No. 12- 983

IN THE

Supreme Court of the United States

MYMAIL, LTD,
Petitioner,

v.

COMMISSIONER, INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is the monetary value in "dollars" of a "gold-clause contract"—made pursuant to 31 U.S.C. § 5118(a)(1)(B) and (d)(2), and payable in legal-tender American Eagle gold and American Liberty silver coins currently minted pursuant to 31 U.S.C. § 5112(a)(7) through (10), (e), (h), and (i)—the aggregate face values of the coins with which that contract is paid?

II. Where a partnership exchanges an aggregate face value of 3,525,839 "dollars" in electronic units (presumably solvable in Federal Reserve Notes) for an aggregate face value of 375,675 "dollars" in American Eagle gold and American Liberty silver dollar coins, which coins the partnership then distributes to its partners in payment of "gold-clause contracts" the aggregate face values of which total 251,754 "dollars", is the partnership entitled to treat all or some of the difference between the value of the electronic units and the value of the coins (3,150,164 "dollars") as a currency transaction deduction or expense deductible from the partnership's gross receipts?

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its Order on November 15, 2012. Pet. App. 1a. This petition is being filed on or before the 90th day thereafter. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

INTRODUCTION

This case is about the United States Court of Appeals for the Fifth Circuit nullifying:

1) The use of Congressionally mandated gold clause contracts, codified at Title 31 U.S.C. § 5118.

2) The long-standing ruling made by this Court in *Thompson* v. *Butler*, 95 U.S. 694 (1878), which states:

> "A coin dollar is worth no more for the purposes of tender in payment of an ordinary debt than a note dollar. The law has not made the note a standard of value any more than coin. It is true that in the market, as an article of merchandise, one is of greater value than the other; but as money, that is to say, as a medium of change, the law knows no difference between them."

3) Congress' mandate that the United States Secretary of Treasury maintain the equal purchasing power of each kind of United States currency pursuant to Title 31 U.S.C. § 5119(a).

Hence this case simply raises the questions of "What is the value of a gold clause contract payable in American Eagle gold and/or American Liberty silver legal tender coins?" And: "How does one account, on an income tax form, for the difference in nominal face values of the Federal Reserve Notes and the legal tender gold and silver coins involved in this case created by the Secretary of Treasury's failure to maintain the equal purchasing power of each kind of United States currency"

By answering these questions this Court will:

1) Facilitate the use and implementation of an alternate monetary system to combat the negative and devastating effects of the ongoing national and international monetary currency crises,

2) Provide definitive guidelines on how these other forms of legal tender can be used and accounted for, and

3) Expeditiously resolve once and for all these problems that have recently been pressed on this Court[1], and will continue to arise[2] as States such as Utah authorize the use of United States gold and silver coins in enforceable gold-clause contracts[3]. If this Court does not definitively state the rule for valuing such contracts, there will be multiple, mutually inconsistent rules established in various jurisdictions[4]. The sooner this Court addresses the issue the lesser the confusion and the more Americans can take advantage of the use of gold and silver legal tender as money, in line with the evident intent of both Congress and the States.

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[1] *Thomas D. and Michelle L. Selgas* v. *H.C.A.D.*, No. 12-39, Petition for Certiorari denied (2012).

[2] Kenefick, Christian J. "What is a $10 Gold Coin Worth? Basis, FMV, and Realization Issues Abound." *Thomson Reuters' Journal of Taxation*, 118 J. Tax'n 86 (February 2013); and *Camp Hendirck Trust* v. *The Henderson County Appraisal District*, No. 2012B-0925, 392nd Judicial District Court of Texas.

[3] H.R. 157 Substitute, 2012 Sess. (Utah 2012).

[4] Contrast *Crummey* v. *Klein Independent School District*, No. 08-20133 (5th Cir. 2008) with *Selgas* v. *Henderson County Appraisal District*, Case No. 12-10-00021-CV (TX Ct. App. 12, Nov. 16, 2011).

STATEMENT OF RELEVANT FACTS

In October 2003, MyMail entered into "gold-clause contracts" with its partners[5], which required all partnership distributions be paid in United States legal-tender currency of each partner's choice. These contracts were executed pursuant to and under the authority of 31 U.S.C. § 5118(a)(1)(B) and (d)(2) , which provides that:

> (a) In this section—
>
> (1) "gold clause" means a provision in or related to an obligation alleging to give the obligee a right to require payment in—
>
> * * * * *
>
> (B) a particular United States coin or currency * * * .
>
> * * * * *
>
> (d)(2) An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977.

MyMail and its partners understood that a contract explicitly made payable only in "a particular United States coin or currency" could be paid only with that

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[5] *See* App. 16a, lns. 6-31; App. 17a, lns. 1-6; and App. 21a-26a. Please note the the gold clause contract ("MyMail, Ltd. Partner Distribution Payment Clause") at App. 21a-26a is represenative of the gold clause contracts that MyMail entered into with its Partners.

"coin or currency". The Commissioner does not deny that this is the case.[6]

In reliance on this statutory authorization, some of MyMail's Partnership Distribution Agreements contained detailed provisions for payment solely in United States American Eagle gold or American Liberty silver coins. In reliance on 31 U.S.C. § 5118(a)(1)(B) and (d)(2) and the Partnership Distribution Agreements, some of MyMail's partners contracted to be paid exclusively in American Eagle gold or American Liberty silver dollar coins. The Commissioner does not deny that valid "gold-clause contracts" payable in United States gold or silver coin resulted from these actions.

In 2005, MyMail licensed some of its intellectual property to various third-party companies; and its counsel took electronic receipt of the funds (presumably solvable in Federal Reserve Notes) through its bank; then electronically transferred a portion of said funds to Wells Fargo, MyMail's bank. Part of these funds were to be used to acquire the United States American Eagle gold and Liberty silver legal tender coins to be paid out as distributions to MyMail's partners. To that end, some of the bank-deposits were withdrawn in Federal Reserve Notes, which were then tendered for "lawful money" at the Federal Reserve Bank of Dallas, Texas, and at the United States Treasury in Washington, D.C., pursuant to the mandate in 12 U.S.C. § 411 that Federal Reserve Notes "shall be redeemed in lawful money on demand at the Treasury Department * * * or at any Federal Reserve bank". Both the Federal Reserve Bank and the United States Treasury denied the demand. But

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[6] *See ante*, footnote 5.

the Treasury directed MyMail to its U.S. Mint operation, which in turn directed MyMail to Dillon Gage, a National Dealer of the U.S. Mint[7]. Pursuant to the instructions from the Mint, MyMail transferred electronic funds of an aggregate nominal value of 3,525,839 "dollars" to Dillon Gage and SW Securities in exchange for American Eagle gold and American Liberty silver legal tender coins of an aggregate face value of $375,675 "dollars", issued to MyMail on its own account. MyMail distributed a total aggregate face value of $251,754 "dollars" to its partners in satisfaction of the terms of their specific "gold-clause contracts". These payouts were made in strict conformity with the terms of those contracts.[8]

In 2006, MyMail filed an amended tax return for Tax Year 2005, documenting the difference between the nominal purported "dollar" value of the electronic funds it received as the result of licensing its intellectual property, and the nominal (or face) "dollar" values of the lawful money coins it distributed to its partners pursuant to their "gold-clause contracts". The return treated this disparity as a "currency expense" from partnership income of 3,150,164 "dollars", arising out of MyMail's exchange of currency consisting of non-legal-tender electronic units with an aggregate value of 3,525,839 "dollars" for American Eagle gold and American Liberty silver legal tender coins having an aggregate face value of $375,675 "dollars". MyMail took the position that:

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[7] Dillon Gage is listed as a U.S. Mint National dealer at: http://www.usmint.gov/downloads/mint_programs/am_eagles/MNTBULC2004_SE.pdf at pg. 7.

[8] *See ante*, footnote 5.

(i) This currency conversion was required in the ordinary course of business, because MyMail was contractually obligated to distribute particular United States gold or silver dollar coins to its partners pursuant to their "gold-clause contracts".

(ii) The currency conversion was necessitated by the refusal of the Federal Reserve and the Treasury to redeem Federal Reserve Notes "dollar for dollar" in "lawful money" consisting of such United States gold or silver dollar coins.

(iii) The difference in aggregate value in "dollars" between the electronic funds, on the one hand, and gold and silver coins, on the other, flowed not from any taxable activity on the part of MyMail but from the Secretary of the Treasury's failure to comply with the requirement in 31 U.S.C. § 5119(a) that he "shall redeem gold certificates owned by the Federal reserve banks at times and in amounts the Secretary decides are necessary to maintain the equal purchasing power of each kind of United States currency", so as to meet the standard in 31 U.S.C. § 5117(b) that the value of gold "for the purpose of issuing [gold] certificates" shall be "42 and two-ninth dollars a fine troy ounce".

(iv) Under Generally Accepted Accounting Principles, MyMail had to factor in the amount of the currency conversion in order to reconcile its books. And therefore, MyMail was entitled to treat as an expense the discrepancy in "dollar" values created by the Secretary of the Treasury's default in his duties.

MyMail filed suit in the United States District Court for the Eastern District of Texas. The Commissioner moved for summary judgment. As to "the currency issue", the Commissioner argued that the "gold-clause contracts" were not to be valued at the aggregate face values in "dollars" of the coins the partners actually received, but at a higher value measured presumable by the aggregate value of Federal Reserve Notes for which the coins would exchange in the free market. The Commissioner identified no statute or regulation that authorizes him to assign to currently minted legal-tender United States gold and silver dollar coins any values in "dollars" other than the values actually stamped on those coins by order of Congress.

On 29 September 2011, the District Court granted the Commissioner summary judgment on the issue of "the currency expense".

On November 15, 2012, the United States Court of Appeals for the Fifth Circuit entered its order affirming the District Court. This Petition followed within 90 days pursuant to Rule 13; and the jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

SUMMARY OF THE ARGUMENT

I. a) Article I, Section 8, Clause 5 of the Constitution delegates to Congress the exclusive authority "[t]o coin Money, [and] regulate the Value thereof". This embraces the powers to set a standard of value and to declare the value of all forms of money in relation to that standard. The standard of value established by the Constitution and Congress is the "dollar". *See* U.S. Const. art. I, § 9, cl. 1 and amend. VII; 31 U.S.C. § 5101. On their faces, all forms of

United States coin and other currency are valued in some number of "dollars" or fraction thereof. The value as money of a particular United States coin or other type of currency is its face value in "dollars". A "dollar" in United States gold or silver coin is worth no more for the purpose of paying a debt than is a "dollar" in Federal Reserve Notes or other United States paper currency or base-metallic coin. Therefore, the monetary value of the contracts specifically payable to MyMail's partners in particular United States gold or silver legal tender coins is the aggregate face values in "dollars" of the coins actually paid, not the value of those coins measured in some other form of currency. *See Thompson* v. *Butler*, 95 U.S. 694, 696 (1878), doctrine applied in *Crummey* v. *Klein Independent School District*, No. 08-20133 (5th Cir. 2008). By authorizing the private ownership of gold (after 1973), the enforceability of private "gold-clause contracts" (after October 1977), and the minting of American Eagle gold and American Liberty silver coins (after 1985), Congress reinstated the type of dual monetary system that existed at the time of *Thompson*, and thus has both ratified that decision and authorized MyMail's partners to rely upon and invoke it.

The Commissioner enjoys no authority to set a standard of monetary value, or to declare the value of any form of United States money, different from what Congress has established. So the Commissioner cannot assign to the contracts specifically payable to MyMail's partners in particular United States gold or silver legal tender coins values different from the aggregate face values of those coins, by employing Federal Reserve Notes, some other form of United States coin or currency, or non-legal tender electronic

units as his own putative standard of monetary value.

b) Because MyMail in fact exchanged a higher aggregate nominal value of non-legal tender electronic units of 3,525,389 "dollars" for a lower aggregate face value of 375,675 "dollars" in American Eagle gold and American Liberty silver legal tender coins, which it distributed to its partners pursuant to "gold-clause contracts", the difference of 3,150,164 "dollars" must be accounted for according to Generally Accepted Accounting Principles ("GAAP") as an expense from the partnership's gross receipts, and MyMail is entitled to any tax or other business-related benefit that accrues from such accounting, because:

> (i) under GAAP MyMail had to reconcile this difference;
>
> (ii) this difference is the result, not of any actions on MyMail's part, but because of (i) Congress' regulation of the face values in "dollars" of Eagles and Liberties in contrast to Federal Reserve Notes, and (ii) the Secretary's failure to maintain parity in purchasing power between Federal Reserve Notes and coins as required by Title 31 U.S.C. § 5119(a).

II. The Commissioner has undertaken this improper action with unclean hands: The aggregate face value in "dollars" of the coins paid to the MyMail partners pursuant to their "gold-clause contracts" was less than the "dollar" value of those coins measured in non-legal tender electronic units only because the Commissioner's superior, the Secretary of the Treasury, has defaulted on his statutory obligation to "redeem gold certificates owned by the Federal

reserve banks at times and in amounts the Secretary decides are necessary to maintain the equal purchasing power of each kind of United States currency", with the result that the free-market exchange-rate of gold as against Federal Reserve Notes has risen above the statutory standard of "42 and two-ninth dollars a fine troy ounce", 31 U.S.C. §§ 5119(a), 5117(b), and 5116(a)(1); and similarly for silver, at the statutory standard of "$1.292929 a fine troy ounce". 31 U.S.C. § 5116(b)(2). Absent those defaults, the aggregate "dollar" value of the non-legal-tender electronic units (presumably solvable in Federal Reserve Notes) which MyMail exchanged for gold and silver legal tender coins for payment to its partners, and the coins' aggregate face value in "dollars", would have been then (and would be today) the same.

ARGUMENT

A. For all purposes, the value in "dollars" of each American Eagle gold and American Liberty silver coin is its face value set by Congress.

1. American Eagle gold and American Liberty silver legal tender coins are minted pursuant to statutes enacted in 1985 perforce of Congress' constitutional authority "[t]o coin Money, [and] regulate the Value thereof". 31 U.S.C. § 5112(a)(7) through (10) , *and* 5112(e), *enacted under aegis of* U.S. Const. art. I, § 8, cl. 5. They are therefore "lawful money". They are also specifically constitutional "currency", because the only use in the Constitution of a word related to "currency" is the reference to "current Coin of the United States". U.S. Const. art. I, § 8, cl. 6. More generally, they are "currency" because they are

"[c]oined money * * * authorized by law" which "in fact circulate[s] from hand to hand as the medium of exchange"—as in this case, when they circulated from MyMail to its partners as the exclusive media of exchange for their "gold-clause contracts". *See Black's Law Dictionary* (rev. 4th ed. 1968), at 458 ("currency"), 459 ("current money"). They are also designated "legal-tender". 31 U.S.C. §§ 5112(h) and 5103.

The statutes providing for American Eagle and American Liberty coins explicitly set their values at their face values. 31 U.S.C. § 5112(a)(7) ("[a] fifty dollar gold coin"), (a)(8) ("[a] twenty-five dollar gold coin"), (a)(9) ("[a] ten dollar gold coin"), (a)(10) ("[a] five dollar gold coin"); *and* 5112(e)(4) ("'One Dollar'" in silver). The coins announce their values on their faces. 31 U.S.C. § 5112(e)(4) ("have inscriptions of * * * the words * * * 'One Dollar'")(American Liberty); *and* 5112(i)(1)(B) ("have inscriptions of the denominations")(American Eagles). And no other statute sets any other values for these coins, or purports to delegate authority to anyone to set other values by regulation or otherwise. Therefore, the coins' values as "lawful money", "currency", and "legal tender" are their face values, and nothing else.

2. Today the United States has a "dual monetary system", consisting of: (i) gold and silver coinage; and (ii) Federal Reserve Notes and base-metallic coinage, which the United States refuses to redeem in gold or silver. *See* 31 U.S.C. § 5112(a)(7) through (10), (e), and (i); 12 U.S.C. § 411; 31 U.S.C. §§ 5112(a)(1) through (6), (b), (c), and (d); *and* 5118(b) and (c). No legal disability prevents Federal Reserve Banks from redeeming their notes in gold, though. *See* 12 U.S.C. § 354. However, those Banks, too, refuse to redeem their notes in gold or silver.

Different United States coins and other currency have different economic purchasing powers in the marketplace. For example, a "ten dollar" American Eagle gold coin or ten "One Dollar" American Liberty silver coins both buy far more than a "ten-dollar" Federal Reserve Note or "ten dollars" face value in base-metallic coin. This discrepancy, however, is irrelevant to their legal values as money. Applying *mutatis mutandis* the controlling case-law with respect to a "dual monetary system" and "gold clauses"—

> [T]he laws for the coinage of gold and silver [enacted in 1985] have never been repealed or modified. * * * And the emission of gold and silver coins * * * continues * * * .
>
> Nor have those provisions of law, which make these coins a legal tender in all payments been repealed or modified.
>
> It follows that there [a]re two descriptions of money in use * * *, both authorized by law, and both made legal tender in payments. The statute denomination of both description [i]s dollars; but they [a]re essentially unlike in nature. The coined dollar [i]s * * * a piece of gold or silver * * * . The [Federal Reserve Note i]s a promise to pay a coined dollar * * * . It [i]s impossible, in the nature of things, that these two dollars should be the equivalent of each other, nor [i]s there anything in the currency acts purporting to make them such * * * .
>
> If then, no express provision to the contrary be found in the acts of Congress, it is a just and necessary inference, from the fact that both descriptions of money were issued by the same

> government, that contracts to pay in either [a]re equally sanctioned by law. It is, indeed, difficult to see how any question can be made on this point. Doubt concerning it can only spring from that confusion of ideas which always attends the introduction of varying and uncertain measures of value into circulation of money. *Bronson* v. *Rodes,* 74 U.S. (7 Wallace) 229, 251-252 (1869).
>
> One owing a debt may pay it in gold coin or in legal-tender notes of the [Federal Reserve System], as he chooses, unless there is something to the contrary in the obligation out of which the debt arises. A coin dollar is worth no more for the purposes of tender in payment of an ordinary debt than a note dollar. The law has not made the note a standard of value any more than coin. It is true that in the market, as an article of merchandise, one is of greater value than the other; but as money, that is to say, as a medium of exchange, the law knows no difference between them. *Thompson* v. *Butler,* 95 U.S. 694, 696 (1878).

Cases such as *Bronson* and *Thompson* stated the law of the "dual monetary system" and "gold clauses" until 1933-1934. When Congress prohibited the private ownership of gold and declared "gold clauses" unenforceable, those cases became temporarily obsolete. *See Norman* v. *Baltimore & Ohio R.R.*, 294 U.S. 240, 300 (1935). However, they were *not* overruled. The private ownership of gold was permitted in 1973-1974. Act of 21 September 1973, Pub. L. 93-110, § 3, 87 Stat. 352, 352; Act of 14 August 1974, Pub. L. 93-373, § 2(b) and (c), 88 Stat. 445, 445. "Gold clauses" were allowed *post*-1978. Act of 28 October 1977,

Pub. L. 95-147, § 4(c), 91 Stat. 1227, 1229.[9] And the minting of American Eagle and American Liberty coins was authorized in 1985. Act of 9 July 1985, Pub. L. 99-61, Title II, 99 Stat. 113, 115; Act of 17 December 1985, Pub. L. 99-185, 99 Stat. 1177. At that point, *Thompson*, *Bronson*, and related cases once again provided the controlling legal standards—as the Fifth Circuit itself recognized when it relied on *Thompson* in *Crummey* v. *Klein Independent School District*, No. 08-20133 (5th Cir. 2008)[10].

On these points, the differences between the United States Treasury Notes at issue in *Bronson* and *Thompson* and Federal Reserve Notes work against the latter. Both were or are obligations of the United States, "legal tender", and irredeemable in gold or silver coin. But Treasury Notes were issued directly from the Treasury, whereas Federal Reserve Notes are "issued at the discretion of the Board of Governors of the Federal Reserve System". And Treasury Notes were designated "lawful money", whereas Federal Reserve Notes are to be "redeemed in lawful money" (and obviously cannot be the very things in which they are to be redeemed). *Compare and contrast* Act of 25 February 1862, ch. 33, § 1, 12 Stat.

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[9] The validity of gold clause contracts today has been upheld; *see Fay Corp.* v. *BAT Holdings I, Inc.*, 646 F. Supp. 946 (W.D.Wash. 1986), affirmed, *Fay Corp.* v. *Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990); *Wells Fargo Bank* v. *Bank of America*, 32 Cal.App.4th 424, 38 Cal.Rptr.2d 521 (1995); *Trostel* v. *American Life & Casualty Insurance Company*, 133 F.3d 679 (8th Cir. 1998); *Nebel, Inc.* v. *Mid-City National Bank*, 329 Ill. App.3d 957, 769 N.E.2d 45 (2002); and *216 Jamaica Ave.* v. *S & R Playhouse Realty Co.*, 540 F.3d 433 (6th Cir. 2008).

[10] A copy of *Crummey* appears at App. 27a to this brief.

345, 345; Act of 18 March 1869, ch. 1, 16 Stat. 1; *and New York* ex rel. *Bank of New York* v. *Board of Supervisors*, 74 U.S. (7 Wallace) 26, 30-31(1869), *with* 12 U.S.C. § 411 and 31 U.S.C. § 5118(b) and (c).

No decision of this Court has overruled *Thompson* or *Bronson*. So lower courts must follow these precedents "no matter how misguided the judges of those courts may think [them] to be". *Hutto* v. *Davis*, 454 U.S. 370, 375 (1982). MyMail is not aware that any modern lower-court case on any matter even tangentially related to "the currency expense" issue *sub judice* here (other than *Crummey*) has even cited *Thompson* or *Bronson*, let alone tried to apply or to distinguish them. Obviously, too, cases in any court decided from 1933 to 1978 are irrelevant here, because Americans could not enter into enforceable "gold-clause contracts" during that period. And cases decided from 1978 through 1985 are also beside the point, because the Treasury was not authorized to mint American Eagle gold and American Liberty silver legal tender coins before the latter date.[11]

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[11] MyMail presumes that the Commissioner will cite as "authorities" some or all of the following cases: *Norman* v. *Baltimore & Ohio Railroad Co.,* 294 U.S. 240 (1935); *Juilliard* v. *Greenman*, 110 U.S. 421 (1884); *Knox* v. *Lee*, 79 U.S. 457 (1871); *Sanders* v. *Freeman*, 221 F.3d 846 (6th Cir. 2000); *Schiff* v. *United States*, 919 F.2d 830 (2d Cir. 1990); *Zuger* v. *United States*, 834 F.2d 1009 (Fed. Cir. 1987); *United States* v. *Davenport,* 824 F.2d 1511 (7th Cir. 1987); *United States* v. *Condo*, 741 F.2d 238 (9th Cir. 1984); *Jones* v. *Commissioner*, 688 F.2d 17 (6th Cir. 1982); *United States* v. *Moore*, 627 F.2d 830 (7th Cir. 1980); *United States* v. *Ware*, 608 F.2d 400 (10th Cir. 1979); *United States* v. *Anderson*, 584 F.2d 369 (10th Cir. 1978); *United States* v. *Rifen*, 577 F.2d 1111 (8th Cir. 1978); *Mathes* v. *Commissioner*, 576 F.2d 70 (5th Cir. 1978); *United States* v. *Ellsworth,* 547 F.2d 1096 (9th Cir. 1976); *United States* v.

As the Fifth Circuit opined in *Crummey*, "'[b]y statute it is established that federal reserve notes, on an equal basis with other coins and currencies of the United States, shall be legal tender'", it must also be "'established'" that American Eagle and American Liberty coins are legal tender "'on an equal basis'" with Federal Reserve Notes. Slip Op. at 3, *quoting United States* v. *Wangrud*, 533 F.2d 495, 495 (9th Cir. 1976). So, "[a]s legal tender, a dollar is a dollar, regardless of the physical embodiment of the currency". *Id*.

B. The value in "dollars" of each of the MyMail partners' "gold-clause contracts" is the aggregate face value of the legal-tender United States gold or silver coins with which each of those contracts was paid.

1. As relevant here, "'gold clause' means a provision in or related to an obligation" which "give[s] the obligee a right to require payment in * * * a particu-

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Whitesel, 543 F.2d 1176 (6th Cir. 1976); *United States* v. *Gardner*, 531 F.2d 953 (9th Cir. 1976); *United States* v. *Scott*, 521 F.2d 1188 (9th Cir. 1975); *Milam* v. *United States*, 524 F.2d 629 (9th Cir. 1974); *United States* v. *Daly*, 481 F.2d 28 (8th Cir. 1973); *Linne* v. *Baker*, 1986 WL 9502, *aff'd,* 826 F.2d 129 (D.C. Cir. 1987); *Hellerman* v. *Commissioner*, 77 T.C. 1361 (1981). **None of these cases can be accepted as pertinent to the Commissioner's argument on the valuation of "gold-clause contracts" unless the Commissioner can show with specific references to the opinion *both* (i) that a case involved the actual use and valuation of such "gold-clause contracts" as are involved in this litigation, *and* (ii) that such case addressed and distinguished the holdings in *Thompson* and *Bronson* upon which MyMail relies**.

lar United States coin". 31 U.S.C. § 5118(a)(1)(B). Such "a particular United States coin" is the *only* "legal tender" for such a contract. "[E]xpress contracts to pay coined dollars can only be satisfied by the payment of coined dollars. They are not '*debts*' which may be satisfied by the tender of United States notes". *Bronson* v. *Rodes*, 74 U.S. (7 Wallace) 229, 254 (1869). Accord, *Butler* v. *Horowitz*, 74 U.S. (7 Wallace) 258, 260-261 (1869). *See Dewing* v. *Sears*, 78 U.S. (11 Wallace) 379, 380 (1870) (court judgment on a "gold-clause contract" must be "entered for coined dollars * * * instead of Treasury notes equivalent in market value"). So, because the value as "legal tender" of any "particular United States coin" is its face value in "dollars" as set by Congress, the value of such a "gold clause" must be the aggregate face value in "dollars" of the coins as required to be paid thereunder.

Any attempt by an executive agency or a court to "re-value" a "gold-clause contract" in terms of some United States coin or currency other than the "particular United States coin" in which the contract is payable, where such "re-valuation" results in a value in "dollars" more or less than the aggregate face value of the "particular United States coin" the contract specifies, thereby attempts to "[re-]regulate the Value" and change the "legal tender" character of that coin contrary to the determination of Congress. The power to "regulate the Value" of money and "to declare what is and what is not 'legal tender'", and at what value in "dollars" particular coins or other currency shall be taken, however, "lies with Congress and not the Courts" or any other governmental body. *See* U.S. Const. art. I, § 8, cl. 5, *and Linne* v. *Baker*, 1986 WL 9502, *aff'd*, 826 F.2d 129 (D.C. Cir. 1987).

MyMail's contracts specified that its partners would receive currently minted, legal-tender American Eagle or American Liberty coins. The legal-tender value of each of those coins is its face value in "dollars". Therefore, the value of each contract is the aggregate face values in "dollars" of the coins payable thereunder. That these happen to be gold "dollars" or silver "dollars", rather than paper "dollars", is of no matter. For "[a]s legal tender, a dollar is a dollar, regardless of the physical embodiment of the currency". *Crummey*, Slip Op. at 3.

2. The Commissioner's contrary contention is frivolous. This Court has described claims "so attenuated * * * as to be absolutely devoid of merit" in several ways: as "wholly insubstantial", "obviously frivolous", or "no longer open to discussion". *See Newburyport Water Co.* v. *Newburyport*, 193 U.S. 561, 579 (1904); *Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962); *Hannis Distilling Co.* v. *Baltimore*, 216 U.S. 285, 288 (1910); *Levering & Garrigues Co.* v. *Morrin*, 289 U.S. 103, 105 (1933); *McGilvra* v. *Ross*, 215 U.S. 70, 80 (1909). "A claim is insubstantial * * * if 'its unsoundness so clearly results *from the previous decisions of* ***this*** *court* as to foreclose the subject'". *Goosby* v. *Osser*, 409 U.S. 512, 518 (1973) (emphasis supplied). As explained above, "the previous decisions of *this* court" in *Thompson* and *Bronson* establish that, where "gold-clause contracts" are concerned, "[a] coin dollar is worth no more for the purposes of tender in payment of an ordinary debt than a note dollar. The law has not made the note a standard of value any more than coin." *Thompson*, 95 U.S. at 696. Inasmuch as the Commissioner cannot disprove that these decisions are controlling in MyMail's favor, his position is "wholly insubstantial".

3. Congress itself has approved every aspect of MyMail's use of "gold-clause contracts". When Congress re-authorized private "gold-clause contracts" in 1977, its Members knew the applicable law as stated in *Thompson, Bronson,* and other decisions of this Court. *See Cannon* v. *University of Chicago,* 441 U.S. 677, 696-697 (1979). Also, because Congress was fully aware of its own constitutional powers, it knew that it could effectively modify or overrule the holdings in those cases as to how such contracts should be valued in "dollars". *See Albernaz* v. *United States,* 450 U.S. 333, 341-342 (1981). *Yet Congress has never taken any such action*.

With the re-authorization of "gold-clause contracts" in 1977, Congress recreated essentially the same "dual monetary system" as existed during and after the Civil War. Congress then strengthened this system in 1985, by authorizing the minting of American Eagle gold and American Liberty silver coins as "legal tender" and "in quantities sufficient to meet public demand". *See* 31 U.S.C. § 5112(e), (h), and (i)(1). At both times (and ever since unto today as well), Congress knew that:

> (i) This dual system consists of paper currency not redeemable in gold or silver coin (United States Notes then, Federal Reserve Notes now) and United States gold and silver coins.
>
> (ii) Under this system, individuals can choose, through "gold-clause contracts", to employ United States gold and silver dollar coins as their media of payment to the exclusion of Federal Reserve Notes.
>
> (iii) As a matter of law, perforce of Congress' monetary statutes as applied in *Thompson,* the

value of a "gold-clause contract" is the aggregate face value of the coins involved.

(iv) As a matter of fact, equal face values of United States gold and silver legal tender coins and that of Federal Reserve Notes do not have equal purchasing powers in the marketplace. Therefore,

(v) Individuals who employ "gold-clause contracts" might obtain some tax benefits therefrom—*unless Congress enacted a statute preventing it, along the lines of a statute it enacted shortly after the Civil War, when America's first dual monetary system existed*. *See* Act of 13 July 1866, ch. 184, § 9, 14 Stat. 98, 147, *amending* Act of 10 March 1866, ch. 15, §§ 3 through 5, 14 Stat. 4, 5, *repealed by* Act of 14 July 1870, ch. 255, § 1, 16 Stat. 256, 256. *See Pacific Insurance Co.* v. *Soule*, 74 U.S. (7 Wallace) 433, 440-443 (1869). But,

(vi) No such statute was in force in 1977 or 1985. And Congress has enacted no such statute since then.

One may posit numerous, and compelling, reasons why Congress created and has maintained such a dual monetary system, including:

- to enable Americans, by increasingly employing gold and silver coin in preference to Federal Reserve Notes, to pressure the Federal Reserve System into adopting policies that would stop the depreciation of those notes relative to specie;
- to enable Americans to protect themselves financially against the consequences of the

Secretary of the Treasury's failure to perform his duty under 31 U.S.C. § 5119(a) to "redeem gold certificates owned by the Federal reserve banks at times and in amounts the Secretary decides are necessary to maintain the equal purchasing power of each kind of United States currency";

- to provide Americans with an alternative currency (and a set of market prices denominated in such currency) that could enable the markets to continue to function even if the Federal Reserve System should collapse in hyperinflation or depression; and
- to supply the several States and the United States with an alternative currency then in use by many Americans on the basis of which public business could be conducted even were the Federal Reserve System to collapse.

In any event, *the very existence of this dual monetary system, unrestricted by statute with respect to the calculation and payment of taxes, establishes that Congress has authorized and empowered Americans to employ that system to the maximum extent they desire and for the maximum benefit that it can afford them, even with respect to taxes*.

4. The Commissioner attempts to nullify Congress' dual monetary system by means of the selfsame contention this Court rejected in *Thompson*: namely, that the monetary value of a "gold-clause contract" must be expressed, not in terms of the contract's actual valuation (the aggregate face value in "dollars" of the United States gold or silver coins which the contract stipulates as its medium of payment), but in terms of a virtual valuation woven out of whole cloth

(the aggregate face value of the Federal Reserve Notes, which would exchange for those coins in the free market). Payment in United States gold or silver coin is the defining characteristic of one form of "gold-clause contract". 31 U.S.C. § 5118(a)(1)(B). The aggregate face value in "dollars" of such coins constitutes their total monetary value, as "regulate[d]" by Congress. *Compare* U.S. Const. art. I, § 8, cl. 5 *with Thompson*, 95 U.S. at 696. Therefore, such valuation is a necessary attribute of such a "gold-clause contract".

C. The Commissioner has no legal authority to set or alter the value of money regulated by Congress.

Even were "the currency exchange" issue treated *arguendo* as one of first impression, the Commissioner's case would collapse.

1. Congress alone enjoys the power to "regulate the Value" of "Money", and thereby to designate one form of "Money" as the standard of "Value" for all others. U.S. Const. art. I, § 8, cl. 5. No statute of Congress, however, explicitly directs that one form of United State coin or other currency is the unique standard by which the values in "dollars" of all other coins or currencies are measured, with respect to taxation or for any other purpose. Congress *could* enact such a statute—*but it has not done so for some one hundred forty-two years*. *See ante*, at page 21 para. (v).

2. The statutes providing for the minting of coins and the issuance of Federal Reserve Notes do not even suggest that those Notes could be the standard of value in the monetary system—

a. "United States money is expressed in dollars". 31 U.S.C. § 5101. So the "dollar" is the standard of value. *See* U.S. Const. art. I, § 9, cl. 1 *and* amend. VII, *definition of the "dollar" as used therein specified in* Act of 2 April 1792, ch. 16, §§ 9 and 20, 1 Stat. 246, 248, 250-251. *See Bronson* v. *Rodes*, 74 U.S. (7 Wallace) 229, 247-248 (1869); *United States* v. *Gardner*, 35 U.S. (10 Peters) 618, 621 (1836).

b. Various United States coins have been described as "dollars": Some of silver. Act of 2 April 1792, ch. 16, § 9, 1 Stat. 246, 248. Some of gold. Act of 3 March 1849, ch. 109, § 1, 9 Stat. 397, 397. And some of base metal. Act of 31 December 1970, Pub. L. 91-607, Title II, §§ 201 through 203, 84 Stat. 1760, 1768-1769. But only two have ever been declared to be the monetary unit or standard of value: 1) The constitutional silver "dollar". Act of 2 April 1792, §§ 9 and 20, 1 Stat. at 248, 250. And 2) the statutory gold "dollar". Act of 12 February 1873, ch. 131, § 14, 17 Stat. 424, 426; Act of 14 March 1900, ch. 41, § 1, 31 Stat. 45, 45; Act of 12 May 1933, ch. 25, § 43(b)(2), 48 Stat. 31, 52.

c. Federal Reserve Notes are denominated in "dollars", and declared to be a form of "United States * * * currency" that is "legal tender for all debts". 31 U.S.C. § 5103. But nowhere are those Notes themselves defined as being "dollars". Being "legal tender" "for all debts" denominated in "dollars" does not qualify Federal Reserve Notes as "dollars" – it merely allows those Notes to substitute for "dollars" in the payment of such debts.

d. Federal Reserve Notes are "obligations of the United States". 12 U.S.C. § 411. Like Treasury Notes, they are "securities". *See New York* ex rel. *Bank of New York* v. *Board of Suprevisors*, 74 U.S. (7 Wallace) 26, 30-31 (1869). "Dollars", distinguishably, are "money", not instruments of debt. 31 U.S.C. § 5101.

e. Federal Reserve Notes are to be "redeemed in lawful money". 12 U.S.C. § 411. Plainly, the Notes cannot be identical with the things that redeem them. Therefore, Federal Reserve Notes are not even "lawful money".

f. The Federal Reserve Act of 1913 mandated that Federal Reserve Notes "shall be redeemed in gold on demand at the Treasury Department * * * or in gold or lawful money at any Federal reserve bank". Act of 23 December 1913, ch. 6, § 16, ¶ 1, 38 Stat. 251, 265. At that time, "the dollar consisting of twenty-five and eight-tenths grains of gold nine-tenths fine * * * [was] the standard unit of value". Act of 14 March 1900, ch. 41, § 1, 31 Stat. 45, 45. Nothing in the 1913 legislation suggested that the Federal Reserve Note superseded gold in that capacity. In 1934, redemption of Federal Reserve Notes in gold was terminated. Act of 30 January 1934, ch. 6, § 2(b)(1), 48 Stat. 337, 337. But nothing in that legislation suggested that the Federal Reserve Note thus became the unit of value. Rather, on 31 January 1934, President Roosevelt proclaimed a new weight for the gold "dollar" of 15-5/21 grains, nine-tenths fine. Presidential Proclamation No. 2072, 48 Stat. 1730. Subsequently, that weight was reduced to 11.37 grains of fine gold (42-2/9 "dollars" *per* ounce), where it remains

today. Act of 21 September 1973, Pub. L. 92-110, § 1, 87 Stat. 352, 352. *See* 31 U.S.C. § 5117(b).

g. Federal Reserve Notes are analogous to legal-tender United States Treasury Notes. When the latter were first issued, this Court ruled that "[t]he legal tender acts do not attempt to make paper [*i.e.,* Treasury Notes] a standard of value. * * * It is, then, a mistake to regard the legal tender acts as either fixing a standard of value or regulating money values, or making that money which has no intrinsic value." *Knox* v. *Lee*, 79 U.S. (12 Wallace) 457, 553 (1871) (Strong, J., for the Court). Everyone knew that those Acts were "not an attempt to coin money out of a valueless material * * *. It is a promise by the government to pay dollars; it is not an attempt to make dollars. The standard of value is not changed." *Id*. at 560 (Bradley, J., concurring). That being true for Treasury Notes, which were declared to be *both* "lawful money and a legal tender in payment of all debts, public and private", it must be doubly true for Federal Reserve Notes, which have been declared to be "legal tender" but never "lawful money". *Contrast* Act of 25 February 1862, ch. 33, § 1, 12 Stat. 345, 345 *with* 12 U.S.C. § 411 and 31 U.S.C. § 5103.

3. The Commissioner lacks authority to designate Federal Reserve Notes (or any other currency) as the unique monetary standard of value.

a. The Constitution delegates exclusively to Congress the power "[t]o coin Money, [and] regulate the Value thereof". U.S. Const. art. I, § 8, cl. 5.

b. If Congress could delegate the power to "regulate * * * Value" to the Commissioner (or anyone else in the Executive Branch) for the purpose of assigning monetary values to one form of United States coin or other currency measured in some other form, it has not done so. *A fortiori*, the Secretary of the Treasury has promulgated no, and could not promulgate any, regulation to that effect pursuant to such a nonexistent statute.

c. If Congress could delegate the power to "regulate * * * Value", *a specific statutory delegation* would be necessary in order to establish *an objective standard* by which someone in the Treasury could perform such a valuation, and a reviewing court could then determine that the valuation was proper. Here, though, no such statute or standard exists. Is the Treasury to select as the standard of value a particular coin or currency, irrespective of its purchasing power—and if so, which coin or currency is that? Or, is the Treasury to select the coin or other currency of the least purchasing power (Federal Reserve Notes) or of the most purchasing power (gold American Eagles)? Or is the Treasury to select a coin or currency based upon its physical substance—that is, gold, silver, base metals, or paper? In this case, the Commissioner contends that Federal Reserve Notes, which are denominated in "dollars", should be used as the unique standard of monetary value of all other coins and currencies, which are denominated in "dollars". Yet the Commissioner cannot explain why American Eagle gold coins, or American Liberty silver coins, which are not simply valued in "dollars" but are *actually* "dollars", should not

be the standards of value for contracts specifically payable therein. Plainly, the Commissioner claims that the Treasury may arbitrarily set *its own* standard, without reference to anything commanded by Congress, because Congress has commanded nothing on that score. This would be unconstitutional even if a statute purported to authorize it, because "Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard". *United States* v. *Chicago, M., St. P. & P. R. Co.,* 282 U.S. 311, 324 (1931). And even if the purported delegation without standards were to the President himself. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935); *William Jefferson Clinton, President of the United States* v. *City of New York*, 524 U.S. 417, 465 (1998).

d. There being no statute purporting to authorize the Treasury to declare an unique monetary standard of value for the purposes of taxation (or otherwise), no valid regulation purporting to do so is possible. And the Commissioner can identify no such regulation at all. Thus devoid of authority derivable from the Constitution, a statute, a Treasury regulation, or any decision of this Court, the Commissioner's position is truly *lawless*.

4. At base, the Commissioner's only argument is that, even absent authorization in statute and regulation, and in the face of contrary decisions from this Court, using Federal Reserve Notes as the unique standard of monetary value for purposes of taxation is permissible because it maximizes nominal tax-receipts with respect to transactions conducted in

United States gold and silver coins.[12] The Commissioner, however, lacks authority to disregard statutes and judicial decisions in order to maximize taxes. Rather, every American enjoys the right to minimize his taxes through whatever lawful means Congress has provided.

> **a.** "In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt, they are construed most strongly against the government and in favor of the citizen." *Gould* v. *Gould*, 245 U.S. 151, 153 (1917). *Accord, Miller* v. *Standard Nut Margarine Co.,* 284 U.S. 498, 508 (1932). An errant "administrative construction adopted by the Treasury Department" affords no exception to this rule. *United States* v. *Field*, 255 U.S. 257, 262 (1921); *United States* v. *Calamaro,* 354 U.S. 351, 358-359 (1957). To be sure, presumably Congress intends for the Treasury to maximize revenue from application of the tax laws. "[B]ut a general intention of this kind must be carried into language which can be reasonably construed to effect it. Otherwise the intention cannot be enforced by the courts." *Smietanka* v. *First Trusy & Savings Bank*, 257 U.S. 602, 606 (1922). *Accord, Calamaro,* 354 U.S. at 357. So, if such an

[12] Even this otherwise inadmissible argument is faulty, because if the Commissioner required taxpayers who employed "gold-clause contracts" to calculate and pay taxes with respect to those contracts in gold or silver coin, the *real* returns to the Treasury would likely be greater than if those taxes were calculated and paid in Federal Reserve Notes.

intention were to be effectuated by a special rule for valuing contracts payable in United States gold and silver coin, it would require statutory "language which can be reasonably construed to effect it". *No such language exists*. Therefore, there is nothing to "extend * * * by implication" or through "administrative construction".

b. As pointed out above, in Congress' monetary statutes the word "dollar" has a long-settled meaning, *equally applicable to* ***all*** *forms of United States coin and other currency*. Within the present dual system of gold and silver coin on the one hand, and paper currency and base-metallic coin on the other, *no* form of coin or currency has been designated by Congress as the unique standard of value or the only "dollar". *See Bronson* v. *Rodes,* 74 U.S. (7 Wallace) 229, 251-252 (1869); *and Thompson* v. *Butler,* 95 U.S. 694 (1878). And paper notes have never been declared by Congress to be a, let alone the, standard of monetary value. *See Knox* v. *Lee*, 79 U.S. (12 Wallace) 457, 553 (1871). Therefore, notwithstanding that "taxation is a practical matter, and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms or expressions", when the word "dollar" is imported "in[to] statutes levying taxes, the literal meaning of th[at] word[ ] * * * is most important, for such statutes are not to be extended by implication beyond the clear import of the language used". *See United States* v. *Merriam*, 263 U.S. 179, 187-188 (1923). In point of fact and law, nothing can be implied from the word "dollar" in the relevant statutes other than, for example, that an American Liberty silver coin *is* "One Dollar", a one-ounce American Eagle gold

coin *is* "fifty dollars", and a "one dollar" Federal Reserve Note is *not* itself a "dollar" but is to be redeemed with "lawful money" at the value of "one dollar", 31 U.S.C. § 5112(a)(7)-(10) and (e)(4); 12 U.S.C. § 411. And that being the *only* sense in which Congress has used the word, the Commissioner must use it only in that sense, too.

c. As explained above, even if a statute appeared to delegate to the Treasury the arbitrary license to set up an unique monetary standard of value for purposes of taxation, that statute would be at least arguably unconstitutional. Therefore, "[d]oubts of the constitutionality of the statute, if construed as contended by the government, would require [the courts] to adopt the [contrary] construction [that is] at least reasonably possible". *Reinecke* v. *Northern Trust Co.,* 278 U.S. 339, 348-349 (1929). How much worse is the situation when *no statute at all* provides the Treasury with even colorable authority?

Absent a statute setting forth some objective standard with respect to the determination of monetary value, and regulations that conform thereto, Americans who employ "gold-clause contracts" will be uncertain as to their potential tax liabilities. But "'[t]ax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them.'" *White* v. *Aronson*, 302 U.S. 16, 20-21 (1937). Moreover, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law". *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). If the Commissioner simply

followed the monetary statutes Congress has enacted, and this Court's applications thereof, no problem would arise. But the Commissioner obstinately denies that these statutes and decisions are controlling. Yet, on the other hand, neither statute nor regulation authorizes or instructs the Commissioner as to setting a standard of monetary value for tax purposes. And no decision of this Court has ever even suggested that the Commissioner may exercise such a power. So the purported rule of tax law the Commissioner asserts here is not simply "unintelligible" or "vague"—rather, it is utterly *nonexistent*. If a merely vague statute "violates the first essential of due process of law", what must be the constitutional demerits of a nonexistent one?

Thus, the Commissioner's position that MyMail is not entitled to whatever business advantage can be had through application of GAAP to "the currency discrepancy" rests on six inadmissible contentions:

> (i) That, with respect to United States gold and silver coin, the Commissioner may treat as a nullity the statute which declares that "United States money is expressed in dollars". 31 U.S.C. § 5101.
>
> (ii) That the Commissioner may treat as nullities the statutes in which Congress has "regulate[d] the Value[s]" of United States gold and silver coins in certain fixed numbers of "dollars". *See* U.S. Const. art. I, § 8, cl. 5; *and* 31 U.S.C. § 5112(a)(7) through (10), (e), and (i).
>
> (iii) That the Commissioner may treat as nullities the statutes in which Congress has declared United States gold and silver coins to be "legal tender", equally with Federal Reserve Notes. 31 U.S.C. §§ 5103, 5112(h).

(iv) That, with respect to the disqualification of Federal Reserve Notes as actual "money" on an equal plane with United States gold and silver coin, the Commissioner may treat as a nullity the statute which defines Federal Reserve Notes as "obligations of the United States", and requires that "[t]hey shall be redeemed in lawful money". 12 U.S.C. § 411.

(v) That the Commissioner may treat as a nullity the statute which authorizes MyMail and its partners to make "gold-clause contracts". 31 U.S.C. § 5118(a) and (d)(2). And,

(vi) That the Commissioner may treat as a nullity the controlling decision of this Court in *Thompson* v. *Butler,* which holds that the monetary value of a "gold-clause" obligation is the aggregate face value of the coins to be paid.

In the final analysis, the Commissioner forges this concatenation of absurdities in order to assist the Secretary of the Treasury in continuing to refuse "to maintain the equal purchasing power of each kind of United States currency". Because if parties such as MyMail and its partners can be deterred by bogus tax penalties from employing United States gold and silver coin in preference to Federal Reserve Notes as an economic "check and balance" against the Secretary's malfeasance, that malfeasance may go on indefinitely, until Federal Reserve Notes are finally consumed in the fires of hyperinflation.

On the other hand, a ruling for MyMail will firmly establish that "check and balance" as a means by which common Americans, in pursuit of their own financial security, can apply economic pressure to the Secretary of the Treasury and the Federal Reserve

System to comply with the requirement imposed by Congress "to maintain the equal purchasing power of each kind of United States currency".

CONCLUSION AND PRAYER FOR RELIEF

On the basis of the foregoing, MyMail prays that this Court grant its Petition for Certiorari.

Respectfully Submitted,

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February __, 2013

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed November 15, 2012]

No. 11-41311
c/w No. 12-40908

MYMAIL LIMITED, A TEXAS LIMITED PARTNERSHIP,
Plaintiff-Appellant,

v.

COMMISSIONER OF THE INTERNAL REVENUE SERVICE,
Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Texas
USDC No. 6:09-CV-273

Before STEWART, Chief Judge, GARZA, and ELROD, Circuit Judges.

PER CURIAM:[*]

Plaintiff MyMail appeals the district court's grant of summary judgment for the Commissioner of the Internal Revenue Service ("Commissioner") and the district court's denial of MyMail's motion to supple-

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[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

ment the record on appeal. The district court found there was no genuine issue of material fact and held the United States was entitled to judgment as a matter of law. The district court denied MyMail's motion to supplement the record on appeal. For the following reasons, we AFFIRM.

The Commissioner sent a Notice of Final Partnership Administrative Adjustment ("FPAA") to MyMail (a limited partnership), adjusting partnership-level items on MyMail's 2005 income tax return. In the FPAA, the Commissioner increased MyMail's gross receipts by $4,457,054, that portion of a $11,300,000 settlement paid directly to MyMail's attorneys as a contingency fee that MyMail did not report as income.[1] The Commissioner also rejected MyMail's currency fee deduction, which MyMail claimed based on the difference between the face value and market value of coins distributed to its partners. MyMail filed a timely petition in the district court objecting to both of the Commisioner's changes to MyMail's partnership return, arguing it was entitled to two deductions from its $11,300,000 settlement: $4,457,054 for attorney's fees and $3,150,164 for currency fees.

The parties then filed cross motions for summary judgment. MyMail and the Commissioner both represented to the court that there were no material facts in dispute. After mediation the parties submitted an Agreed Partial Judgment to the Court on the attorney's fee issue, agreeing the computational adjustment would be zero for the attorney's fee issue. The

[1] The Commissioner contends the proper tax treatment would have been to report the entire $11,300,000 in gross receipts and then to claim as a business expense the $4,457,054 in attorney's fees. I.R.C. § 162(a) (2006).

parties then submitted the remaining issue through summary judgment.

In support of its motion for summary judgment the Commissioner submitted five exhibits, all authenticated in an affidavit by its own trial counsel: (1) MyMail's 1065 Form reporting as its gross receipts only the net of the litigation proceeds, (2) a copy of wire transfer records showing the transfer of $11,300,000 in litigation proceeds to MyMail (3) MyMail's amended 1065 Form including MyMail's deduction for the "currency fee," (4) the FPAA issued to MyMail for the 2005 tax year, and (5) e-mail correspondence between counsel for the Commissioner's and MyMail's counsel. The Commissioner's trial counsel represented the first four items all came from "IRS administrative files." MyMail did not object to the admission of these exhibits as evidence.

The district court granted summary judgment for the Commissioner on the currency fee issue. MyMail appealed and filed a motion to supplement the record on appeal with the district court. MyMail sought to supplement the record with "gold clause contracts" related to the claimed currency fee deduction. The district court denied MyMail's motion to supplement the record on appeal. MyMail moved for reconsideration of the district court's denial of its motion to supplement the record on appeal. In its motion for reconsideration, MyMail stated there were no factual issues in dispute and the sole issue in dispute was whether MyMail was entitled to a currency fee deduction. In its motion, MyMail submitted the following facts:

> MyMail is a limited partnership established pursuant to Texas law. The Defendant Commissioner ("CIR") asserts, with agreement from

> MyMail, that in 2005, MyMail settled a patent infringement case with Internet service provider AOL, and the phone companies of AT&T and Verizon. The total amount of this settlement, $11,300,000, was paid to MyMail's patent litigation counsel, a Dallas law firm named McKool Smith. That law firm received a contingency fee of $4,457,054 for representing MyMail in that litigation, and distributed the sum of $6,842,946 by wire transfer to MyMail's bank.

The district court denied MyMail's motion for reconsideration of its order denying MyMail's motion to supplement the record on appeal.

MyMail also filed a motion to supplement the record on appeal with this court. The Commissioner filed an opposition and we denied that motion. During the pendency of its first appeal, MyMail filed a second appeal contending the district court erred in denying MyMail's motion to supplement the record in the first appeal. The Commissioner filed a motion for summary affirmance in the second appeal, and requested the motion be submitted along with the panel in the first appeal. We issued an order consolidating MyMail's second appeal with the first appeal. Therefore, both appeals are now before us.

We review the grant of summary judgment *de novo*, applying the same standard as the district court. *Stotter v. Univ. of Texas at San Antonio*, 508 F.3d 812, 820 (5th Cir. 2007). We construe facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *Id.* A party is entitled to summary judgment only if the evidence in the record shows that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. FED.

R. CIV. P. 56(c). We review a district court's denial of a motion to supplement the record on appeal under the abuse-of-discretion standard. *Performance Autoplex II Ltd. v. Mid-Continent Cas. Co.*, 322 F.3d 847, 854 (5th Cir. 2003).

The only substantive issue on summary judgment was the allowability of MyMail's claimed currency fee deduction. On appeal MyMail does not challenge the court's ruling on the merits; therefore MyMail waived its right to appellate review of that issue and we do not address it here. *Succession of McCord v. Comm'r.*, 461 F.3d 614, 623 n.17 (5th Cir. 2006) (citation omitted) ("[A] party who fails to raise an issue in its brief waives the right to appellate review of that issue"). Even assuming MyMail had not waived its right to appeal the merits of the currency fee deduction issue, courts have long held that such arguments are frivolous. *See*, *e.g.*, *Mathes v. Comm'r*, 576 F.2d 70, 70-71 (5th Cir. 1978) (citing *Juilliard v. Greenman (The Legal Tender Cases)*, 110 U.S. 421, 448 (1884)) (holding attempt of taxpayers to reduce their reported income by approximately 40% based on statutes defining the United States dollar as either a specific weight of gold or silver coin was not lawful method for taxpayers to reduce their tax liability).

MyMail's central contention is that the district court erred in granting summary judgment to the Commissioner because the exhibits the Commissioner attached to its motion for summary judgment were improperly authenticated. *See* FED. R. CIV. P. 44; FED. R. EVID. 902. Because MyMail raises this objection for the first time on appeal, MyMail must show the district court's admission of the exhibits was plain error. *Puckett v. United States*, 556 U.S. 129, 135 (2009). To succeed on plain error review

MyMail must show (1) the district court made an error (2) that is clear and obvious (3) that affects appellant's substantial rights (4) we should exercise our discretion to correct the error because the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

The Commissioner does not allege the exhibits were properly authenticated. The Commissioner instead contends plain error review is irrelevant and unnecessary because the disputed exhibits merely provided underlying documentation for undisputed facts. The Commissioner maintains sufficient evidence corroborating the disputed exhibits exists in the attachments to MyMail's petition, MyMail's motion to supplement the record, and the district court's order entering an agreed partial judgment, to make MyMail's plain error allegation irrelevant.

Even if the district court committed an obvious error by admitting the Commissioner's summary judgment exhibits, we hold the error did not affect My Mail's substantial rights because it did not affect the outcome of the proceedings. *See Puckett*, 556 U.S. at 135. MyMail alleges the district court could not have granted summary judgment for the Commissioner but for the claimed error. MyMail repeatedly represented to the district court, however, that there is no issue of material fact in dispute and the only issue in dispute is a legal one: whether MyMail is entitled to a "currency fee" deduction. MyMail cites *Portillo v. Comm'r.*, 932 F.2d 1128 (5th Cir. 1991) for the proposition that IRS forms are insufficient to prove the receipt of business income in tax court proceedings, but unlike in that case the facts regarding MyMail's receipt of business income are not in dispute. Because MyMail does not allege any of the

information in the Commissioner's summary judgment exhibits is false or untrustworthy, remanding this case to the district court to require the Commissioner to authenticate the summary judgment exhibits would not change the outcome of the proceedings. As such, MyMail failed to show the error affected its substantial rights or that we should correct the error.

Because the "gold clause contracts" MyMail seeks to supplement the record with are not relevant to our disposition of the appeal, we hold the district court did not abuse its discretion by denying MyMail's motion to supplement the record on appeal.[2]

For these reasons, we AFFIRM.

[2] After we entered an order consolidating both appeals, MyMail filed a motion to file an opening brief to address its motion to supplement. Because we have disposed of the consolidated appeal in this opinion, we DENY that motion as moot.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

[Filed 09/29/11]

Civil No. 6:09-CV-273

MYMAIL LTD., A TEXAS LIMITED PARTNERSHIP,
Plaintiff,

v.

UNITED STATES (COMMISSIONER OF
INTERNAL REVENUE SERVICE),
Defendant.

AGREED FINAL JUDGMENT

At a hearing held on September 22, 2011, the parties submitted an Agreed Partial Judgment to the Court on the attorney's fee issue which stated:

> The United States concedes that the Final Partnership Administrative Adjustment should be reduced by $4,457,054 since that amount was paid to attorneys in a patent infringement case involving the Plaintiff and is allowed as a deduction from income to the partnership. As a result of this partial concession, the computational adjustment to be made at the partner level resulting from the attorney's fee issue as set out in the FPAA dated March 23, 2009, shall be zero.

The Court directed that it would enter the Agreed Partial Judgment, which was electronically filed with the Court on September 22, 2011.

On September 22, 2011, the Court also heard oral arguments on the United States' Motion for Summary Judgment ("Motion") (Dkt. 29). The Court determined that the United States' Motion should be granted. Pursuant to the Court's ruling, the parties submit this Final Judgment, which resolves all issues in this case. Therefore, it is hereby

ORDERED that MyMail, Ltd. is not entitled to a "currency fee" deduction in the amount of $3,150,164, or any other amount, for the plaintiff's 2005 tax year.

All other relief is denied.

So ORDERED and SIGNED this 28th day of September, 2011.

/s/ Leonard Davis
Leonard Davis
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

———

DOCKET NO. 6:09cv273

Tyler, Texas
9:00 a.m.
September 22, 2011

———

MYMAIL, LTD

-vs-

COMMISSIONER OF THE INTERNAL REVENUE SERVICE

———

TRANSCRIPT OF PRETRIAL CONFERENCE
BEFORE THE HONORABLE LEONARD DAVIS,
UNITED STATES DISTRICT JUDGE

APPEARANCES

FOR THE PETITIONER:

MS. JUDITH STREET
LAW OFFICES OF JUDITH STREET
5904 S. Cooper, Ste. 104-189
Arlington, Texas 76017

FOR THE DEFENDANT:

MS. MICHELLE JOHNS
DEPARTMENT OF JUSTICE
717 N. Harwood, Ste. 400
Dallas, Texas 75201

FOR THE MOVANT:

MR. DONALD P. LAN, JR.
12221 Merit Dr., Ste. 825
Dallas, Texas 75251

COURT REPORTER:

MS. SHEA SLOAN
211 West Ferguson
Tyler, Texas 75702

Proceedings taken by Machine Stenotype; transcript was produced by a Computer.

[2] PROCEEDINGS

THE COURT: Please be seated.

All right. Ms. Ferguson, if you will call the first case.

THE CLERK: Court calls Case No. 6:09cv273, MyMail Ltd., A Texas Limited Partnership v. Commissioner of the IRS.

THE COURT: Announcements.

MS. STREET: Good morning, Your Honor. Judith Street for MyMail, Ltd.

THE COURT: If you will please stand. Thank you.

MR. LAN: Don Lan, Your Honor, for Robert Derby.

MS. JOHNS: Your Honor, I'm Michelle Johns representing the United States.

THE COURT: All right. We are here on a pretrial, but I think the threshold matter – I believe y'all resolved a big part of this through mediation before Judge Guthrie; is that correct?

MS. STREET: Yes, Your Honor. We have a revised proposed partial judgment to present, that everyone has agreed upon.

THE COURT: Okay. Everybody has agreed upon it?

MS. STREET: Yes.

THE COURT: If you will hand it up and let me take a look at it, please.

(Document given to the Court.)

[3] THE COURT: All right. Very well. So that issue has been resolved. And have you submitted this electronically or just in this form?

MS. JOHNS: We have not submitted it yet electronically.

THE COURT: Okay. If you will submit it electronically, I will go ahead and enter that partial judgment. I believe that disposes of all of the issues except I believe it is a currency issue; is that correct?

MS. STREET: That's correct, Your Honor.

THE COURT: All right. And that has been teed up by cross – well, by the United States' motion for summary judgment, and then plaintiff has filed a cross-motion for summary judgment on that issue. Is that correct?

MS. STREET: That's correct, Your Honor.

THE COURT: Okay. And then there is – the Government has filed a motion to strike that. Is that correct?

MS. STREET: They filed a motion for summary judgment out of time, but that was based on this

attorneys' fee issue. So since we resolved that, that is probably moot.

THE COURT: So your motion to strike late filed motion for summary judgment, Docket No. 47 is now moot; is that correct?

MS. STREET: Part of the motion for summary judgment [4] dealt with the currency, but it was also contained in Ms. John's motion for summary judgment, so I think we have an argument about –

THE COURT: Then I will deny plaintiff's motion to strike as moot. Then plaintiff's motion for summary judgment and brief in support thereof, Docket No. 45, that dealt with the settlement amount, as well as the currency issue. But you are saying you can just address the currency issue in response to their motion for summary judgment?

MS. STREET: That's correct, Your Honor.

THE COURT: So are you withdrawing your cross-motion for summary judgment and brief in support thereof, Docket No. 45?

MS. STREET: Yes, Your Honor.

THE COURT: Okay. All right. That will be denied then as moot. So the issues are all then keyed up.

And, let's see, plaintiff's motion for enforcement of mediated settlement agreement, Docket No. 32, is also denied as moot in light of the announcements made here today.

That leaves us with the United States' motion for entry of partial judgment, Docket No. 30.

And do both sides agree that this is strictly a legal question for the Court to decide?

MS. JOHNS: Your Honor, I think that issue is now moot, since we have agreed on this partial judgment.

[5] THE COURT: Okay. That is the wrong one. Excuse me. Which one tees up the currency issue? That is the United States' motion for summary judgment and brief in support thereof, Docket No. 29, right?

MS. JOHNS: That's right.

MS. STREET: That's correct.

THE COURT: Yeah, that is the only live motion still pending, right?

MS. STREET: Yes, Your Honor.

THE COURT: Do both sides agree that the Court's disposition of that will dispose of all issues in this case?

MS. STREET: Yes.

MS. JOHNS: Yes, Your Honor, that's correct.

THE COURT: Okay. So there are no fact issues that the Court needs to decide –

MS. STREET: No.

THE COURT: – or anybody needs to decide?

Okay. All right. The Court will hear from the United States first with regard to that motion for summary judgment, and then I will hear from the plaintiff. If you would like to go to the podium over here – or either – over there. Either place is fine.

MS. JOHNS: Your Honor, I'm not sure I'm going to be able to articulate their argument as well as they will be able to, but the United States considers

their argument on the [6] currency fee deduction a frivolous one.

They filed an amended partnership return, basically taking the income they reported on their initial return and reducing it by quite a bit based on a currency issue that they claim has to do with the value of gold; and that they got paid based on the settlement in the – as a result of the attorneys' fees. They got 11 million dollars in settlement on a patent litigation from AOL, Verizon, and AT&T.

And they claim, I think, that they were paid not in currency or Federal Reserve Notes but in gold and silver. And so they claim they should be able to reduce their income on this amended return, based on this idea that the Federal Reserve Note is not legal tender, and they didn't get paid in Federal Reserve Notes, they got paid in –

THE COURT: So they are claiming the face amount of the gold and silver that they contend they were paid in?

MS. JOHNS: Yes.

THE COURT: As opposed to what you consider the fair market value of the gold or the value of the settlement?

MS. JOHNS: They got paid in Federal Reserve Notes, which is legal tender. That is the amount that should be included in income. There were numerous taxpayers, numerous cases that tried to argue about the gold standard –

THE COURT: Were they paid in Federal Reserve Notes?

MS. JOHNS: Yes. We attached wire transfer exhibits [7] to our motion for summary judgment showing

that they were paid in U.S. dollars, which is Federal Reserve Notes. I don't think that AT&T, Verizon, and AOL paid MyMail in gold and silver bullion.

THE COURT: Thank you.

Response?

MS. STREET: Good morning, Your Honor. The argument that MyMail makes with regard to the currency issue is based on the fact that they were actually paid and had contracts for gold and silver payment of money rather than in Federal Reserve Notes.

THE COURT: Paid by who?

MS. STREET: The settlement plaintiffs – I mean the settlement defendants in the litigation –

THE COURT: So AOL paid you in gold and silver as opposed to currency?

MS. STREET: Well, it went through the attorneys that represented MyMail at the time, which were McKool Smith. And the entire amount of money was distributed to them.

THE COURT: Okay. The entire amount of money was distributed to them by wire transfer?

MS. STREET: Correct. And then the partners themselves were paid in, as pursuant to the contracts that they had signed with the partnership, they were paid in gold and silver coin.

[8] THE COURT: Okay. So to be sure I understand correctly, MyMail's contract with McKool Smith called for them to be paid in gold and silver coins?

MS. STREET: The partners in contracts with MyMail, Ltd.

THE COURT: Oh, okay.

MS. STREET: Called for them to be individually paid when the income was distributed, in gold and silver.

THE COURT: The individual partners?

MS. STREET: Correct.

THE COURT: But MyMail, Ltd. was paid by wire transfer?

MS. STREET: I believe that is correct.

THE COURT: In currency, right?

MS. STREET: In what is called the U.S. dollar, yes.

THE COURT: Okay. And whose tax return is in dispute here, MyMail, Ltd., or the individual partners?

MS. STREET: MyMail, Ltd. They filed an amended return in order to produce a return for which K-1's could then be issued to the individual partners.

THE COURT: I'm sorry?

MS. STREET: I'm sorry. They filed an amended return; and then based on the amended return, each individual partner, of course, was then issued K-1's.

THE COURT: Right. They received, you are saying, [9] gold and silver –

MS. STREET: In order to pay the partners in gold and silver, yes.

THE COURT: From MyMail?

MS. STREET: Yes.

THE COURT: So MyMail, the Limited Partnership, went out and converted the 7 or 8 million dollars that

the partners were to receive, to gold and silver and then paid the partners?

MS. STREET: Correct.

THE COURT: Okay. All right. Go ahead.

MS. STREET: And based on the Crummey case, that is an unpublished opinion with the Fifth Circuit, it is MyMail's position that the Government must take the gold and silver coin at face value rather than at market value.

The Crummey case involved someone that was trying to pay their property taxes and attempted to do so with coinage, gold coin. The taxing authority gave it the same value that it had on its face rather than its market value and would not – and the Fifth Circuit upheld that decision.

So on that basis, on the one hand the Government wants to say it has market value. On the other hand, it has an opinion that says the coin is worth what it says on its face.

And on that basis, the currency deduction from the [10] return is correct because it is reducing the value from what they actually received to what they actually received, which is the face value of the coin rather than its fair market value because they we were not attempting to sell the coin. They were receiving it in payment as per the contracts that were executed with the partnership.

And in light of the Crummey case, the Government cannot take an opposing position to benefit it on one hand and then not benefit it on the other.

THE COURT: Who was the taxing authority in the Crummey case?

MS. STREET: Klein Independent School District.

THE COURT: All right. Thank you. Anything further?

MS. STREET: Pardon me?

THE COURT: Anything further?

MS. STREET: No, Your Honor, that's it.

THE COURT: Thank you.

Response?

MS. JOHNS: Your Honor, MyMail took what was originally 6.8 million dollars of income and reduced it based on this, what we would consider a very frivolous argument, to about $729,000 on their amended return based on this gold/currency argument.

I have cited numerous cases in my brief where [11] taxpayers have tried the same, if not very similar, tactics. You know, I could go through them all for you; but in the Linne case, Congress has delegated the power to establish a national currency to the Federal Reserve.

Congress has made the Federal Reserve Note the measure of value under a monetary system and has defined Federal Reserve Notes as legal tender for taxes.

The Hellermann case states that Congress has the power and authority to establish the dollar as a unit of legal value with respect to the determination of taxable income.

Norman v. Baltimore holds Congress has broad and comprehensive power to regulate the value of currency and create a unitary currency.

Congress can choose a uniform monetary system and reject a dual system with respect to all obligations.

In the Mathes case, which I cited, which is a Fifth Circuit case, taxpayers try to do something very similar where they file an amended return –

THE COURT: What is your response to the Crummey case?

MS. JOHNS: The Crummey case, in that case the Court said – they rejected the assertion that the dollar has multiple meanings or values within the U.S. system of currency. So we would argue it supports our position.

THE COURT: All right. Thank you.

[12] The United States' motion for summary judgment, Docket No. 29, is granted.

Now, does that dispose of all of the issues in the case?

MS. JOHNS: Yes, Your Honor, it does.

THE COURT: The Government will prepare a proposed order and final judgment dealing with their summary judgment, and submit it to the Court electronically, submit a copy to opposing Counsel, and the Court will enter judgment.

MS. JOHNS: Thank you.

MS. STREET: Thank you, Your Honor.

THE COURT: Thank you.

We will be in recess until the attorneys in the next case can get situated.

(Hearing concluded.)

APPENDIX D

MYMAIL, LTD. PARTNER DISTRIBUTION PAYMENT CLAUSE

($10 Gold Eagle)

This MyMaiL, Ltd. Partner Distribution Payment Clause, "AGREEMENT", made effective this 28th October, 2003, by and between Michelle L. Selgas, "PARTNER" and MyMail, Ltd., "PARTNERSHIP".

(a) *AUTHORIZATION AND CONSTRUCTION*. This AGREEMENT is authorized by, relies upon, and must be construed and implemented according to:

(i) Section 4(c) of the Act of 28 October 1977, Public Law 95-147, 91 Statutes at Large 1227, 1229, now codified in Title 31, United States Code, Section 5118(d)(2);

(ii) Section 2(a)(9) of the Act of 17 December 1985, Public Law 99-185, 99 Statutes at Large 1177, 1177, now codified in Title 31, United States Code, Section 5112(a)(9);

(iii) Title II, Section 202(h) of the Act of 9 July 1985, Public Law 99-61, 99 Statutes at Large 113, 116, now codified in Title 31, United States Code, Section 5112(h);

(iv) Title 31, United States Code, Sections 5101, 5102, and 5103;

(v) the decisions of the Supreme Court of the United States in New York ex rel. Bank of New York v. Board of Supervisors, 74 U.S. (7 Wallace) 26 (1869); Bronson v. Rodes, 74 U.S. (7 Wallace) 229 (1869); Butler v. Horowitz, 74 U.S. (7 Wallace) 258 (1869); and Thompson v. Butler, 95 U.S. 694 (1878); and

(vi) such other authorities as the PARTNER, the PARTNERSHIP, or both may invoke in the event of any challenge, by any third party and for any reason, to the propriety, sufficiency, or effect of any part of this AGREEMENT.

(b) *VALUATION OF PARTNERSHIP DISTRIBUTION*. All Partnership Distributions shall be valued in increments of Ten **($10.00) "dollars" of coined gold**, each such "dollar" to consist of twenty-five one-thousandths (0.025) of a Troy ounce of fine gold in the form of the coins hereinafter specified in Section (c) of this AGREEMENT, as authorized pursuant to:

(i) the valuation of "ten dollar [s]" in gold coin as "contain[ing] one quarter (¼) troy ounce of fine gold", established and implemented by the Congress of the United States in Section 2(a)(9) of the Act of 17 December 1985, Public Law 99-185, 99 Statutes at Large 1177, 1177, *now codified in* Title 31, United State Code, Section 5112 (a)(9), *enacted under* Congress's exclusive power "[t]o coin Money, [and] regulate the Value thereof' in Article I, Section 8, Clause 5 of the Constitution of the United States; and

(ii) the rule set down by the Supreme Court of the United States in *Thompson* v. *Butler,* 95 U.S. 694,696 (1878). that:

> [o]ne owing a debt may pay it in gold coin or legal-tender notes of the United States, as he chooses, unless there is something to the contrary in the obligation out of which the debt arises. A coin dollar is worth no more for the purposes of tender in payment of an ordinary debt than a note dollar. The law has not made the note a standard of value any more than coin. It is true that in the market, as an article of merchandise, one is of greater value than the

other; but as money, that is to say, as a medium of exchange, the law knows no difference between them.

(c) ***DELIVERY AND SATISFACTION OF DISTRIBUTION PAYMENTS.*** All Partnership Distribution Payments made by the PARTNERSHIP to the PARTNER shall consist only, and be executed exclusively through physical delivery by the PARTNERSHIP (or its authorized agent) to the PARTNER (or his authorized agent), in the form of American Eagle "ten dollar gold coin[s]" –

(i) each of which "contains one quarter (¼) troy ounce of fine gold, pursuant to Section 2(a)(9) of the Act of 17 December 1985, Public Law 99-185, 99 Statutes at Large 1177, 1177, now codified in Title 31, United States Code, Section 5112(a)(9);

(ii) each of which has been designated "legal tender" by Congress under Title II, Section 202(h) of the Act of 9 July 1985, Public Law 99-61, 99 Statutes at Large 113, 116, now codified in Title 31, United States Code, Sections 5112 (h) and 5103; and

(iii) which collectively shall constitute the sole and exclusive medium of exchange, money, currency, and legal tender for the purposes of this AGREEMENT.

(d) ***SPECIFIC PERFORMANCE OF AND ARBITRATION REGARDING PAYMENT; IMPOSSIBILITY OF PERFORMANCE*** The PARTNER and PARTNERSHIP mutually agree that:

(i) no medium of payment, money, currency, or legal tender other than American Eagle gold coins heretofore specified in Section (c) of this AGREEMENT may be tendered, accepted, or in any other way used for payment and satisfaction of this AGREEMENT in whole or in any part;

(ii) in the event of any breach of this Agreement with respect to payment and satisfaction of this AGREEMENT by the PARTNERSHIP, the sole and exclusive remedy and relief which the PARTNER shall seek, and to which the PARTNER shall be entitled and the PARTNERSHIP shall be liable, shall be specific performance of this AGREEMENT by the PARTNERSHIP, in whole or in such part as may prove necessary; and

(iii) in the event of any alleged breach, disagreement as to performance, or other issue related to implementation of this AGREEMENT , the matter shall be subject to binding arbitration, pursuant to the COMPULSORY AND BINDING ARBITRATION Clause of this AGREEMENT, the arbitrator to be bound by and required to enforce the terms and conditions of this AGREEMENT, to the exclusion of any other damages, remedy, or relief; but.

(iv) in the event that performance and satisfaction of this AGREEMENT as specified herein shall be rendered impossible, because the ownership, possession, or use as a medium of exchange or legal tender of American Eagle gold coins has been declared illegal or otherwise prohibited by competent governmental authority prior to such performance and satisfaction, this Agreement shall be null and void *in toto*.

(e) ***DISCLAIMER.*** This AGREEMENT is not intended to be, to operate as, or to be construed in any manner as, or for any purpose of, an "abusive tax shelter" or other unlawful means to defeat, evade, or avoid any lawful tax or other public charge, due, or debt arising out of the underlying transaction to which this AGREEMENT pertains. In particular, this AGREEMENT does not necessarily purport, in, of, or by itself alone, to establish that either the aggregate nominal face

value of the American Eagle gold coins specified for payment in this AGREEMENT, or the free market value of such coins expressed in any other coin or currency, is or should be the monetary value to be used in the calculation of any tax, or other public charge, due, or debt that might be or become applicable to the underlying transaction to which this AGREEMENT relates. Rather, this AGREEMENT presumes that the value to be assigned to the American Eagle gold coins specified for payment in this AGREEMENT, and the particular coin or currency in which that value is to be expressed, for the purpose of calculating any tax, or other public charge, due, or debt that might be or become applicable to the underlying transaction to which this AGREEMENT relates, will be determined pursuant to those provisions of the Constitution of the United States, and of valid statutes, regulations, or other lawful enactments or requirements, as well as relevant judicial decisions, that apply to any such valuation (including, but not necessarily limited to, the statutes and judicial decisions cited in this AGREEMENT).

(f) COMPULSORY AND BINDING ARBITRATION. The PARTNER, and PARTNERSHIP mutually agree that:

(i) In the event of any alleged breach, disagreement as to performance, or other issue related to interpretation or implementation of this AGREEMENT, the matter shall be subject to such compulsory and binding arbitration as is or may be recognized under the laws applicable to the contract, agreement, or other underlying transaction to which this AGREEMENT relates. And such compulsory and binding arbitration shall be the exclusive procedure for resolving any such issue.

(ii) In any decision that enforces this AGREEMENT, the arbitrator shall be strictly bound by and required to apply the terms and conditions of this AGREEMENT, to the exclusion of any and all other damages, remedy, or relief.

(iii) The parties agree to be bound by this agreement, the Texas Alternative Dispute Resolution Procedures Act (chapter 154 of the Texas Civil Practice and Remedies Code), the Texas General Arbitration Law (chapter 171 of the Texas Civil Practice and Remedies Code), sections 6.601 and 153.0071(a) and (b) of the Texas Family Code, and the laws of the state of Texas.

The format of the arbitration will be determined by the arbitrator, with the objective of expediting the hearing. The arbitrator may take any testimony from sworn witnesses that the arbitrator believes is necessary to elicit the facts required to render a decision.

The Texas Rules of Evidence, Texas Rules of Civil Procedure, and Texas Civil Practice and Remedies Code will be applied.

(iv) The parties agree to be *bound* by the decision and award of the arbitrator unless the award is set aside under section 171.088 of the Texas Civil Practice and Remedies Code.

(g) MULTIPLE COUNTERPARTS. If this agreement is signed in multiple counterparts, the aggregate will constitute the entire agreement.

Telefaxed signatures are acceptable.

Signed: /s/ Michelle L. Selgas
Michelle L. Selgas, Partner

Signed: /s/ Robert T. Derby
Robert T. Derby, Manager, MyMail, Ltd.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed October 2, 2008]

No. 08-20133
Summary Calendar

BRENT E. CRUMMEY,
Plaintiff - Appellant,

v.

KLEIN INDEPENDENT SCHOOL DISTRICT;
THOMAS PETREK; DEBORAH H. WEHNER,
Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Texas
4:07-CV-1685

Before DAVIS, GARZA, and PRADO, Circuit Judges.

PER CURIAM:[*]

Brent E. Crummey brought this lawsuit complaining that the defendants-appellees, Klein Independent School District ("KISD") and two employees of the KISD tax office, declined to accept Crummey's fifty-dollar United States American Eagle gold coins for any more than the face value of the coins in Fed-

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[*] Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

eral Reserve Note dollars as tender in payment for taxes Crummey owed. Crummey, proceeding *pro se*, sought to assert various federal and state causes of action arising from this incident, including that the appellees violated Crummey's alleged right under Article 1, Section 10 of the Constitution to pay a debt in gold coin.[2] The district court, adopting the Memorandum, Recommendation and Order of the Magistrate Judge, dismissed ma sponte Crummey's federal claims and declined to exercise supplemental jurisdiction over Crummey's remaining state law claims, which were remanded to state court. Crummey appeals.

The core of Crummey's appeal rests on Crummey's argument that the legal monetary value of fifty dollars in United States American Eagle gold coin is different than (and worth more than) the legal monetary value of fifty dollars in Federal Reserve Notes, or as it is sometimes affectionately called, cash. Regardless of any currency confusion that may have arisen in bygone eras, our present standard is clear: As legal tender, a dollar is a dollar.

Crummey suggests that the United States has a parallel or dual monetary valuation system for the dollar. Crummey relies for support on a statute authorizing the Secretary of the Treasury to mint certain coins and to sell them to the public at a price based on the market value of the bullion plus production costs. *See* 31 U.S.C. § 5112(f)(1). According to Crummey, the fact that the United States Mint sells coins into circulation at an amount that is often

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[2] Article 1, Section 10 of the Constitution provides, in part: "No State shall . . . make any Thing but gold and silver Coin a Tender in Payment of Debts."

different than the face value of the coins, supports his theory for the existence of some form of dollar-for-dollar exchange rate between the "coin" dollar and the "FRN" dollar.

Crummey's argument conflates the market value of such coins as bullion, or as a collectors' items, with the value of the coins as legal tender. Fittingly, the Supreme Court has explained:

> A coin dollar is worth no more for the purposes of tender in payment of an ordinary debt than a note dollar. The law has not made the note a standard of value any more than coin. It is true that in the market, as an article of merchandise, one is of greater value than the other; but as money, that is to say, as a medium of exchange, the law knows no difference between them.

Thompson v. Butler, 95 U.S. 694, 696 (1877). "United States coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) are legal tender for all debts, public charges, taxes, and dues. Foreign gold or silver coins are not legal tender for debts." 31 U.S.C. § 5103; *see also Mathes v. Commissioner of Internal Revenue*, 576 F.2d 70, 71 (5th Cir. 1978) (per curiam) ("Congress has delegated the power to establish this national currency which is lawful money to the Federal Reserve System."); *United States v. Wangrud*, 533 F.2d 495, 495 (9th Cir. 1976) (per curiam) ("By statute it is established that federal reserve notes, on an equal basis with other coins and currencies of the United States, shall be legal tender for all debts, public and private, including taxes.").

We reject Crummey's suggestion that the "dollar" has multiple meanings or values within the United States system of currency. *See* 31 U.S.C. § 5101 ("United States money is expressed in dollars, dimes or tenths, cents or hundreths, and mills or thousandths. A dime is a tenth of a dollar, a cent is a hundredth of a dollar, and a mill is a thousandth of a dollar."). As legal tender, a dollar is a dollar, regardless of the physical embodiment of the currency.

The legal monetary value of Crummey's fifty dollar American Gold Eagle coin is equivalent to that of a fifty dollar Federal Reserve Note. Crummey's argument to the contrary, on which the bulk of his appeal rests, fails.

Having carefully considered all of Crummey's issues on appeal in light of the record and the applicable law, we find them to be without merit. For these reasons, the judgment of the district court is AFFIRMED.

Furthermore, appellees' motion for sanctions pursuant to Rule 38 of the Federal Rules of Appellate Procedure is DENIED, Crummey's alternative request for an evidentiary hearing on appellees' motion for sanctions is DENIED as moot.