued by the Zambian government: a Zambian Health and Sanitation Export Permit, an

International Sanitary Certificate, and a Certificate of Export Tax Valuation of trophies and CITES export permit 6768. SOF at pg. 87. All but the CITES export permit included the lion. *Id.*

When the trophies entered the U.S., Hunter International realized that the lion had been omitted from the CITES export permit. SOF at pg. 98. Instead, a tseebe had been mistakenly carried over by the government from its other export documents. SOF at pg. 99. Claimant's agent immediately contacted the Zambian shipper. SOF at pg. 101. Zambian authorities ("ZAWA") acknowledged that Inatius Mulembe, a licensing officer, had omitted the lion from the CITES permit. SOF at pg. 85. ZAWA immediately issued a new CITES permit on May 22 with the expectation it would prevent a seizure. SOF at pg. 86. The FWS inspector at the port of entry had not yet seized the trophy but she refused to accept the permit because it was issued "after the fact of import into the United States." SOF at pg. 5. On June 4, the Head of the Zambian CITES authority sent a letter to the FWS explaining that it "wish[ed] to sincerely apologize for the omission of the issuance of the lion CITES permit", and that Zambia was happy to accept shipment back to Zambia. SOF at pg. at 89 and attached Declaration, and Exhibit . The FWS did not respond. On June 18 the Head of CITES for Zambia followed up with an e-mail and on August 18 sent yet another that said "I wish to restate that the omission that

occurred was purely due to human error and that we have since put mechanisms in place to ensure that it does not happen again." SOF at pg.103, attached declaration and Exhibit 3 thereto. Since that time the Zambia CITES Authority has sent an e-mail on August 18, 2008 and a letter from the Director General of ZAWA on August 12, 2009. SOF pg. 90-92. FWS has not responded to or acknowledged any of Zambia's efforts to confer about the retrospective permit. SOF pg. 105.

The FWS continues to refuse to respond to Zambian officials regarding this matter, and has ignored Claimant's request that they simply refuse to accept shipment and send the trophy back to Zambia or impose a civil fine up to $500.00, the maximum for that level violation, 16 U.S.C. 1540 (e)(4)(A). SOF pg. 105.

## IV. Argument

### a. Claimant's trophy was not traded contrary to CITES and is therefore not Illegal to Possess

In their Motion for Summary Judgment, Plaintiffs have alleged that Claimant cannot be an innocent owner because his trophy is "illegal to possess". They have decided to argue that the trophy is "illegal to possess" because if it were, Claimant would be deprived of the Innocent Owner Defense. The Innocent Owner Defense is part of the Civil Asset Forfeiture Reform Act,

which mandates that "an innocent owner's interest in property shall not be forfeited under **any** civil forfeiture statute." 18 U.S.C. 983(d)(1). It also creates the exception that "no person may assert an ownership interest under this subsection in contraband or other property that it is illegal to possess." 18 U.S.C. 983(d)(4). Claimant's trophy is neither contraband nor property that is illegal to possess because it was traded in a way that is permitted by CITES and it does not fit the traditional criteria used to define contraband.

Although the term "illegal to possess" is not explicitly defined within 18 U.S.C. 983(d), the surrounding language makes the meaning quite clear. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs.*, 129 S. Ct. 2343, 2347 (2009). The authors of the Civil Asset Forfeiture Reform Act ("CAFRA") chose to prevent individuals from asserting an ownership interest in contraband, per se, but this is just the kind of circumstance in which it intended to relieve innocent owners from "any" forfeiture statute. CAFRA is aimed at returning derivative contraband to innocent owners.

There is very little case law discussing the issue of what "illegal to possess" means under CAFRA. However, in the cases which exist, those items which were deemed "contraband" or "illegal to possess" were taken illegally in

the country of origin. In this case, the property was taken legally, imported legally, and seized because of a misunderstanding or miscommunication between CITES management authorities that is correctable. *See*, *United States v. 144,774 of Blue King Crab*, 410 F.3d 1131 (9th Cir. 2005). This distinction is consistent with traditional definitions of contraband. *See*, e.g. *Bennis v. Michigan*, 516 U.S. 442 (1996); *U.S. v. Kaczynski*, 551 F.3d 1120 (9th Cir. 2009). It is unreasonable to extend the definition of "contraband" and things "illegal to possess" to items about which there is a correctable clerical import dispute purely to prevent the property owner from proving that he is innocent of wrongdoing. Claimant is therefore entitled to raise the Innocent Owner Defense.

**b. Claimant is entitled to the return of his property because he is an innocent owner**

Plaintiff has declared Claimant's lion trophy forfeit both because it was not included on the CITES export permit issued by the Zambia CITES Authorities and because the Zambian CITES authority allegedly failed to follow every detail of the recommended procedure in issuing a retrospective permit. Neither of these grounds for forfeiture can be used to justify the Government's seizure because any errors were committed by a government authority without Claimant's knowledge or participation, and CAFRA's Innocent Owner Defense

provides that an innocent owner's "interest in property shall not be forfeited under **any** civil forfeiture statute." 18 U.S.C. 983(d)(1).[1] Plaintiff's first ground for forfeiture, that Claimant's lion trophy was not included on the CITES original permit that accompanied the shipment, was not a violation of CITES and cannot be a justification for forfeiture because the relevant CITES management authority "unintentionally made a technical error that was not prompted by information provided by the applicant when issuing the CITES document." 50 C.F.R. 23.53(d)(6)(ii), *What are the requirements for obtaining a retrospective CITES document?*. Claimant is therefore entitled to a retrospective permit. The government's second ground for forfeiture, that its procedure was not followed when Claimant's retrospective permit was issued, is also not a proper justification for forfeiture of the lion trophy, because Claimant fulfilled his procedural obligations to obtain his permit, and he cannot be held responsible for disagreements about procedure between Zambia's CITES management authority and the United States' CITES management authority. Claimant is an innocent owner and has not violated CITES because he acquired his disputed property legally, he complied with local and international rules by obtaining permits from Zambia, he used an expert international hunting broker to import his trophies into the United States, and

[1] CAFRA was passed in 2000, after the ESA forfeiture provision.

when the broker discovered that the Zambian CITES authority had made one typographical omission on the CITES permit, Claimant initiated all possible steps within his control.

**i. Claimant did not know that his lion trophy was typographically omitted from his shipment's CITES permit, and is therefore an innocent owner as defined by CAFRA**

In order to demonstrate that Claimant is an innocent owner under CAFRA, he must prove that either "he did not know of the conduct giving rise to forfeiture; or upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property." *Von Hofe v. United States*, 492 F.3d 175, 180 (2nd Cir. 2007). Claimant meets both tests. The FWS's first justification for seizing Claimant's hunting trophy is that the trophy arrived with CITES permit on which it was not listed. Claimant's innocence in this omission, and therefore his entitlement to the return of his property pursuant to the Innocent Owner Defense, has been unquestionably established. There were two export permits. Claimant's lion trophy was shipped from Zambia with one correctly completed Zambian national Export Permit and one incomplete CITES export permit. The lion trophy was listed on the Zambian export permit but did not appear on the CITES permit. The head of the Zambian CITES authority acknowledged in her

letters of June 4 and June 18 that the Zambian authority was responsible for this error. SOF at pg. 103, 89. The shipment arrived on May 16, and Claimant's agent became aware of the clerical error in the CITES export permit . . . on May 20, 2008." SOF at pg. 98. She called Michael Borman, the shipper, who immediately notified the CITES authority in Zambia. These communications resulted in the issuance of the retrospective CITES permit on May 22.It is unquestionable that Claimant did not know of the error when it was made, and that he "did all that reasonably could be expected under the circumstances to" remedy the error and bring the shipment into compliance with CITES procedures upon learning of it.

**ii. Claimant took all proper possible steps to ensure that his trophy received a retrospective CITES permit**

The Government's second justification for seizing Claimant's trophy is that the retrospective permit was issued by the Zambian authorities without strict procedural compliance. A retrospective CITES permit may be issued where, as here, "it can be shown that the issuing Management Authority made a technical error that was not prompted by the applicant." 50 C.F.R. 23.53(b)(3)(i); *see* CITES Conf. 12.3 (Rev. CoP14)(c)(1). In the instant action, the Zambian Wildlife authority has fully acknowledged its self-evident culpability for omitting the lion on the original CITES export permit.

Claimant's import agent notified the exporter and Zambian authorities as soon as she became aware of the typographical error. SOF at pg. 101, 83. CITES recommends that "retrospective documents can only be issued after consultation between the Management Authorities in both the exporting or re-exporting country and the importing country." 50 C.F.R. 23.53(b)(2). Claimant is not a CITES Management Authority and cannot therefore fulfill this requirement himself. However, the Zambian Authority responsible for the clerical error on Claimant's CITES permit has attempted to initiate a consultation, and Plaintiff has failed to respond. Moreover, FWS was supposed to contact Zambia immediately and failed to initiate that contact. Res. Conf. 12.3 XIV (9).

**iii. The Purpose of the "Recommended" Consultation**

The specified purpose of the recommended investigation in CITES Resolution Conf. 12.3 (Rev. CoP14), the resolution on which FWS regulation 50 C.F.R. 23.53 is based, is to ensure that any errors "are not attributable to the (re-)exporter or the importer" and that "the export (or re-export) and import of the specimens concerned are otherwise in compliance with the Convention." In this instance the clerical error for which the trophy was seized was clearly exclusively the fault of the Zambian CITES authority. Because the government-issued documents speak for themselves, so no further inquiry was necessary.

**iv. The FWS has Refused required communication with Zambia, and even if it had consulted, there was no need for consultation**

Plaintiff has failed to follow CITES regulations in two ways during the course of this seizure process. First, according to CITES Resolution Conf. 12.3 (Rev. CoP14) §XIV(g) "when a Party refuses to accept a permit or certificate issued for export or re-export, it [should] immediately inform the exporting or re-exporting country." Plaintiff failed utterly to carry out this duty under the CITES convention. Secondly, under CITES Resolution Conf. 12.3 (Rev. CoP 14) §XIII(c), "Management Authorities of both the exporting (or re-exporting) and the importing countries" must ascertain whether there was any wrongdoing "in close consultation" with each other. Plaintiff has failed to notify Zambia that their CITES permit would not be accepted, and Plaintiff has refused to consult with the Zambian Authorities. Plaintiff has therefore obstructed any attempt by Claimant or Zambia to ensure that proper procedures were followed.

On June 4, 2008, 8 days before the lion was seized and 2 days before Inspector Merida obtained Claimant's declaration packet, Ms. Francesca Chisangano, head of the Zambian Wildlife Authority, wrote a letter to the FWS taking responsibility for omitting Claimant's lion from the original CITES permit. SOF at pg. 103. Then she sent correspondence to Ms. Sheila Einsweiler of the FWS. The existence of this documented attempt at

consultation calls into question the Government's assertion that proper procedure was not followed in the issuance of Claimant's retrospective permit. Any defect in the retrospective permit issued to Claimant derived from a disagreement between CITES authorities, not misconduct by Claimant or the Zambian Authority. But for FWS noncompliance, Zambia could still issue yet another retrospective export permit after consulting about the self-evident cause of the clerical error – a government mistake.

Moreover, the Zambian authority's immediate willingness to accept responsibility for omitting the lion from the original CITES permit clearly obviated the need for a consultation in the first place. To qualify for a retrospective permit, an individual must prove "it can be shown that the issuing Management Authority made a technical error that was not prompted by the applicant." 50 C.F.R. 23.53. Although ordinarily a retrospective permit will only be issued "after consultation between the Management Authorities" to determine who was responsible for the relevant technical error, in this case fault was self-evident. No such consultation was necessary because Zambia sought from the outset to prove that it was responsible for omitting Claimant's lion from the CITES permit. Even if the United States had been responsible enough to engage in consultation, there would have been no reasonable basis for them to withhold their consent to the issuance of this permit. Had the consultation

been consented to by the FWS the retrospective permit would have been issued. All relevant parties *except the United States* adhered to the recommendation under CITES resolution Conf. 12.3(Rev. 14).

To be deemed an innocent owner, Claimant is required to prove that he "did all that reasonably could be expected under the circumstances" to remedy the defect in paperwork for which Plaintiffs have seized his property. Claimant followed his regulatory obligations in obtaining a retrospective CITES permit and the Zambian authority did its best to remedy its error, despite the United States's refusal to communicate. Claimant is therefore both an owner who "did not know of the conduct giving rise to forfeiture" because he was not aware of the clerical error committed by the Zambian wildlife authority and an owner who "upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property," because when he discovered that his lion trophy had been omitted from the CITES permit,his agents immediately notified the Zambian authorities to initiate proceedings to obtain a retrospective permit. 18 U.S.C. 983(d)(1). Congress has definitively stated that "interest in property shall not be forfeited under **any** civil forfeiture statute." 18 U.S.C. 983(d)(1). Plaintiff's seizure of the defendant hunting trophy and this forfeiture proceeding are therefore

contrary to Congressional mandate, and there remain material issues of fact and law rendering Summary Judgment inappropriate in this case.

**c. Plaintiff's seizure of Claimant's trophy is an Excessive Fine under the 8th Amendment**

If this court grants Plaintiff's request for forfeiture, it will be an excessive fine within the meaning of the 8th amendment of the United States Constitution. The Civil Asset Forfeiture Reform Act provides that a Claimant may petition a proportionality review from the court. When conducting such a review, a court "shall compare the forfeiture to the gravity of the offense giving rise to the forfeiture". 18 U.S.C. 983(g). The statute further provides that "if the court finds that the forfeiture is grossly disproportional to the offense it shall reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause of the Eighth Amendment of the Constitution." 18 U.S.C. 983(g). Under 8th Amendment jurisprudence it would be excessive to force Claimant to forfeit his trophy because he has engaged in no personal wrongdoing, the error that gave rise to the forfeiture was clerical, harmless and relatively minor ($500.00 maximum penalty), and his trophy has a hugely disproportionate acquisitional and replacement value.

**i. Forfeiture of Claimant's Trophy is Punitive**

By including the proportionality test in CAFRA at 18 U.S.C. 983(f), Congress guaranteed 8th Amendment proportionality review in forfeiture actions regardless of whether the forfeiture is punitive. However, even if Congress had not done so, Claimant's forfeiture would still qualify as punitive and be entitled to 8th Amendment excessive fines review. The Supreme Court first applied the Excessive Fines Clause to civil forfeitures in *Austin v. United States*. In that case, they clarified that "the purpose of the Eighth Amendment . . . was to limit the government's power to punish." 509 U.S. 602, 609 (1993). They further explained that "it is commonly understood that civil proceedings may advance punitive as well as remedial goals." *Id.* The question of whether a forfeiture is punitive can therefore be informed by whether or not it is remedial. In *Bennis v. Michigan*, the Court looked at the degree to which the property was involved in the crime in order to decide whether its forfeiture was punitive or remedial. 516 U.S. 442. The court found that removing "pure contraband", such as sawed off shotguns, adulterated food and narcotics was remedial, because it removed dangerous substances from society. *Id*. at 459. However, the court concluded that subjecting other items related to an alleged offense to forfeiture is punitive, "both because of its potentially far broader sweep, and because the government's remedial interest in confiscation is less apparent." *Bennis*, 516 U.S. at 460. Furthermore, the originators of the ESA

stated that they had provided for automatic forfeiture of animal specimens imported illegally because "simple forfeiture should prove to be an ample deterrent" for ordinary tourists. *Carpenter v. Andrus*, 485 F. Supp. 320, 323 (D.De. 1980). Given that "punishment serves the twin aims of retribution and deterrence", and "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives" it is clear that this forfeiture action is a punitive action subject to 8th Amendment excessive fines analysis. *United States v. Halper*, 490 U.S. 435, 448 (1989).

**ii. Forfeiture of Claimant's Trophy is Unconstitutionally Excessive**

The Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *United States v. Bajakajian*, 524 U.S. 321, 325 (1998). When, as here, a civil forfeiture is punitive, and therefore subject to the restrictions of the Excessive fines clause of the 8th Amendment, it must "bear some relationship to the gravity of the offense that it is designed to punish." *Bajakajian*, 524 U.S. at 334. This principle was also codified in CAFRA's guarantee of proportionality review, which states that a "court shall compare the forfeiture to the gravity of the offense giving rise to the forfeiture." 18 U.S.C. 983(g). This standard requires a valuation of the forfeiture, in this case Claimant's lion trophy, and an

evaluation of the justice of that forfeiture in light of the typographical error at issue.

**1. Claimant's trophy should be valued according to the cost of acquisition or cost of replacement, not the cost of export fees or its value at resale**

In Plaintiff's complaint the value of Claimant's lion trophy was assessed as $130, which represents the total cost of its export fees carried forward from document to document. SOF at pg. 107. This was an inappropriate method of valuation because, "there is no fair market value for endangered species in the United States", and fair market value is the relevant value for customs purposes. *United States v. Asper*, 753 F. Supp. 1260, 1269 (M.D.Pa. 1990). The cost of acquisition for these trophies is, however, enormous, and Ward's lion trophy would cost approximately $70,500 if he were to replace the trophy. SOF at pg. 111. Trophies have been valued at the cost of acquisition or cost of replacement for tax purposes. In *Estate of Darwin v. Commissioner of Internal Revenue* the United States Tax Court determined that the estate of the deceased individual was permitted to use the cost of replacement to evaluatea collection of hunting trophies for a charitable giving deduction from the estate's tax burden. Docket No. 5875-88 (U. S. Tax Court LA 1991); *see also, Asper*, 753 F. Supp. at 1270. The court found that the estate "has demonstrated a probative

correlation between replacement costs and fair market value" of hunting trophies. *Darwin*, at 8.

In the criminal context of seizure of endangered species illegally taken, courts have concluded that "any reasonable method may be employed to ascribe an equivalent monetary value to the items". *Asper*, 753 F. Supp. At1282. In *Asper*, the court chose to "consider the appraisal of taxidermists based on the cost of replacement and acquisition of the wildlife." *Id.* Using the valuation method of a criminal court reviewing improperly taken hunting trophies is by far the most appropriate method of measuring the trophy's value in this case. Plaintiff's contention that this trophy should be valued according to taxes charged in Zambia is irrational and remains an issue for the trier of fact to decide.

**2. Forfeiture of the lion trophy is grossly disproportionate punishment for a technical error committed by an issuing government**

Under *Bajikajian* a fine is excessive when "grossly disproportional to the gravity of a defendant's offense." 524 U.S. at 334. Disproportionality is determined by comparing the possible punishment for the offense to the value of the item being forfeited. In *Bajikajian*, the plaintiff carried $357,144.00 out of the country but only declared $10,000. The offense, according to the court,

was a failure to accurately declare currency. The maximum fine for that offense was $5,000. *Bajikajian*, 524 U.S. at 336. The Court emphasized that "Such penalties confirm a minimal level of culpability", and that such minimal culpability was significant in assessing the gravity of an offense for Excessive Fines purposes. *Id*.

Claimant finds himself in an even more blameless situation. Under 16 U.S.C. 1540, the section of the ESA dealing with penalties and enforcement, an individual "may be assessed a civil penalty by the Secretary of not more than $500 for each such violation." 16 U.S.C. 1540(a)(1). Claimant has therefore been deprived of enough property that the amount of his forfeiture is 140 times the maximum civil penalty ($70,500/500). The 9th Circuit has adopted *Bajikajian*'s holding, and has determined that "in considering an offense's gravity, the other penalties that the legislature has authorized are certainly relevant evidence." *U.S. v. 3814 NW Thurman Street*, 164 F.3d 1191, 1197 (1991). *Thurman Street* was a case in which the owner of a home forfeited it because a third party preparer made false representations on a loan application, and she was aware of some of those representations. The court found that the fine was excessive because the owner's offense was not severe, the penalties to which she might otherwise be subjected were minimal, and her actions did not cause harm to anyone. *Id*. at 1197-99. If the claimant in *Thurman Street* was

entitled to relief under the excessive fines clause Claimant Ward is absolutely entitled, because he has committed no offense personally, the penalty to which he might be subjected is a comparative pittance, and absolutely no one was harmed by a clerical error on an otherwise legal export permit.

**d. A regulation that holds an individual importer responsible for the actions of a foreign nation is not a proper implementation of CITES**

Like all other regulations implemented by FWS under the auspices of CITES, 50 C.F.R. 23.53 was authorized by the ESA. Under 16 U.S.C. 1537(a), "the Secretary shall do all things necessary and appropriate to carry out the functions of the Management Authority under the Convention." The question raised by the instant matter is whether 50 C.F.R. 23.53 actually constitutes a "necessary" or "appropriate" regulation for purposes of the Convention. It is clear that this regulation does not implement the express purpose of CITES. The FWS has deprived an individual American citizen of his property not because he has broken any law or regulation, but because the FWS chose to create regulations purportedly authorized by CITES which holds an individual importer responsible for the errors of a foreign government. There is no question that this action was neither 'necessary' nor 'appropriate'. Resolution 12.3 makes it very clear that the parties to CITES intended to ensure that

individuals are not deprived of their imported wildlife because a government has committed a technical error. The fact that Zambia committed a technical error puts this instance firmly within that protection. Any subsequent aspect of the Zambian authority's conduct that did not adhere strictly to the recommendations of the Convention cannot lawfully or rationally be imputed to Claimant. Under international law and the terms of the Convention, Zambia is obligated to honor the CITES recommendations, but it is not bound to adhere to them. If the nation who actually deviated from procedure is not legally culpable for that deviation, it is arbitrary, capricious, and outside of the United States' management authority's authorization to impute that culpability to an innocent owner who has taken all possible steps to comply with international and domestic law.

## V. Conclusion

Claimant Ward is entitled to the return of his property because he is an innocent owner who had no part in either of the errors or misunderstandings, and because the forfeiture of a $70,000 trophy for a government's technical error would be excessive. Claimant has done everything in his power to ensure that his shipment was in compliance with CITES. It is both unreasonable and unlawful to hold him responsible and to deprive him of his property because a foreign management authority made a clerical mistake and then disagreed with

the United States about how to fix it. Zambia cured its initial mistake and if consultation was really called for in this instance of self-evident and acknowledged government error, Zambia can still issue yet another retrospective permit. Plaintiff has not demonstrated a lack of material issues of fact, nor has Plaintiff demonstrated that it is entitled to Judgment as a Matter of Law. Summary Judgment is therefore inappropriate in this case.

Respectfully submitted this February 12, 2010,

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ATTORNEYS FOR CLAIMANT AND ONE (1) SPORT-HUNTED AFRICAN LION (*Panthera leo*) TROPHY

## CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2010, I caused the foregoing to be electronically filed the forgoing with the Clerk of Court via the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ John J. Jackson

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African Lion (*Panthera leo*) Trophy

**UNITED STATES DISTRICT COURT**

**FOR THE CENTRAL DISTRICT OF CALIFORNIA**

**WESTERN DIVISION**

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| UNITED STATES OF AMERICA<br><br>Plaintiff,<br><br>vs.<br><br>ONE (1) SPORT-HUNTED AFRICAN LION (*Panthera leo*) TROPHY,<br><br>Defendant.<br><br>MATT WARD,<br>Claimant. | Case Number 2:09-cv-5030-JFW (CWx)<br><br>**CLAIMANT'S STATEMENT OF GENUINE ISSUES OF MATERIAL FACT AND STATEMENT OF UNCONTROVERTED FACTS**<br><br>Date: March 15, 2010<br>Time: 1:30 p.m.<br>Pre-Trial Conference<br>Date: March 26, 2010<br>Trial<br>Date: April 6, 2010<br>Before the Honorable John F. Walter,<br>UnitedStates District Judge |

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Local Rule56-1 and this Court's Scheduling Order, Claimant submits his Statement of Genuine Issues of Material Fact and makes Claimant's Statement of Uncontroverted Facts.

| FACTS | CLAIMANT'S POSITION |
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| 1. On or about June 6, 2008, FWS Inspector Dahlia Merida received an electronic Wildlife declaration, Form 3-177, through the FWS on-line declaration filing system ("eDecs") as well as a paper document package containing permits, licenses, and other documents for clearance of a shipment of hunting trophies from Zambia into the United States. | Undisputed. |

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| 2. The Declaration was submitted by Hunter International Brokerage Services as customs broker and attorney in fact for Claimant Matt Ward. | Undisputed. |
| 3. The Shipment included twelve hunting trophies and twenty-four hippopotamus teeth. | Disputed only insofar as Claimant classifies the Hippo teeth as part of the Hippo trophy. |
| 4. WI Merida reviewed these filings and found that the Wildlife Declaration declared the Shipment to contain a different number and type of wildlife specimens than that identified in documents included in the package. | Plaintiff cites Declaration of Dahlia Merida paragraph 6.<br><br>Claimant disputes that the eDec contained "a different number and type of wildlife specimens" than the document package. Claimant declared a Hippopotamus trophy on the first eDec, which was refused on 06/12/08, and Inspector Merida insisted that Hunter International declare the Hippo teeth separately from the Hippo skull. The same "type species" appear on |

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| | both versions of the eDec. *See* Form 3-177 versions 1 and 2, attached to declarations of Dahlia Merida and Sheila Einsweiler at Document 23, Attachment #4. |
| 5. In addition, WI Merida found that the paper document package contained a CITES document that had been issued after the fact of import into the United States for one wildlife specimen. | Undisputed. |
| 6. That CITES document was CITES Permit Number 6826 ("Retrospective CITES Export Permit") for the defendant Wildlife Specimen, the skull and full skin of an African lion (*panthera leo)* | Undisputed. |

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| 7. The Retrospective CITES Export Permit had been issued by the CITES Management Authority for the Republic of Zambia on May 22, 2008, almost a week after the date on which the Shipment was imported into the United States on May 16, 2008. | Disputed in part. Plaintiff cites to Declaration of WI Merida. Claimant does not dispute that the Retrospective CITES Export Permit was issued 6 days after the Shipment arrived in the United States, but notes that under 50 C.F.R. 23.53 and CITES Resolution Conf. 12.3 (Rev. CoP14) Claimant could obtain a Retrospective permit because the government " made a technical error that was not prompted by the applicant." |
| 8. On or about June 11, 2008 WI Merida notified the Broker that the entry had been selected for physical inspection, that all wildlife (including the twenty-four hippo teeth identified in the paper document package but not the initial Wildlife Declaration) | Undisputed. |

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| should be declared, and that the FWS intended to seize the defendant Wildlife Specimen because an after-the-fact (or retrospective) CITES export permit could not be accepted. | |
| 9. Subsequently, WI Merida received a Wildlife Declaration that had been revised to match the documents in the paper document package. | Undisputed. |
| 10. On or about June 12, 2008, WI Merida physically inspected the Shipment at the British Airways cargo facility at Los Angeles International Airport. | Undisputed. |
| 11. WI Merida located in the Shipment the defendant Wildlife Specimen, and, based on a field inspection, confirmed that it was | Undisputed. |

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| the skin and skull of an African lion (Panthera leo). | |
| 12. Acting pursuant to 50 C.F.R. § 23.27 (which implements the inspection process and enforcement required by Article VIII of CITES), WI Merida verified that no valid CITES documents accompanied the defendant Wildlife Specimen. | Disputed in part. Plaintiff cites to the Declaration of Inspector Merida. Claimant disputes that the Retrospective Permit was invalid. Claimant notified Zambia that there was an error, and Zambia attempted to consult with the United States, which repetitively refused to communicate with Zambia. *See* Borman Declaration at paragraphs 17-25. |
| 13. Specifically, WI Merida determined that the Retrospective CITES Export Permit had been issued after the fact of import but did not comply with the requirements for retrospective CITES | Disputed in part. Claimant specifically disputes the claim that the retrospective permit did not comply with the requirements of 50 C.F.R. 23.53. Specifically, Claimant maintains that the FWS was the noncompliant party. *See* Borman Declaration paragraphs |

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| documents set out in 50 C.F.R. § 23.53. | 17-25. |
| 14. Consequently, on behalf of the FWS, WI Merida seized the defendant Wildlife Specimen on June 12, 2008 for violations of the ESA and its implementing regulations. | Undisputed. |
| 15. WI Merida cleared the rest of the Shipment for entry into the United States on June 13, 2008. | Undisputed. |
| 16. The defendant Wildlife Specimen was determined pursuant to 50 C.F.R. § 12.12 to be of a value of $130.00 (the declared value as stated in claimant's Wildlife Declaration). | Disputed in part. Plaintiff cites Merida Declaration paragraph 11. Claimant does not dispute that WI Merida decided the trophy was worth $130.000, but Claimant does dispute that this value is in accordance with 50 C.F.R. 12.12. *see* Bell-Cross Declaration; Borman Declaration at |

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| | paragraph 34. |
| 17. On June 28, 2008, Senior Wildlife Inspector Sheila Einsweiler received an e-mail from the CITES Management Authority for the Republic of Zambia concerning the importation of the defendant Wildlife Specimen. | Undisputed. |
| 18. Attached to the e-mail was a letter dated June 4, 2008 (thirteen days after the date of issuance of the Retrospective CITES Export Permit) from the Zambian CITES Management Authority addressed to "To whom it may concern" at the FWS. | Undisputed. Plaintiff notes that the June 4 letter had already been received by the FWS on June 10 and hand delivered before that. *See* Borman Declaration at 18. |

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| 19. In the June 4, 2008 letter, the Zambian CITES Management Authority apologized for the "omission" of the issuance of a CITES export permit for the defendant Wildlife Specimen, noted that the lion had been included on a Zambian Wildlife Permit (non-CITES) accompanying the specimen, advised it had issued permit number 6862 for the specimen, and asked that it be re-exported back to Zambia if permit number 6826 was not acceptable. | Undisputed. |
| 20. In the June 18, 2008 e-mail, the Zambian CITES Management Authority further noted that the omission was purely due to | Undisputed. |

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| human error and that mechanisms since had been put in place to make sure the error would not happen again. | |
| 21. Fed.R.Civ.P. 56(c) authorizes the granting of a summary judgment "if the pleadings, the discovery and disclosure materials on fire, and any affidavits show that there is no genuine issue as to any material fact and that the Movant is entitled to a judgment as a matter of law." | Undisputed. |
| 22. The Movant bears the initial burden of establishing "the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories and admissions | Undisputed. |

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| on file, together with the affidavits, if any,' which believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting former Fed. R. Civ. P. 56(c)). | |
| 23. The burden then shifts to the adverse party who "may not rest merely on allegations or denials in its own pleading; rather, its response must - by affidavits or as otherwise provided in this rule - set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e) (2). | Undisputed. |
| 24. The non-moving party may not merely attack or discredit the moving party's evidence. | Undisputed. |

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| National Union Fire Ins. Co. v. Argonaut Ins. Co., 701 F.2d 95, 97 (9th Cir. 1983). | |
| 25. Instead, the non-moving party must affirmatively present admissible evidence sufficient to create a genuine issue of material fact for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). | Undisputed. |
| 26. The Ninth Circuit has recognized that "[c]onclusory allegations unsupported by factual data will not create a triable issue of fact." Marks v. United States, 578 F.2d 261, 263 (9th Cir. 1978). | Undisputed. |
| 27. The United States and the Republic of Zambia (the country of export here) are among more | Undisputed. |

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| than 175 countries which have agreed to be bound by the Convention on International Trade in Endangered Species of Wild Fauna and Flora, a multilateral treaty that aims to protect wildlife that is vulnerable to or adversely affected by trade, and which regulates trade in species that are listed in its three Appendices. 27 U.S.T. 1087; TIAS 8249, Mar. 3, 1973 ("CITES"). | |
| 28. Many CITES-listed species are threatened with extinction. | Undisputed. Claimant notes that Plaintiff cites to no authority and that the statement is not relevant to this species. |

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| 29. This case concerns African lions, which are listed on Appendix II of CITES. 50 C.F.R. § 23.91. | Undisputed. |
| 30. Appendix II includes species that may become threatened with extinction if trade is not regulated. | Undisputed. |
| 31. CITES ensures that trade is legal by way of standardized import and export permits. All specimens of Appendix II species in international trade, including parts and products, require an export permit from the country of origin or a re-export certificate from the country of re-export, unless certain limited and specifically defined exceptions apply. | Undisputed. |

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| CITES, Article IV; 50 C.F.R. §§ 23.4(b), 23.20. | |
| 32. For any import of specimens of an Appendix II species, the treaty requires the prior grant and presentation of either an export permit from the country of origin or a re-export certificate from the country of re-export. CITES, Article IV. | Disputed in part. Claimant does not dispute that CITES generally requires an export permit before import , but notes 1) a permit was granted before import in this case, there was merely a clerical error in the execution of the permit and 2) CITES enumerates exceptions to this rule in Resolution Conf. 12.3(Rev. CoP14). |
| 33. CITES also specifies the conditions under which permits and certificates may be granted. CITES, Article VI. | Undisputed. |
| 34. In addition, CITES directs that parties to the treaty take appropriate measures to enforce its provisions and to prohibit | Undisputed. |

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| trade in specimens in violation thereof, including the imposition of penalties and confiscation. CITES, Article VIII. | |
| 35. The United States has adopted and applies stricter national legislation, including the ESA. | Undisputed. |
| 36. The trade controls for Article II species specified by CITES have been incorporated into Section 9(c) of the ESA, which prohibits "any trade in specimens contrary to the provisions of [CITES]." 16 U.S.C. § 1538(c)(1). | Undisputed. |
| 37. Regulations promulgated under the ESA to implement CITES prohibit the importation into the United States (absent limited, defined exceptions) of any wildlife or wildlife products | Undisputed. |

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| listed on Appendix II unless a valid export permit from the country of origin or a re-export certificate from the country of re-export is obtained prior to such importation. 50 C.F.R. § 23.13. | |
| 38. CITES Resolution 12.3 also recommends that parties to CITES "not accept" and "not issue CITES, permits and certificates retrospectively," based on the parties' agreement that the "retrospective issuance of permits and certificates has an increasingly negative impact on the possibility for properly enforcing the Convention and leads to the creation of loopholes for illegal trade." | Undisputed. Claimant notes that Resolution 12.3 also goes on to enumerate exceptions for Appendix II species like the lion in issue. |

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| CITES Res. 12.3 ¶ XIII. | |
| 39. CITES documents that are issued after an export or re-export occurs but before the shipment is cleared for import are referred to as "retrospective." See 50 C.F.R. § 23.53. | Undisputed. |
| 40. Relatedly, Resolution 12.3 also states that the parties should "not provide exporters…in importing countries with declarations about the legality of exports…of specimens having left the country without the required CITES documents." Id. | Undisputed, but the Resolution then goes on to recommend that the parties confer in the case of Appendix II species. |
| 41. Although foreign exporters play an important role in the CITES | Disputed in part. Claimants dispute the statement that the required |

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| permitting system by including required CITES permits and certificates with their shipments to the United States, the United States importer nevertheless is responsible for obtaining a valid permit before commencing an activity for which a permit is required by 50 C.F.R. Part 23 (except as provided for retrospective permits for certain CITES shipments under very specific situations not present here) and is liable and responsible for the conduct of any activity conducted under the authority of such permits. 50 C.F.R. §§ 13.1(a), 13.50. | circumstances for a retrospective permit do not exist in this instance. |

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| 42. In addition, it is the United States importer who initiates the import and, as a consequence, has the ability to exercise control over its foreign suppliers. | Disputed. Private importers don't "exercise control" over Sovereign Parties to CITES. |
| 43. The DOI "will accept a CITES document as valid for import…only if the document…is authentic and does not contain erroneous or misleading information." 50 C.F.R. § 23.26(c)(7). | Undisputed. |
| 44. The DOI "has the authority to question any shipment and its accompanying documents if the surrounding facts indicate a potential violation." Revision of Regulations CITES; Final Rule, 72 Fed. Reg. 48,402, 48,416 | Undisputed. |

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| (Aug. 23, 2007) (codified at 50 C.F.R. part 23). | |
| 45. The ESA "places the burden on the permittee to prove that the document was valid and in force at the time of entry into the United States." Id. | Undisputed. |
| 46. Violations of documentation requirements "are particularly troubling and significant in the CITES framework, where signatory nations attempt to monitor and conserve dwindling wildlife populations in an era of increasing international trade." Underwater Exotics, Ltd. v. Sec'y of Interior, 1994 U.S. Dist. LEXIS 2262, *17, 1994 WL 80878, *6 (D.D.C. Feb. 28, | Disputed. Claimant disputes Plaintiff's citation as wholly misrepresentative. The full quotation is as follows: " The Court is not persuaded by Underwater's claim that identification of coral is too difficult because of its similarity to rock. By making this claim, Underwater virtually concedes that without the ban on coral, it will continue to violate the law. Moreover, **its** documentary violations are particularly troubling and significant in |

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| 1994). | the CITES framework, where signatory nations attempt to monitor and conserve dwindling wildlife populations in an era of increased international trade." *Underwater Exotics, Ltd. v. Sec'y of Interior*, 1994 U.S. Dist. LEXIS 2262, *17, 1994 WL 80878, *6 (D.D.C. Feb. 28, 1994). The quotation refers to the specific violations of an individual, not *any and all* CITES documentary violations. |
| 47. The DOI, through the FWS, enforces the ESA. | Undisputed. |
| 48. As part of its enforcement authority, FWS is authorized to seize wildlife with or without a warrant and detain it pending institution of an action *in rem* | Undisputed. |

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| for the forfeiture of such wildlife. 16 U.S.C. § 1540(e)(3). | |
| 49. The ESA further provides:<br><br>All fish or wildlife or plants taken, possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped, exported, or imported contrary to the provisions of this chapter, any regulation made pursuant thereto, or any permit or certificate issued hereunder shall be subject to forfeiture to the United States.<br><br>16 U.S.C. § 1540 (e)(4)(A). | Undisputed. |
| 50. Superimposed on these statutory and regulatory provisions are the requirements of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"). | Undisputed. |
| 51. CAFRA created three new statutes, 18 U.S.C. §§ 983 and 985 and 28 U.S.C. § 2465(b), | Disputed. CAFRA effects forfeiture provisions of all laws other than those enumerated as exceptions. |

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| which supersede any inconsistent provisions of preexisting federal law but otherwise leave intact all civil asset forfeiture laws and regulations in existence prior to CAFRA. | |
| 52. Specifically, CAFRA created a uniform innocent owner defense, provisions for claimants to recover interest and attorney fees, and other procedural tools, See 18 U.S.C. § 983. | Undisputed. |
| 53. The Retrospective CITES Export Permit presented for the defendant Wildlife Specimen was issued on May 22, 2008, which was after the fact of importation of the defendant Wildlife Specimen into the | Undisputed. |

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| United States on May 16, 2008. | |
| 54. The Parties to CITES have recommended that retrospective CITES documents are not to be issued or accepted except in very limited, defined situations. CITES Resolution Conf. 12.3 (Rev. CoP13). | Undisputed. |
| 55. "The parties intended for this provision to be used rarely and only under very narrow circumstances. The exporter is responsible for obtaining CITES documents before making a shipment and for inspecting the CITES documents to ensure the key information on the face of the permit, such as quantity and | Undisputed. |

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| species, match what was requested and what is in the shipment. The provisions for retrospective documents are not to help resolve an enforcement issue, but to resolve a mistake by the government or a genuine error made by a person exporting or re-exporting specimens for their personal use." 72 Fed. Reg. 48402, 48427 (August 23, 2007). | |
| 56. Federal regulations have made mandatory this CITES Conference of the Parties recommendation regarding retrospective CITES documents. | Undisputed. |
| 57. Under 50 C.F.R. § 23.26(c)(17), the FWS may not accept a retrospective CITES permit for | Undisputed. |

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| Appendix II specimens except as set out in 50 C.F.R. § 23.53. | |
| 58. One of the cornerstones of 50 C.F.R. § 23.53 is that a retrospective CITES document can be issued "only" after consultation between the CITES Management Authorities in both the exporting or re-exporting country and the importing country "including a thorough investigation of circumstances and agreement between them that criteria in paragraph (d) of this section have been met." 50 C.F.R. § 23.53(b)(4). | Disputed in part. Claimant disputes the use of the word "cornerstone" as unsupported characterization. |
| 59. Applicable criteria in 50 C.F.R. § 23.53(d) includes (among other things) that (1) the wildlife | Undisputed, with the understanding that the Management Authority of the importing country should not refuse |

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| specimen was presented to the appropriate official for inspection at the time of import and a request for a retrospective CITES document was made at that time; and (2) the importing CITES Management Authority has agreed to accept the retrospectively issued CITES document. 50 C.F.R § 23.53(d)(2) and (4). | unreasonably. |
| 60. Here, there was no consultation with or agreement by the CITES Management Authority for the importing country, the United States, prior to the issuance of the Retrospective CITES Export Permit. | Disputed. Zambian authorities attempted consultation numerous times but the FWS refused attempts to communicate. *See* Borman Declaration paragraphs 17-25 and exhibits 1, 2, 3 and 4 attached thereto. |

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| 61. The initial correspondence from the Zambian CITES Management Authority to the FWS regarding issuance of the document was not provided until after the fact - through the June 18, 2008 e-mail and June 4, 2008 letter - and did not provide for consultation and agreement by the FWS (the United States CITES Management Authority). | Disputed. Claimant disputes that Plaintiff first received notification of Zambia's error on June 18. Plaintiff received notification of Zambia's error on June 10, by UPS in Torrance, California, and the correspondence was signed for. *See* Borman Declaration paragraph 18 and Exhibit 2 thereto. |
| 62. Consequently, the Retrospective CITES Export Permit was not valid. | Disputed. Claimant disputes that the Retrospective permit was not valid. *See*, Borman Declaration paragraphs 17-25. |
| 63. Nor did claimant make a valid claim of exemption or permission for the defendant Wildlife Specimen in lieu of the required export permit or re- | Disputed. Claimant disputes this insofar as it is unclear what Plaintiff means by "a valid claim of exemption" because Plaintiff has cited to no authority. |

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| export certificate. | |
| 64. The defendant Wildlife Specimen was therefore imported in violation of Sections 9(c) and (g) of the Endangered Species Act and its implementing statute and regulations, 16 U.S.C. § 1538(c) and (g); 50 C.F.R. Part 23. | Disputed. Claimant disputes that the trophy was imported in violation of the Endangered Species Act as set forth above. |
| 65. As such, it is subject to forfeiture to the United States pursuant to 16 U.S.C. § 1540 (e)(4)(A). | Disputed. Claimant disputes this for the same reasons set forth in paragraph 62; the permit was valid, and the trophy is therefore not subject to forfeiture. |
| 66. Pursuant to 18 U.S.C. § 983 (d)(2)(A), claimant bears the burden of establishing by a preponderance of the evidence that he is an innocent owner of | Undisputed. |

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| the defendant Wildlife Specimen. 18 U.S.C. § 983 (d)(1). | |
| 67. However, an "innocent owner" defense may not be asserted in instances where the property to be forfeited to the United States is "contraband or other property that it is illegal to possess." 18 U.S.C. § 983 (d)(4). | Disputed. Claimant disputes that an innocent owner defense "may not be asserted", and contends instead that any property owner may *assert* the defense. |
| 68. Wildlife specimens are "illegal to possess" when imported, received, or acquired in violation of CITES and the ESA. United States v. 144,774 Pounds of Blue King Crab, 410 F.3d 1131 (9th Cir. 2005). | Disputed. Claimant disputes Plaintiff's characterization of the facts of *Blue Crab*, and refers the Court to Claimant's discussion of that case in his *Points and Authorities.* |
| 69. As the defendant Wildlife Specimen in this case was imported in violation of the | Disputed. Claimant disputes Plaintiff's characterization of the innocent owner defense, refers the Court to its *Points* |

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| ESA, claimant may not assert an innocent owner defense. | *and Authorities*, and notes that this Court has ordered that "**no argument should be set forth**" in the parties' Statements of Uncontroverted Facts . *see*, Scheduling and Case Management Order at 8. |
| 70. Rejection of an innocent owner defense in this matter is further supported by the very nature of the property to be forfeited. | Disputed. Claimant disputes Plaintiff's characterization of the innocent owner defense, refers the Court to its *Points and Authorities*, and notes that this Court has ordered that "**no argument should be set forth**" in the parties' Statements of Uncontroverted Facts . *see*, Scheduling and Case Management Order at 8. |
| 71. Property acquired or possessed in violation of law may not be returned to the requesting party. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, | Disputed. Claimant disputes this assertion, and notes that the FWS and courts regularly return items "possessed or acquired in violation of law". *See, United States v. Bajikajian*, |

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| 699-700 (1965) (return of contraband "would clearly have frustrated the express public policy against the possession of such objects"); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972) (forfeiture "prevents forbidden merchandise from circulating in the United States"). | 524 U.S. 321, 334 (1998) (holding that forfeitures must bear some relationship to the gravity of the offense; returning undeclared currency); *Austin v. United States*, 509 U.S. 602, 609 (1993) (returning mobile home seized as drug contraband); *United States v. Real Prop.*, 261 F.3d 65, 73-74 (1st Cir. 2001) (holding that a wife was entitled to retain her home despite her husband's use of it in drug trade). |
| 72. In addition, the Endangered Species Act makes it unlawful to possess any wildlife traded contrary to the provisions of CITES. 16 U.S.C. § 1538(c). | Undisputed. |
| 73. Accordingly, the defendant Wildlife Specimen is subject to forfeiture to the United States pursuant to 16 U.S.C. § 1540 | Disputed. Claimant disputes this assertion as laid out in paragraph 62. |

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| (e)(4)(A). | |
| 74. Any of the foregoing conclusions of law which are deemed to be uncontroverted facts are hereby incorporated in the preceding uncontroverted facts. | Undisputed. |
| CLAIMANT'S STATEMENT OF FACTS | |
| 75. In August 2007, Matt Ward undertook a Safari in Zambia, where he legally acquired 13 hunting trophies, including the African Lion at issue. | Ward Declaration paragraph 1. |
| 76. A professional hunting and safari service made all arrangements for this safari, including the selection of | *Id*. at paragraph 3. |

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| qualified experts to manage the export of Ward's trophies from Zambia and their import into the United States. | |
| 77. Claimant Ward is the sole lawful owner of the Lion in question. | *Id*. at paragraph 2. |
| 78. Claimant Ward was aware that his import and export agents were experienced professionals but he was not informed as to the particulars involved in importing and exporting his trophies. | *Id*. at paragraph 4. |
| 79. Claimant Ward had no knowledge of or control over the clerical error made on the lion's export permit by the Zambian Wildlife Authority (ZAWA). | Ward Declaration paragraph 5 |

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| 80. Claimant Ward first learned of the clerical error when Maria Felix of Hunter International Brokerage Services ("Hunter International") told him. | Ward Declaration at paragraph 7. |
| 81. In January 2008, ProHunt Zambia engaged Michael Borman to supervise the exportation of Matt Ward's lion trophy. | Borman Declaration at paragraph 3. |
| 82. ProHunt Zambia provided all of the documentation proving that the lion and other trophies were taken legally. | *Id*. at paragraph 5. |
| 83. Mr. Borman was first notified that ZAWA omitted the lion on its CITES export permit on May 21 2008 by Maria Felix of Hunter International. | *Id*. at paragraph 8. |

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| 84. Mr. Borman confirmed that the export permit contained 2 Crocodiles, 1 Hippo and 1 Tsessebe. | Borman Declaration at paragraph 9. |
| 85. Ignatius Mulembe, a licensing officer at ZAWA, neglected to transfer the lion from the other export documents and instead listed the Tsessebe. | *Id*. at paragraph 12. |
| 86. ZAWA confirmed to Mr. Borman that their understanding of proper procedure after a technical error is to "issue a 'new' CITES Export Permit for the lion and confirm to the U.S. Fish and Wildlife Service ("FWS") that it had committed an error. | *Id*. at paragraph 15. |

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| 87. The lion trophy was included on all other official export documentation, specifically the ZAWA export permit, the ZAWA Certificate of Valuation of Trophies, the Zambian Veterinary Certificate, the packing list, and the Bangweulu Invoice. | Borman Declaration at paragraph 17. |
| 88. The new permit and information letter from Zambia authorities was sent via courier to Hunter International on June 4 for hand delivery and was also sent to the Law Enforcement Office of FWS, where it was received on June 10, 2008. | Borman Declaration at paragraph 18. |
| 89. Francesca Chisango, Head of CITES for Zambia, sent an e-mail to Sheila Einsweiler, the | Borman Declaration at paragraph 20 |

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| senior Law Enforcement Officer in Washington, D.C., on 18 June 2008, asking for consultation regarding the lion. | |
| 90. Ms. Chisango sent another email on August 18, 2008, after the FWS had refused to communicate with her for a further 2 months. | Borman Declaration at paragraph 21. |
| 91. On August 12, 2009, the Director General of ZAWA, the Zambia Wildlife Authority, personally sent a letter to FWS referring to past correspondence and again asking for feedback regarding ZAWA's remedial action. | Borman Declaration at 23. |
| 92. The letter was transmitted via Federal Express waybill number 8678 9768 9590 on August 18, | Borman Declaration at paragraph 24 and Exhibit 4 attached thereto. |

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| 2009, and was received in Arlington Virginia on August 21, 2009 by D. McCray. | |
| 93. Matt Ward's Taxidermist/export facilitator attests that "By Zambian law, we must issue a Tax Invoice for all exports for charges paid to us in Foreign Exchange. This invoice is stamped by Zambian Customs and we must show that the funds received match this invoice. Our Tax Invoice #832 cleraly shows our itemized charges for trophy preparation for each trophy. It also shows our charges for crating, packing, export documentation, vet clearance, airport delivery, and local forwarding charges to load | Borman Declaration at paragraph 31. |

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| the shipment on aircraft." The total value of the invoice was $1200, but Mr. Borman does not understand this to relate to the value of the trophy. | |
| 94. ZAWA issues a "Certificate of Valuation of Trophies" but does not put the value of the trophies, it merely puts down the cost of the certificate. | Borman Declaration at paragraph 33. |
| 95. The only way individuals in the hunting and outfitting business would establish the value of a trophy is by providing an invoice showing what the outfitter charged the client for each animal. | Borman Declaration at 34. |
| 96. On May 16, 2008, 13 sport-hunted trophies owned by Matt Ward arrived in LAX | Declaration of Maria Europa-Felix at paragraph 3. |

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| International in Los Angeles. | |
| 97. Hunter International handled the importation of the trophies into the United States through KSI Corporation, its contract agent in LA. | Felix Declaration at paragraph 4. |
| 98. Hunter International first became aware of Zambia's clerical error on the CITES export permit on May 20, 2008. | Felix Declaration at paragraph 6. |
| 99. Maria Europa-Felix observed on May 20 that the CITES export permit contained two crocodiles, one hippopotamus, and one tsessebe, but did not include the African lion. | Felix Declaration at paragraph 7. |
| 100. Maria Europa-Felix observed that all the other documents | Felix Declaration at paragraph 8. |

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| included in the shipment did include the African lion. | |
| 101. Hunter International could not tell whether the lion trophy was actually packed and shipped and therefore sent an e-mail to Michael Borman. | Felix declaration at paragraph 9. |
| 102. Mr. Borman informed Ms. Europa-Felix that he had informed the head of CITES in Zambia about the clerical error. | Felix Declaration at paragraph 13. |
| 103. Zambia's head of CITES sent a letter to the FWS seeking to correct the error. | Felix Declaration at paragraph 15; attached letter at exhibit 1. |
| 104. FWS was legally permitted to "refuse" shipment and return the trophy to Zambia to be reshipped with a new permit. | Felix Declaration at paragraph 16. |

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| 105. FWS has not responded to Zambia's request that the lion be returned to Zambia for re-export. | Felix Declaration at paragraph 18. |
| 106. To import any animal or animal part one must complete FWS form 3-177 and that form has a space for the value of the item. | Felix Declaration at paragraph 24. |
| 107. Hunter International lifted the value for Matt Ward's African lion from the shipper's invoice, which totaled $1200, and Hunter International pro-rated the amount so that the lion was valued at $130. | Felix Declaration at paragraph 25. |
| 108. Maria Europa-Felix, who wrote the trophy valuation on the 3-177 form, is aware that the amount she recorded represents | Felix Declaration at paragraph 26. |

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| only the preparation or dipping cost, and that this is a tiny fraction of the actual cost of the trophy. | |
| 109. Game animals killed abroad by a returning U.S. resident and imported for noncommercial purposes are "duty free". | Felix Declaration at paragraph 26. |
| 110. Hunter International did not intend to make representations as to the value of the trophy when it carried over the shipper's invoice figure – this is simply a common practice in the industry. | Felix Declaration at paragraph 28. |
| 111. If Matt Ward were to undertake a hunting expedition to obtain a comparable African lion trophy using the same professional hunter, the total | Declaration of Richard Bell-Cross, Professional Hunter. |

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| cost of the safari, excluding airfare, would be $70,000. | |

Respectfully submitted this 24 of February, 2010,

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ATTORNEYS FOR CLAIMANT AND ONE (1) SPORT-HUNTED AFRICAN LION (*Panthera leo*) TROPHY

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African Lion (*Panthera leo*) Trophy

**UNITED STATES DISTRICT COURT**
**FOR THE CENTRAL DISTRICT OF CALIFORNIA**
**WESTERN DIVISION**

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| UNITED STATES OF AMERICA<br><br>Plaintiff,<br><br>vs.<br><br>ONE (1) SPORT-HUNTED AFRICAN LION (*Panthera leo*) TROPHY,<br><br>Defendant. | Case Number 2:09-cv-5030-JFW-CWx<br><br>**CLAIMANT'S [PROPOSED] STATEMENT OF DECISION**<br><br>Date: March 1, 2010<br>Time: 1:30 p.m.<br>Pre-Trial Conference<br>Date: March 26, 2010<br>Trial<br>Date: April 6, 2010<br>Before the Honorable John F. Walter,<br>UnitedStates District Judge |

The instant action is a Forfeiture Proceeding under 16 U.S.C. 1540(e), the penalties provision of the Endangered Species Act. Plaintiff United States of America has initiated Forfeiture Proceedings, alleging that the Defendant trophy of an African lion (*panthera leo*) was imported contrary to CITES. Claimant contends that the United States acted contrary to CITES by refusing to

consult with Zambia, that he is an innocent owner, and that this forfeiture is an excessive fine under the 8th Amendment. This matter having come before this Court, and this Court having considered all evidence and arguments presented by the parties, Plaintiff's Motion for Summary Judgment is DENIED. Summary Judgment has been denied for the following reasons:

## I. Background

In August 2007, Claimant Matt Ward undertook a Safari in which he the Defendant African lion trophy. Claimant's Statement of Uncontroverted Facts ("CSOF") at pg. 75. Claimant then sought to import his trophy, and hired Hunter International Brokerage to facilitate the importation. CSOF at pg. 97. The Defendant African lion trophy was included in the shipment with a separate, retrospective CITES permit. CSOF at pg. 87. Zambia provided the United States Fish and Wildlife Service "FWS" with a contemporaneous explanation for the retrospective permit, which assumed full responsibility for the technical error that left the lion off the original CITES permit. CSOF at pg. 103. Plaintiff FWS seized the Defendant African lion trophy on June 12, 2008. CSOF at pg. 105.

## II. Standard of Summary Judgment

In an action for summary judgment under rule 56 of the Federal Rules of Civil Procedure, judgment should be granted in favor of a party where "the

pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." When evaluating a motion for summary judgment, "the inferences to be drawn from the underlying facts contained in such materials [affidavits, depositions, and exhibits] must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc*. 369 U.S. 654, 655 (1962).

**III. Discussion**

a. The Innocent Owner Defense

The parties do not dispute that Claimant Matt Ward did not know that his lion trophy had been omitted from Zambia's CITES permit. CSOF at pg.98. Moreover, the error was committed by government official of a sovereign nation, Zambia, which could not be considered to be under Claimant's control. Under 18 U.S.C. 983(d), individuals whose property is deemed by the government to be subject to forfeiture are entitled to raise the Innocent Owner Defense if they can prove that either i) "did not know of the conduct giving rise to forfeiture" or ii) "upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property." One might satisfy this requirement by giving "timely notice to an appropriate law enforcement agency of information that led the

person to know the conduct giving rise to a forfeiture would occur or has occurred." Declarants Borman and Europa-Felix have established that Claimant informed the proper authorities as soon as he became aware there had been an error, and the Zambian CITES authorities have attested to his innocence. Courts have found that where an innocent owner has no knowledge of an act that renders possession of property unlawful, and seeks to remedy any defect that occurs, they are entitled to the return of their property. *See Von Hofe v. United States*, 492 F.3d 175, 180 (2nd Cir. 2007)(noting that innocent owner defense would have required owner to prove she had done all she could to cure defect). The parties dispute whether Claimant is entitled to the innocent owner defense not because he is not innocent, but because they disagree about whether the lion trophy is "illegal to possess" under CAFRA. Motions for Summary Judgment must be viewed in the light most favorable to the non-moving party, and Plaintiff has established neither that there are no disputed issues of material fact nor that it is entitled to Judgment as a Matter of Law.

b. Proportionality under CAFRA and the 8th Amendment

The 8th Amendment of the United States Constitution prohibits excessive fines, and CAFRA, 18 U.S.C. 983(g) guarantees proportionality review under the 8th Amendment to anyone whose property is deemed subject to civil forfeiture. Under the 8th Amendment and CAFRA, a fine is excessive when it is

"grossly disproportional to the offense." 18 U.S.C. 983(g). Under *U.S.v. Bajikajian*, a court examines the possible punishment for the offense with the amount of the forfeiture. 524 U.S. 321, 334 (1998). Claimant contends Defendant African lion trophy, according to cost of replacement, is worth $70,500, and has offered precedent to suggest that this is an appropriate way of valuing taxidermied hunting trophies. CSOF at pg. 111; P&A at 20. Plaintiff has neither established that its valuation of the defendant lion trophy is the appropriate one, nor that forfeiture was not an excessive fine.

## IV. Conclusion

For all of the reasons set forth above Plaintiff's Motion for Summary Judgment is DENIED.

_____ _____

Date

John F. Walter
United States District Judge

Presented By:

/s/ John J. Jackson, III
**CONSERVATION FORCE**
Counsel for Claimant