JOHN W. HUBER (#7226)
United States Attorney
JOHN MANGUM (#2072)
Assistant United States Attorney

VIRGINIA CRONAN LOWE (admitted Pro Hac Vice)
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 683, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 307-6484
Facsimile: (202) 307-0054

Attorneys for the United States

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH

NELDON JOHNSON and GLENDA JOHNSON, Plaintiffs, v. UNITED STATES OF AMERICA, Defendants.	Case No. 2:15-cv-00742-JP (Consolidated with Civil Nos. 2:16-cv-0080 and 2:16-cv-0081 UNITED STATES' REPLY MEMORANDUM

On April 19, 2016, the Court entered an Order Granting Motion to Consolidate Cases which consolidated Civil Nos. 2-16-cv-0080 and 2-16-cv-0081 with the instant action. The plaintiffs submitted a Memorandum in Opposition to Respondent's Motions to Summarily Deny Petitions to Quash Summonses and Counter-Petitions For Enforcement of the Summonses ("Opposition") in response to the United States' Motion to Summarily Deny Petition to Quash Summons and Counter-Petition For Enforcement of the Summons filed in Civil Nos. 2-16-cv-0080 and 2-16-cv-0081. The United States, by and through its undersigned counsel, submits this memorandum in reply to the Opposition.

At issue are summonses issued to Millard County Credit Union and Bank of American Fork. As set forth in the United States' motions, to obtain enforcement of a summons, the Government need only make a "minimal" initial showing (1) that the summons was issued in good faith, *i.e.*, that the investigation will be conducted pursuant to a legitimate purpose; (2) that the information sought may be relevant to that purpose; (3) that the information sought is not already within the Commissioner's possession; and (4) that the administrative steps required by the Internal Revenue Code have been followed. *United States v. Powell*, 379 U.S. 48, 57-58 (1964). In addition, the Government must show that no Justice Department referral is in effect with respect to such person. 26 U.S.C. § 7602(d).

The government's burden of satisfying the *Powell* requirements is a "slight one" that can be satisfied by introducing a sworn declaration of the revenue agent who issued the summons that the *Powell* requirements have been met. *United States v. Balanced Financial Management, Inc.*, 769 F.2d 1440, 1443 (10 Cir. 1985); *see also Fortney v. United States,* 59 F.3d 117, 120 (9th Cir.1995). In this case, Revenue Agent Zielke's Declaration establishes that the summonses at issue met all requirements of law and were issued in accordance with the four elements set forth in *Powell.* Once the Government establishes its prima facie case, the burden of proof shifts to the taxpayer. The taxpayer bears a "heavy burden" of showing an abuse of process or the lack of institutional good faith. *Anaya v. United States*, 815 F.2d 1373, 1377 (10th Cir. 1987); *United States v. Balanced Financial Management, Inc.*, *supra.* In meeting this burden, neither "[l]egal conclusions [nor] mere memoranda of law will … suffice." *Villarreal v. United States*, 523 Fed. Appx. 419, 423 (10th Cir. 2013); *Balanced Fin. Mgmt.*, 769 F.2d at 1444. Instead, the Plaintiffs "must factually oppose the Government's allegations by affidavit." *Id.*, *Hanna v. United States*, 647 F.Supp. 590, 593-4 (D. Utah 1986). The Plaintiffs have failed to meet this burden. The

Plaintiffs have only submitted a memoranda of law with conclusory, unsubstantiated allegations. Therefore, the Court should deny the petition to quash and enforce the summonses.

ARGUMENT

A. The Summonses Were Issued for a Legitimate Purpose

In their Opposition, the plaintiffs allege that the third-party summonses were not issued for a proper purpose. Plaintiffs maintain that some of the information that will be provided through the summonses are bank statements of third parties for which the Plaintiffs are signatories on the accounts and this will not assist the IRS in the determination of the Plaintiffs' federal income tax liabilities for the years 2012, 2013, and 2014. The Plaintiffs' conclusory and unsubstantiated allegation lacks merit. Congress has conferred upon the Secretary of the Treasury the responsibility to make accurate determinations of tax liabilities and has given him broad authority to conduct investigations for that purpose. Section 6201, 26 U.S.C., charges the Commissioner of Internal Revenue, as the Secretary's delegate, with the duty "to make the inquiries, determinations, and assessments of all taxes" imposed by the Internal Revenue Code. *See also* I.R.C. § 7601; *Donaldson v. United States*, 400 U.S. 517, 523–524 (1971); *United States v. McAnlis*, 721 F.2d 334, 336 (11th Cir. 1983); *United States v. Harris*, 628 F.2d 875, 879 (5th Cir. 1980).

The summons power is the means provided by Congress to allow the Commissioner to discharge this investigative responsibility. Section 7602, 26 U.S.C., authorizes the Commissioner, "[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, . . . [or] determining the liability of any person for any internal revenue tax, . . . [t]o examine any books, papers, records or other data which may be relevant or material to such inquiry" and to summon any person to appear and produce such documents and

to give relevant testimony. *See Crystal v. United States*, 172 F.3d 1141, 1143–1144 (9th Cir. 1999). The courts have consistently held that § 7602 endows the IRS with expansive information-gathering authority in order to encourage effective tax investigations. *See United States v. Arthur Young & Co.*, 465 U.S. 805, 813–815 (1984); *United States v. Balanced Fin. Mgmt*, 769 F.2d 1440, 1446 (10th Cir. 1985); *United States v. Jose*, 131 F.3d 1325, 1327 (9th Cir. 1997) (*en banc*); *Hintze v. IRS*, 879 F.2d 121, 125–126 (4th Cir. 1989). As set forth in the Declaration of Revenue Agent Joel Zielke, the IRS is examining the federal tax liabilities of Plaintiffs, Neldon and Glenda Johnson, for tax years 2012, 2013, and 2014. (Zielke Decl. ¶ 3.) The Plaintiffs have admitted that they have personal accounts and other accounts for which they are signatories at Millard County Credit Union and Bank of American Fork. The summonses requests that the financial institutions produce copies of signature cards, monthly bank statements, bank deposits slips, deposit items, credit memos, cancelled checks, and debit memos drawn on accounts which either Neldon Johnson or Glenda Johnson either owns or is a signer for the period December 2012 – January 2015. The information requested by the summonses, on accounts controlled by the Plaintiffs, is needed to reconstruct the Plaintiffs' income for the years 2013 and 2014. In *Kerr v. United States*, 801 F.2d 1162, 1163 (9th Cir. 1986), the court found that by narrowing the summonses to encompass accounts that the Kerrs controlled, the government had established the requisite relation between the documents sought and the legitimate governmental end of assessing the Kerrs' tax liability. Similarly, in the instant case the summonses only seek information for accounts that the Plaintiffs control which will provide information with regard to the Plaintiffs' tax liabilities for the years 2013 and 2014. Thus, the summonses were issued for a legitimate purpose – a purpose specifically set forth in §7602.

Additionally, Plaintiffs allege that the summonses were issued improperly and were only issued to harass or put pressure on Mr. Johnson with regard to another suit pending in this Court which seeks injunctive relief. Again, the Plaintiffs' have failed to set forth any facts in support of these allegations. Plaintiffs have failed to set forth any facts with regard to the other suit or how an investigation and determination of both Mr. and Mrs. Johnson's federal tax liabilities for the years 2012, 2013, and 2014 would have any impact on this other suit. Plaintiffs' conclusory allegations are insufficient to support their burden to show an abuse of process or the lack of institutional good faith. *See Villarreal v. United States*, 524 Fed. Appx. 419, 423 ((10th Cir. 2013) (allegations of a "harassment campaign" are conclusory and thus insufficient to meet Mr. Villarreal's burden).

Finally, the Plaintiffs, citing to *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310 (1985), maintain that the summonses are invalid because information about unidentified taxpayers may be gathered and the IRS failed to comply with the John Doe summons requirements of 26 U.S.C. §7609(f). Under §7609(f), special requirements apply when the IRS seeks to issue a "John Doe Summons," which is defined as a summons "which does not identify the person with respect to whose liability the summons is issued * * *." In such event, the IRS must, prior to the issuance of the summons, satisfy a district court that (1) the summons is issued as part of an investigation of an ascertainable person or class of persons; (2) that there exists a "reasonable basis for believing" that some or all of that class may have not complied with some internal revenue law; and (3) that the information summoned cannot be readily obtained elsewhere. The Plaintiffs' reliance on *Tiffany Fine Arts, Inc.* as support for their allegation is misplaced. The Supreme Court rejected Tiffany's argument that Section 7609(f) has application to a "dual purpose" summons, that is, a summons issued for the purpose of investigating a

specific named taxpayer, but also for obtaining information relating to the tax liabilities of unknown persons. The Court explained that, where the IRS issues a summons which does not identify any target of its investigation, there may be no interested taxpayer who would have the opportunity to oppose enforcement of the summons. (*Id.* at 321.) In such cases, under Section 7609(f), the district court "takes the place of the affected taxpayer," and provides "some guarantee that the information that the IRS seeks through a summons is relevant to a legitimate investigation, albeit that of an unknown taxpayer." (*Id.*) Where, however, the summons is issued in the investigation of a named taxpayer who has an interest in and right to object to its enforcement, Section 7609(f) simply has no application. (*Id.*at 322.) Thus, even assuming that the summonses were served for the dual purpose of investigating both the tax liabilities of the Plaintiffs and also of unnamed parties, the IRS need not comply with Section 7609(f) "as long as all the information sought is relevant to a legitimate investigation of the summoned taxpayer." *Tiffany Fine Arts, Inc.*, 469 U.S. at 324; *United States v. Balanced Financial Management, Inc.*, 769 F.2d at 1449; *Liberty Financial Services v. United States*, 778 F.2d 1390, 1393 (9th Cir. 1985).

As set forth in the Zielke Declaration, the IRS is investigating the Plaintiffs' 2012, 2013, and 2014 federal income tax liabilities. The summons power is the means that Congress has provided to enable the Commissioner to discharge these investigative and collection responsibilities. Section 7602(a) of the Code authorizes the Commissioner, "[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, [or] determining the liability of any person for any internal revenue tax, . . . [t]o examine any books, papers, records or other data which may be relevant or material to such inquiry" and to summon any person to appear and produce such documents and to give relevant testimony. *See* 26

U.S.C. § 7601(a)(1) and (2). The courts have consistently held § 7602 gives the IRS expansive information-gathering authority to facilitate effective tax investigations. *See Church of Scientology v. United States*, 506 U.S. 9, 10 n.2 (1992); *United States v. Arthur Young & Co.*, 465 U.S. 805, 813-15 (1984). Therefore, the summonses to Millard County Credit Union and Bank of American Fork issued in support of the IRS investigation into the Plaintiffs' 2012, 2013, and 2014 federal income tax liabilities have a legitimate purpose.

B. The Records Are Relevant to the Purpose of the Investigation

In their Opposition, the Plaintiffs maintain that the United States fails to meet the second element of the *Powell* test because the summonses do not seek relevant information since most of the information sought is the financial records of third-parties. Again, the Plaintiffs' have failed to set forth any facts to support this allegation Moreover, this argument is specious due to the fact that the plaintiffs admit that they have personal accounts at both of these financial institutions and they provided information for their accounts from these institutions for the year 2012. *See* Zielke Decl., ¶7. In addition, the IRS is only seeking information with regard to accounts which are in the names of the Plaintiffs or for which they have signatory authority and therefore for which they have control.

The Supreme Court has held that the information sought by the IRS only needs to be potentially relevant, and not actually relevant. *United States v. Arthur Young & Co.*, 465 U.S. 805, 813-814 (1984). Information is deemed relevant where it "might have thrown light upon the correctness of [the taxpayer's] return." *See id.* at 813 n.11 (noting that standard "appears to be widely accepted among the Courts of Appeals"). The Tenth Circuit has held that the IRS may issue a summons for items of even potential relevance to an ongoing investigation. *Villarreal v. United States*, 524 Fed. Appx. at 423. The summonses at issue in this case meet that standard.

In this case, the IRS is examining the tax liability of Plaintiffs for tax years 2012, 2013, and 2014. The IRS is reconstructing the Plaintiffs' income for the years 2013 and 2014. *See* Zielke Decl., ¶8. Through the summonses at issue the IRS is seeking information related to the Plaintiffs' financial activity during the 2013 and 2014 tax years which is relevant to the determination of their federal income tax liability for those years. Towards that end, the requested bank and financial records will facilitate the examination by showing the source and amount of income received by Plaintiffs. Therefore, the summoned documents may be relevant to the purpose of the examination. *See Sylvestre v. United States*, 978 F.2d 25, 27 (1st Cir. 1992) (records of financial institutions are relevant to purpose of determining possible income tax liability), *cert denied*, 507 U.S. 994 (1993).

The Plaintiffs also maintain that the summonses are over broad. A summons is not overbroad if it describes information sought with "reasonable certainty." I.R.C. § 7603(a)(1). An overbroad summons is a summons that does not advise the summoned party what is required of him with sufficient specificity to permit him to respond adequately to the summons and where enforcement would constitute an unreasonable search in violation of the Fourth Amendment. *United States v. Wyatt*, 637 F.2d 293, 302 n.16 (5th Cir. 1981). The summonses in this case are not overbroad because they describe the requested documents with sufficient specificity to allow Millard County Credit Union and Bank of American Fork to produce them. The summonses directed Millard County Credit Union and Bank of American Fork to produce "copies of signature cards, monthly bank statements, bank deposits slips, deposit items, credit memos, cancelled checks, and debit memos drawn on accounts which Neldon Johnson or Glenda Johnson either owns or is a signer for the period December 2012 – January 2015." *See* Zielke Decl., ¶6.

Thus, the Plaintiffs' allegation that the summonses are over broad has no merit and should be denied.

C. All Administrative Steps Have Been Satisfied

Next, the Plaintiffs allege that the IRS has failed to follow all the administrative steps required by the Internal Revenue Code because the IRS failed to comply with the John Doe summons requirements of §7609(f). The Plaintiffs maintain that the summonses seek information about unidentified taxpayers and therefore the John Doe summons notice requirements should have been followed. The Plaintiffs' allegations have no support and should be denied. The summonses at issue specifically request Millard County Credit Union and Bank of American Fork to produce "copies of signature cards, monthly bank statements, bank deposits slips, deposit items, credit memos, cancelled checks, and debit memos drawn on accounts which Neldon Johnson or Glenda Johnson either owns or is a signer for the period December 2012 – January 2015." *See* Zielke Decls., ¶6. Thus, the summonses specifically identify the Plaintiffs. Section 7609(a)(1) expressly states that only those persons identified in a summons are entitled to notice of its issuance. As set forth in the Ziekle Declarations, pursuant to §7609(a) notice was sent to the Plaintiffs on January 13, 2016. *See* Ziekle Decls., ¶9.

As set forth in detail above, the Plaintiffs' cite to *Tiffany Fine Arts, Inc., et al. v. United States*, 469 U.S. 310 (1985), as support for their position is misplaced. *Tiffany* actually supports the United States' position in this matter. In *Tiffany*, the Supreme Court held that where the IRS serves a summons on a known taxpayer with the dual purpose of investigating both the tax liability of that taxpayer and the tax liabilities of unnamed parties, it need not comply with the requirements for John Doe summonses set out in §7609(f), as long as all the information sought is relevant to a legitimate investigation of the summoned taxpayer. *Tiffany*, 469 U.S. at 324.

Providing notice only to individuals identified in the summons is supported by case law. In *United States v. First Bank*, 737 F.2d 269 (2d Cir. 1984), the court determined that the plain text of §7609(a)(1) combined with its inconclusive legislative history compelled the interpretation that a co-owner of a joint bank account who is not identified in the summons is not entitled to notice when an administrative summons is served on a third-party record-keeper. *Id.* at 271. Recognizing that such an interpretation would deny the joint owner of a bank account the right to notice of a summons pertaining to that account unless such owner is identified in the summons, the court in *First Bank* concluded that "this possibility was not thought by Congress to create a sufficient infringement to warrant the inclusion of additional statutory notice requirements for unidentified persons," and that Congress's decision was "reasonable." *Id.* at 274; *Stewart v. United States*, 511 F.3d 1251 (9th Cir. 2008) (wife who was not identified in summonses directed to banks lacked standing to challenge summonses' validity); *See also Vanguard Int'l Mtg., Inc. v. United States*, *supra*. (holding that a corporation not identified in an IRS summons lacked standing under §7609(b)(2) to challenge the summons's validity even though the summons sought records relating to a taxpayer who had signatory authority over the corporation's bank accounts). As the Plaintiffs were identified in the Millard County Credit Union and Bank of American Fork summonses, they were the only persons entitled to notice of the summonses. Thus, Plaintiffs' allegations have no support and should be denied.

Finally, the Plaintiff's argument that since the IRS failed to give notice to third-parties the procedures of Title 26 were not followed, and thus, the Right to Financial Privacy Act (RFPA), 12 U.S.C. §3401 et seq., applies, is also without merit. As shown above, the procedures of Title 26 were followed. Section 7609(a)(1) expressly states that only those persons identified

in a summons are entitled to notice of its issuance and the Plaintiffs were provided notice of the summonses on January 13, 2016.

CONCLUSION

As set above, and in the United States' Motions To Summarily Deny Petition to Quash Summons And Counter-Petition For Enforcement of the Summons, Plaintiffs have not met their burden to show that the summonses should be quashed. Accordingly, their petitions should be summarily denied and the summonses should be enforced.

Respectfully submitted this 5th day of May, 2016.

JOHN W. HUBER
United States Attorney

JOHN K. MANGUM
Assistant United States Attorney

/s/ Virginia Cronan Lowe
VIRGINIA CRONAN LOWE
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 683
Ben Franklin Station
Washington, D.C. 20044-0683
Telephone: (202) 307-6484

Attorneys for the United States

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing UNITED STATES' REPLY MEMORANDUM has been made this 5th day of May, 2016, via the Court's CM/ECF system to:

Paul W. Jones, Esq.
Attorney for Plaintiffs

And by first class U.S. Mail, postage prepaid to:

Bank of American Fork
P.O. Box 307
American Fork, UT 84003

Millard County Credit Union
109 S 300 East
Delta, UT 84624

/s/ Virginia Cronan Lowe
VIRGINIA CRONAN LOWE
Trial Attorney, Tax Division
United States Department of Justice