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9 UNITED STATES DISTRICT COURT FOR THE
1 NORTHERN DISTRICT OF CALIFORNIA

11 IN THE MATTER OF THE TAX)
LIABILITIES OF:) Civil Number:

13 JOHN DOES, United States person(s), who)
directly or indirectly had authority over any)
combination of accounts held with Payward)
14 Ventures Inc., d/b/a Krakon or Krakon.com, or)
its predecessors, subsidiaries, divisions, or)
15 affiliates (collectively, "Kracon"), with at)
least the equivalent of \$, in value of)
1 transactions (regardless of type) in)
1 cryptocurrency in any one year, for the period)
January 1, 2011 through December 31, 2011 .)

**UNITED STATES' MEMORANDUM IN
SUPPORT OF EX PARTE PETITION
FOR LEAVE TO SERVE "JOHN DOE"
SUMMONS**

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1 p The United States of America submits this memorandum in support of its petition for an order
2 a approving the service of an Internal Revenue Service John Doe summons on Payward Ventures Inc. and
3 Subsidiaries (collectively, “Kraken”). A copy of the summons and summons attachment (listing the
4 items requested) are filed herewith, as well as a proposed order, Declaration of IRS Revenue Agent
5 Karen Cincotta (hereinafter “Declaration”), and supporting exhibits. p

I. INTRODUCTION

6 The summons is in furtherance of the IRS’s ongoing investigation to determine the identity and
7 correct federal income tax liability of U.S. persons who have conducted transactions in cryptocurrency
8 (defined below). See Declaration ¶¶ 3, 8, 3. Transactions in cryptocurrency have grown substantially p
9 in recent years, and the IRS is concerned that taxpayers are not properly reporting these transactions.

10 The summons seeks account and transaction records from Kraken that are expected to aid the IRS’s
11 investigation.

12 The summons is a so-called “John Doe” summons because it does not identify the persons with
13 respect to whose liabilities the summons is issued. U.S.C. § 9(f). The government therefore must
14 obtain court approval prior to serving the John Doe summons. *Id.* As discussed below, the criteria for
15 court approval of a John Doe summons in § 9(f) are met.

16 Pursuant to U.S.C. § 9(h)(), the Court’s determination of whether a John Doe summons
17 may be served shall be made ex parte and shall be made solely on the petition and supporting affidavits.

18 The leadings filed in this proceeding will therefore not be served upon any person or entity, and no
19 other filings are permitted from other persons or entities. The United States requests that the Court
20 review the petition and supporting documents and that it enter the proposed order at the Court’s earliest
21 opportunity.

3 II. BACKGROUND

4 p The summons seeks account and transaction records from Kraken regarding a group of its
5 customers whose identities are not known to the IRS (the “John Does”). The group of John Does is
6 defined on the summons as follows: United States person(s), who directly or indirectly had authority
7 over any combination of accounts held with Payward Ventures Inc., d/b/a Kraken or Kraken.com, or its
8 predecessors, subsidiaries, divisions, or affiliates (collectively, “Kraken”), with at least the equivalent of

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1 2 , in value of transactions (regardless of type) in cryptocurrency in any one year, for the period p
 2 January 1, 2011 through December 31, 2012 (the “John Doe Class”) The six document requests are for
 3 account registration records, Know-Your-Customer due diligence, account-related correspondence, anti-
 4 money laundering exception reports, records of account activity, and records of account funding Before
 5 addressing why a summons for these requested items directed at this John Doe Class meets the criteria
 in § 9(f), this brief will first provide relevant background regarding (A) the definition of
 cryptocurrency, (B) its tax treatment, (C) the information regarding taxable cryptocurrency transactions
 8 that is in the possession of Kraken, and (D) the grounds for the IRS’s belief that these transactions are
 9 not being properly reported

1 A. “Cryptocurrency” Defined

11 “Cryptocurrency” is one kind of “virtual currency” In Notice 2014-21, 2014-1 IRB 938,
 12 2014 WL 12244-4 (Mar 2, 2014), the IRS defined “virtual currency” as a digital representation of
 13 value that functions as a medium of exchange, a unit of account, and/or a store of value It sometimes
 14 operates like “real” or “fiat” currency, *i.e.*, the coin and paper money of the United States or of any other
 15 country that is designated as legal tender, circulates, and is customarily used and accepted as a medium
 1 of exchange in the country of issuance But virtual currency does not have legal tender status in any
 1 jurisdiction When virtual currency has an equivalent value in real currency, or acts as a substitute for
 18 real currency, then it is referred to as “convertible” virtual currency

19 The summons at issue here solely concerns “cryptocurrency” Cryptocurrency is a type of
 2 virtual currency that utilizes cryptography to secure transactions that are digitally recorded on a
 21 distributed ledger (such as a blockchain) Distributed ledger technology uses independent digital
 22 systems to record, share, and synchronize transactions, the details of which are recorded in multiple
 23 places at the same time with no central data store or administration functionality Units of
 24 cryptocurrency are generally referred to as coins or tokens The most common cryptocurrency is
 25 Bitcoin, but there are many others¹ The technological innovation, rapid growth, and decentralized

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¹ As of January 15, 2021, cryptocurrency tracking website www.coinmarketcap.com indicated
 that more than 8,000 separate cryptocurrencies existed <http://www.coinmarketcap.com/all/views/all/>
[\[http://www.erna.cc/TEC-2W8B\]](http://www.erna.cc/TEC-2W8B)

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1 ature of cryptocurrency have created new challenges for regulators, including the IRS. *See generally*
 2 *Report of the Attorney General's Cyber Digital Task Force: Cryptocurrency Enforcement Framework*,
 3 Oct. 1, 2013, <https://www.justice.gov/ag/page/file/1311/download> [<https://perma.cc/QXH-5LF9>].

4 **B. Tax Treatment of Cryptocurrency Transactions**

5 The IRS's position is that convertible virtual currencies (including
 6 cryptocurrency) are considered property for tax purposes, and a taxpayer can have a gain or loss on the
 7 sale or exchange of a virtual currency. Thus, taxpayers who transact in virtual currencies may have
 8 related tax filing and reporting requirements under various provisions of the Internal Revenue Code,
 9 including U.S.C. §§ 1,451, and 111.

10 Taxpayers often complete the virtual currency transactions through businesses known as digital
 11 currency exchanges, which allow users to buy and sell cryptocurrency exchange for fiat currency or
 12 other virtual currency. Declaration ¶ 5. Depending on the details, these transactions may be taxable.
 13 *See id.* ¶ 3. Taxpayers must report income, gain, or loss from all taxable transactions involving virtual
 14 currency on their federal income tax returns for the year of the transaction, regardless of the amount or
 15 whether they received a payee statement or format of return. *See Frequently Asked Questions on*
 16 *Virtual Currency Transactions*, [https://www.irs.gov/individuals/interact/individual-taxpayers/frequently-](https://www.irs.gov/individuals/interact/individual-taxpayers/frequently-asked-questions-on-virtual-currency-transactions)
 17 [asked-questions-on-virtual-currency-transactions](https://www.irs.gov/individuals/interact/individual-taxpayers/frequently-asked-questions-on-virtual-currency-transactions) [<https://perma.cc/34V-UW5P>] (Q&A-4).

18 **C. Information Regarding Cryptocurrency Transactions Held by Kraken**

19 Payward, Inc. is the parent corporation for multiple subsidiaries located both in the United States
 20 and foreign jurisdictions. Declaration ¶ 43. The John Doe summons is directed to Payward Ventures,
 21 Inc., because it is the U.S.-operating subsidiary which does business under the trade name Kraken.
 22 Kraken operates a digital currency exchange and provides users with a way to trade legal tender (U.S.
 23 dollars and certain foreign currency) for cryptocurrency and vice versa; or to trade (exchange) one type
 24 of cryptocurrency for another type of cryptocurrency. *Id.* ¶ . Kraken is one of the largest digital
 25 currency exchanges, with over 4 million clients and over \$14 billion in trading activity since 2011. *Id.*
 ¶ 4. It has been reported that as of the end of 2013, Kraken was registering up to 5 million new users a
 day. *Id.* While Kraken's United States headquarters is located in San Francisco, California, Kraken

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operates in over 19 countries worldwide. *Id.* ¶ 48. Within the United States, Kraken does not operate in, or provide services to residents of, Washington State and New York. *Id.*

Kraken is regulated as a “money services business” (MSB), and more specifically as a “money transmitter.” See 31 C.F.R. § 101.11 (ff) (defining “money services business”); § 101.11 (ff)(5) (defining “money transmitter” as one type of MSB); see also Declaration ¶¶ 7, 8. It is currently registered as an MSB with the Financial Crimes Enforcement Network (FinCEN). See Declaration ¶ 51 (citing *Is Kraken licensed or regulated?*, <https://support.kraken.com/en-us/articles/318351-Is-Kraken-licensed-or-regulated-> [<https://perma.cc/8M7M-KSD>]).

An MSB like Kraken is required to maintain certain records. See 31 C.F.R. §§ 101.41 (Records to be made and retained by financial institutions) and 101.44 (making these recordkeeping requirements applicable to MSBs). These records include, for transactions worth more than \$3,000, the name and address of both the sender and recipient, the amount of the transaction, the date of the transaction, and other identifying information. § 101.41 (e); see Declaration ¶¶ 5-5. MSBs are also required to obtain and maintain certain customer identification information and transactional data for reporting purposes for combating money laundering. See 31 C.F.R. § 101.11.

In keeping with these rules, Kraken historically required all new customers to create an account by submitting certain identifying information, including the user’s name, email address, physical address, telephone number, and date of birth. Declaration ¶ 3. In addition, valid ID, proof of residence, occupation, and social security number (for U.S. clients) are required for intermediate-level and pro-level accounts. *Id.* ¶ 4. For a “pro-level” account (the highest-level account for individual traders and high net worth individuals), Kraken requires a Know-Your-Customer (“KYC”) application that includes additional customer identifying information. *Id.* ¶ 5.

FinCEN has issued guidance explaining that digital currency exchanges are generally to be regulated as money transmitters. See FinCEN Guidance Notice FIN-13-G-01: Application of FinCEN’s Regulations to Persons Administering, Engaging, or Using Virtual Currencies (Mar. 18, 2013), available at <https://www.fincen.gov/sites/default/files/attached-files/FIN-13-G-01.pdf> [<https://perma.cc/E9C8-YH3C>]; FinCEN Guidance Notice FIN-19-G-01: Application of FinCEN’s Regulations to Certain Business Models Involving Convertible Virtual Currencies (May 9, 2019), available at <https://www.fincen.gov/sites/default/files/attached-files/19-5/FinCEN%20Guidance%20CVC%20FINAL%205-8.pdf> [<https://perma.cc/BVK-AJVP>].

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ased on the regulations applicable to Kraken as well as Kraken’s historical business practices the IRS expects that in response to the John Doe summons Kraken will be able to provide information about its customers’ cryptocurrency transactions which the IRS will then be able to use in conjunction with other publicly-available information to examine whether an individual has complied with the internal revenue laws. Declaration ¶ 9.

D. Grounds for the IRS’s Belief That Virtual Currency Transactions Are Not Being Properly Reported

The IRS in recent years has become aware of significant tax compliance issues relating to the use of virtual currencies. Declaration ¶ 4. Of particular relevance here are the lack of third-party reporting to the IRS the experience with the John Doe summons that was served on Coinbase Inc. data from the Modernized Tax Return Database (MTRD) and Agent Cincotta’s knowledge about non-compliance by specific Kraken users.

1. The Lack of Third-Party Reporting to the IRS

Kraken does not make any third-party reports to the IRS of cryptocurrency transactions that occur on its platforms. Declaration ¶ 3 ; *see also id.* ¶ 85 (stating that the IRS does not already possess the information requested by the summons). This information gap is a concern for the IRS because as Agent Cincotta’s Declaration explains cryptocurrency transactions can already be difficult to trace with many having an inherent pseudo-anonymous aspect making them especially attractive to taxpayers who may want to use them to hide taxable income. *Id.* ¶¶ 4 35.

More generally the IRS’s experience is that tax noncompliance increases when there is less third-party information reporting making the likelihood of underreporting significant. *Id.* ¶ 3 ; *see Federal Tax Compliance Research: Tax Gap Estimates for Tax Years 2011–2013* IRS Publication 1415 (Rev. 9-19) <https://www.irs.gov/pub/irs-pdf/p1415.pdf> at 13 [<https://perma.cc/XM5-PDNH>] (finding that the net misreporting percentage “for income amounts subject to little or no information reporting . . . is 55 percent.”); *see also* Patricia Cohen *If the I.R.S. Is Watching You, You’ll Pay Up* N.Y. Times Jan. 5 2019 at 1 <https://www.nytimes.com/2019/01/05/business/economy/if-the-irs-is-watching-you-youll-pay-up.html> [<https://perma.cc/S9DK-QYU>]. Unfortunately the problem of a lack of third-party reporting of cryptocurrency transactions is not confined to Kraken. *See* Wendy Walker

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1 *NS GHT: The 5 Most Common Tax Reportable Crypto Events*, Bloomberg Tax, Aug 1, 2017, available at <https://news.bloombergtax.com/daily-tax-report/insight-the-5-most-common-tax-reportable-crypto-events> [https://perma.cc/TH-J5TT6] (noting that “a recent survey of crypto CPAs found that
2 more than 35% of crypto investors do not receive Form 1099 information related to their crypto
3 transactions”) As the Treasury Inspector General for Tax Administration has reported, “[t]he IRS
4 cannot easily identify taxpayers with virtual currency transactions because of the lack of third-party
5 information reporting that specifically identifies virtual currency transactions.” *The Internal Revenue
6 Service Can Improve Taxpayer Compliance for Virtual Currency Transactions*, TIGTA Ref No 2017-03-66 (Sept 4, 2017), <https://www.treasury.gov/tigta/auditreports/reports/2017-03-66fr.pdf> [https://perma.cc/83SZ-YJUK] R

11 2. The John Doe Summons to Coinbase, Inc., and Its Aftermath

1 In November 2016, the U.S. District Court for the Northern District of California authorized
2 service of a John Doe summons on Coinbase, Inc. (“Coinbase”), a U.S.-based cryptocurrency exchange,
3 for information to be used in identifying taxpayers who conducted transactions in virtual currency. See
4 *United States v. John Doe*, No. 3:16-cv-6658-JSC (N.D. Cal.). Coinbase was served with the summons
5 but did not voluntarily comply with it. Declaration ¶ 1. The government then filed a petition to
6 enforce the summons in March 2017, and, after the IRS agreed to narrow the scope of the summons, the
7 court granted in part and denied in part the enforcement petition. See *United States v. Coinbase, Inc.*,
8 Case No. 17-cv-1431-JSC, 2017 WL 5895 (N.D. Cal. Nov. 8, 2017). Coinbase was ordered to
9 produce documents for accounts with at least the equivalent of \$10,000 in any one transaction type (buy,
10 sell, send, or receive)³ in any one year for the period between 2013 and 2015. *Id.* at *8.

1 Since Coinbase complied with the John Doe summons, the IRS has continued to reach out to
2 taxpayers regarding their reporting requirements, to conduct examinations, and to make criminal
3 investigation referrals. Declaration ¶ 4. On July 6, 2019, the IRS announced that it had begun
4 sending letters to virtual currency owners, advising them to pay back taxes and file amended returns.
5 Declaration ¶ 14. By the end of August 2019, the IRS had issued more than 1 million such letters to
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³ There is no similar limitation in the summons to Kraken because the terminology of Kraken’s exchanges differs. That is why the summons covers all transactions “regardless of type.”

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1 taxpayers who owned virtual currency. *I* Following the issuance of the letters, taxpayers filed
 2 amended returns reporting virtual currency transactions for tax years 2013 through 2018 that were not
 3 previously reported. *I* To date, these IRS letters have resulted in more than 1,000 amended returns
 4 and more than \$13.1 million in assessments. *I* ¶ 4 The IRS has also opened audits of taxpayers
 5 identified by materials it received in response to the Coinbase John Doe summons, and it has received
 6 submissions through its voluntary disclosure practice as well. *I* Separately, the IRS has contacted
 7 taxpayers who have not filed returns reporting virtual currency by sending notices related to virtual
 8 currency. Those notices have already resulted in more than \$11.9 million in assessments. *I* The IRS
 9 expects these numbers to increase as the investigations continue. More recently, the IRS sent letters to
 10 taxpayers who conducted transactions with foreign virtual currency exchanges and may have failed to
 11 properly report such transactions and associated income. *I* ¶ 41

1 3. MTRDB Search Results

13 During the summons enforcement litigation against Coinbase, the IRS determined that for the
 14 years 2013-2015, only 8% to 9% of taxpayers per year filed tax returns with a properly description related
 15 to bitcoin or virtual currency, despite the fact that Coinbase alone had serviced more than 5.9 million
 16 customers and handled more than \$1 billion in transactions during that time. This was strong evidence
 17 of likely large-scale underreporting of taxable transactions. *See* 2017 WL 589,553, at *1-4, 4-5;
 18 Declaration ¶ 38. The number of taxpayers filing returns with a properly description related to bitcoin or
 19 virtual currency increased in 2016-2018, but the numbers still fall far short of what would be expected
 20 given the number of users, transactions, and value that the exchanges publicize occur on an annual basis.
 1 *See* Declaration ¶ 39.

2 4 Suspected Tax Non-Compliance by Kraken Users

3 *d* Finally, as explained in detail in the Declaration, Agen Cinco has conducted an investigation
 4 and identified specific individuals who held accounts with Kraken and failed to comply with their tax
 5 reporting requirements under the internal revenue laws. Declaration ¶ 8. Five specific taxpayers—
 6 referred to as “Taxpayer 1” through “Taxpayer 5”—are discussed at ¶¶ 7-74 of the Declaration.

7 Taxpayer 1, through LLCs, has engaged in more than \$39 million in unreported financial
 8 transactions since 2017, at least 70% of which related to cryptocurrency held in accounts at Kraken, and

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1 ny of which followed suspicious transaction patterns indicative of taxable income. *Id.* ¶ 1. Ta
 2 payer 1, along with other individuals, appears to have operated a financial scheme between 2011 and
 3 2018 involving unreported cryptocurrency transactions exceeding \$1 million, some of which were
 4 completed using Kraken accounts. *Id.* ¶ 1. Ta payer 3 appears to have underreported his personal and
 5 business income by almost \$1 million based, in part, on transactions conducted through a Kraken
 6 account. *Id.* ¶ 2. Ta payer 4 did not report cryptocurrency transactions exceeding \$5 million, some
 7 of which originated from a Kraken account. *Id.* ¶ 3. Ta payer 5 entered the IRS's voluntary disclosure
 8 program and belatedly reported substantial taxable income of approximately \$1.5 million for 2015 and
 9 2016 relating to transactions on multiple digital currency exchanges, including Kraken. Ta payer 5 also
 10 has acknowledged over \$3 million in cash deposits and withdrawals in 2011 and 2018 at such
 11 exchanges, including Kraken, likely indicating substantial additional taxable income that was not timely
 12 reported. *Id.* ¶ 4.

13 Agent Cincotta's Declaration also describes criminal cases where defendants used accounts at
 14 Kraken to conceal proceeds from criminal activity. *Id.* ¶ 5. One case against Backpage.com resulted in
 15 a guilty plea to one count of money laundering conspiracy where proceeds were routed through various
 16 digital currency exchange accounts, including some at Kraken. *Id.* ¶ 6. In another case, defendant
 17 Joseph Kippled guilty to wire fraud for a scheme where he defrauded his employer of bitcoin worth
 18 approximately \$44 million and transferred it to his Kraken account. *Id.* ¶ 7.

19 Based on these examples, the IRS suspects that there may be many Kraken users who have
 20 failed to report their cryptocurrency transactions, and to pay their associated tax liabilities, in accordance
 21 with the internal revenue laws.

III. LAW AND ARGUMENT

A. Governing Law

22 The IRS is statutorily required to have its employees "proceed from state to state, through each
 23 internal revenue district and inquire after and concerning all persons therein who may be liable to pay
 24 any internal revenue tax [.]” U.S.C. § 601(a). To this end, the IRS also has broad investigative
 25 powers “for the purpose of ascertaining the correctness of any return, making a return where none has
 26 been made, determining the liability of any person for any internal revenue tax or the liability at law or

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1 n equ ty of any transferee or f duc ary of any person n respect of any nternal revenue tax, or collect n
 any such l ab l ty[.]” U.S.C. § (a). To ful ll these purposes, the IRS “ s author zed” by statute:

3 (1) To exam ine any books, papers, records, or other data wh ch may be relevant or
 mater al to such nqu ry;

5 () To summon the person l able for tax or requ red to perform the act, or any off cer
 or employee of such person, or any person hav n possess on, custody, or care of books
 of account conta n n entr es relat n to the bus ness of the person l able for tax or
 requ red to perform the act, or any other person the Secretary may deem proper, to appear
 before the Secretary at a t me and place named n the summons and to produce such
 books, papers, records, or other data, and to ve such test mony, under oath, as may be
 8 relevant or mater al to such nqu ry; and

9 (3) To take such test mony of the person concerned, under oath, as may be relevant or
 mater al to such nqu ry.

1 *Id.* In sum, there s “broad lat tude ranted to the IRS by § .” *United States v. Jose*, 131 F.3d 13 5,
 11 13 9 (9th C r. 199) (quot n *United States v. Arthur Young & Co.*, 4 5 U.S. 8 5, 81 (1984)); *see also*
 1 *United States v. Bell*, 5 F. Supp. d 898, 9 (N.D. Cal. 1999) (“The IRS has broad nvest atory
 13 powers that are set forth n §§ 1 throu h 1 of the Internal Revenue Code.”).

15 When ssu n an adm n strat ve summons to a th rd party, the IRS s enerally requ red to ve
 not ce to the taxpayer. U.S.C. § 9(a)(1). The taxpayer then has the r ht to fle a pet t on n court
 1 seek n to quash the summons. § 9(b)() (A). However, the th rd-party not ce rules do not apply to
 1 certa n types of summonses, nclud n a so-called “John Doe” summons, § 9(c), def ned as a
 18 summons that “does not dent fy the person w th respect to whose l ab l ty the summons s ssued.”

19 § 9(f). Instead, a John Doe summons “may be served only after a court proceed n ” establ sh n the
 1 elements l sted n § 9(f). *Id.* Th s proceed n s necessar ly ex parte because the po nt of a John Doe
 summons s to allow the IRS to obta n nformat on when the dent ty of the taxpayer s unknown. *See*
 3 § 9(h)() (stat n that the court’s determ nat on under § 9(f) “shall be made ex parte and shall be
 4 made solely on the pet t on and support n aff dav ts”).

5 The Court, n th s ex parte proceed n , effect vely serves the same funct on as a taxpayer n a
 § 9(b)() (A) pet t on to quash. *See Tiffany Fine Arts, Inc. v. United States*, 4 9 U.S. 31 , 31 (1985)
 (“As a subst tute for the procedures of §§ 9(a) and (b), Con ress enacted § 9(f)[.]”); *United*
States v. Gertner, 5 F.3d 9 3, 9 5 n.1 (1st C r. 1995) (“[T]he court n effect ‘takes the place of the

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1 affected taxpayer' who, being unaided, cannot herself be expected to know both—let alone to
 2 oppose—the summons even if it is irregular” (quoting *Tiffany Fine Arts*, 49 U.S. 311). “Congress
 3 did not intend to impose stringent restrictions on the Service’s investigatory function but merely sought
 4 to prevent the indiscriminate exercise of the John Doe summons power.” *United States v. Ernst &*
 5 *Whinney*, 50 F.3d 511, 519-20 (9th Cir. 1984) (quotation omitted)

Section 7609(f) provides that the IRS may not serve John Doe summons until after court proceeding in which the government establishes the following three numbered elements:

- 8 (1) the summons relates to the investigation of particular person or ascertainable group or
 9 class of persons,
 10 (2) there is reasonable basis for believing that such person or group or class of persons may
 11 (and the identity of the person or persons with respect to whose liability the summons is
 1 issued) is not readily available from other sources

13 Additionally, Section 7609(f)'s new filtering requirement requires that the summons be “narrowly
 14 tailored to information that pertains to the filer (or potential filer) of the person or group or class of
 15 persons referred to in paragraph (2) to comply with one or more provisions of the internal revenue law
 1 which have been identified for purposes of such paragraph.”

1 B. Application of § 7609(f)

18 The summons at issue here meets all three of the numbered criteria in § 7609(f) as well as the
 19 new “narrowly tailored” requirement

1 1. The Summons Relates to the Investigation of an Ascertainable Class

1 The first of the three numbered requirements in § 7609(f) is that “the summons relates to the
 2 investigation of particular person or ascertainable group or class of persons.” § 7609(f)(1). This first
 3 prong is met because the John Doe Class is particularized from the general public and Kraken has the
 4 information necessary to ascertain whether its customers are members of the class

5 Again, the face of the summons defines the John Doe Class this way: “United States person(s),
 who directly or indirectly hold authority over any combination of accounts held with Payward Ventures
 Inc., d/b/a Kraken or Kraken.com, or its predecessors, subsidiaries, divisions, or affiliates (collectively,

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1 Kraken’), with at least the equivalent of \$, in value of transactions (regardless of type) in
 2 cryptocurrency in any one year, for the period January 1, 2011 through December 31, 2011.” This class
 3 is ascertainable because it is limited in at least four ways. First, it is limited to Kraken account holders.
 4 Second, it is limited to United States persons.⁴ Third, it is limited to those account holders whose
 5 transactions were worth at least \$, in a year. Fourth, it is limited to the five-year time period of
 6 1 - .

7 The Jahn D e Class identified in the summons is “ascertainable” because courts have repeatedly
 8 found § 9(f)(1) to be satisfied where a summons identifies a particular group of taxpayers in a
 9 similar manner. For example, this test was passed where a summons “squarely particularize[d] the
 10 individuals sought from the general public” by identifying the class as California residents who, between
 11 2005 and 2011, were involved in certain property transfers for little or no consideration. *See In re Tax*
 12 *Liab. of Does*, No. 13-mc-13-MCE-EFB, 2011 WL 3884, at * (E.D. Cal. Dec. 15, 2011).
 13 Likewise, the IRS satisfied the “ascertainable group” standard where a summons concerned U.S.
 14 taxpayers who, as agents for subsidiaries of a certain company, sold credit insurance policies reinsured
 15 with entities in the Turks and Caicos Islands. *See In re Tax Liab. of Does*, No. 3-93-CIV, 2003 WL
 16 95318, at *1 (S.D. Fla. Oct. 3, 2003) (“*American Bankers Insurance Group*”); *see also Matter of*
 17 *Does*, Case No. CV-13-3393 YGR, 2013 WL 553135 (N.D. Cal. Aug. 9, 2013) (approving Jahn D e
 18 class of U.S. taxpayers who had accounts with CIBC First Caribbean International Bank Limited
 19 through correspondent account at Wells Fargo Bank, N.A., during 2004-2011); *In Matter of Tax*
 20 *Liabilities of Does*, Civ. No. 3:9-CV-5(DF), 199 WL 1933, at *1 (M.D. Ga. Feb. 5, 1999) (“As
 21 required by U.S.C. § 9(f)(1), the summons relates to the investigation of an ascertainable group or
 22 class of persons, that is, individuals, businesses, corporations, partnerships, joint ventures, and
 23

4 “The term United States person’ means—

(A) a citizen or resident of the United States,

(B) a domestic partnership,

(C) a domestic corporation,

(D) any estate (other than a foreign estate, within the meaning of paragraph (31)), and

(E) any trust if—

(i) a court within the United States is able to exercise primary supervision over the
 administration of the trust, and

(ii) neither more United States persons have the authority to control all substantial
 decisions of the trust.

U.S.C. § 1(a)(3).

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1 ompanies within the State of Georgia that received payments from The Loef Company, for the sale of
 2 reliable materials, (also referred to as scrap metal), including commissions, for the calendar years
 3 1992, 1993 and 1994”)

4 Moreover, as discussed in Part II C above, Kraken should be able to ascertain from its records
 5 which of its virtual currency exchange customers were U.S. persons, and who among them engaged in
 the \$2,000 floor transactional levels⁵ during the years specified in the summons, based on the
 information expected to be collected on their customers. The availability of this information to Kraken
 8 means that the John Doe Class is an “ascertainable group of class of persons” and that § 9(f)(1) is
 9 satisfied

1 **2. There Is a Reasonable Basis for Believing That the John Doe Class May Fail,**
 11 **or May Have Failed, to Comply with the Internal Revenue Laws**

12 The second numbered element of § 9(f) that the government must establish for the Court to
 approve service of the summons relating to the John Doe Class is that “there is a reasonable basis for
 13 believing that such person or group or class of persons may fail or may have failed to comply with an
 14 provision of an internal revenue law” § 9(f)(2). There is a reasonable basis for believing that
 15 members of the John Doe Class may fail (or may have already failed) to report, or to pay tax associated
 1 with, virtual currency transactions. This belief is based upon the information discussed in Part II D,
 1 above: the lack of third-party reporting to the IRS by Kraken regarding its customers’ transactions; the
 18 IRS’s experience with the Coinbase John Doe summons and its aftermath; the MTRDB search results
 19 showing likely large-scale underreporting of taxable virtual currency transactions; and Agent Cinotta’s
 2 personal knowledge of non-compliance by Kraken users

21 To meet the “reasonable basis” prong of § 9(f)(2), the government need only show that a
 22 transaction has occurred that is “of such a nature as to be reasonably suggestive of the possibility that
 23 the correct tax liability with respect to that transaction may not have been reported” H.R. Rep. No. 94-
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 2 ⁵ At least one case has addressed whether a class is “ascertainable” where the class is defined
 2 based on a dollar-value threshold but the summoned party “does not record members’ transactions in
 terms of monetary value, and is unaware of the monetary value applied to the transactions by the
 members.” *United States v. Coble*, 1982 WL 111 at *5 (S.D. Iowa June 2, 1982). But we have reason
 to believe that this dollar-value information is available to Kraken such that the class can be ascertained
 and the summons readily complied with

58 t 311 (19 5), *reprinted in* 19 U.S.C.C.A.N. 89 , 3 8; *see e.g., United States v. Ritchie*, 15 F.3d 59 , 1 (th Cir. 1994) (clients’ p yment for leg l services with l rge mounts of c sh provided re son ble b sis for John Doe summons). When en cting § 9(f), Congress did “not intend to impose n undue burden on the [IRS] in connection with obt ining court uthoriz tion to serve this type of summons.” H.R. Rep. No. 94- 58 t 311, *reprinted in* 19 U.S.C.C.A.N. t 3 . R ther, Congress sought to ensure th t the IRS would h ve “ specific situ tion to present in the court,” inste d of using the summonses to eng ge in “possible ‘fishing expedition.’” *Id.*; *see also In re Tax Liabs. of Does*, 88 F. d 144, 149 (d Cir. 198) (Section 9(f) w s “concerned only with . . . preclud[ing] the IRS from using [John Doe] summonses to eng ge in possible ‘fishing expeditions.’” (quoting H.R. Rep. No. 94- 58 t 311)). The government need not “produce conclusive evidence of n ctu l t x viol tion s prerequisite to obt ining John Doe summons.” *Matter of Does*, 1 F. d 9 , 98 (th Cir. 198) (per curi m) (“*Columbus Trade Exchange*”). The point of the st tute is merely “to prevent the Service from exercising its summons power in n rbitr ry or quixotic m aner.” *Id.*; *see also Byers v. United States Internal Revenue Service*, 9 3 F.3d 548, 553 (th Cir.) (“when the government seeks inform tion bout n unn med person from third p rty, it must show the district court th t it h s some re son to believe th t this unn med person viol ted or m ay viol te the l w.”).

Prior experience with simil r tr ns ctions involving simil r p rties is re son ble b sis under § 9(f)(). For ex mple, *Columbus Trade Exchange* is one of group of c ses from the e rly 198 s involving John Doe summonses th t the IRS sought pprov l to serve on b rter exch nges. Those b rter exch nges re n logous to virtu l currency exch nges insof r s the IRS’s experience showed th t their customers, whose identities were unknown, were likely to be underreporting the t x on their tr ns ctions. The Sixth Circuit held th t the IRS’s “p st experience with this problem is ‘re son ble b sis’ for its decision to investig te the returns of Columbus Exch nge members,” 1 F. d t 98 , nd other courts m ale simil r rulings. *See United States v. Pittsburgh Trade Exchange Inc.*, 44 F. d 3 , 3 (3d Cir. 1981) (finding, b sed on IRS gent’s testimony, th t “b rter tr ns ctions such s those rr nged by The Exch nge re inherently susceptible to t x error since no c sh is involved nd the only records of the members’ credits re kept by The Exch nge, which llegedly does not provide members ny inform tion reg rding their tr de ccounts. Such circumst nces provide sufficient b sis for the

internal Revenue Service’s action.”) *United States v. Island Trade Exchange, Inc.*, 535 F. Supp. 993, 999-1000 (E.D.N.Y. 1988) (approving John Doe summons to barter exchange and finding “reasonable basis” requirement in § 9(f)(1) met based on RS agent’s declaration that “prior examinations of bartering exchanges and their members by the internal Revenue Service revealed high levels of omitted or improperly reported income”). Equally here, the RS’s knowledge of non-compliance by some Kraken users, the Coinbase John Doe summons, and other situations in which there is a lack of third-party reporting all strongly suggest that there is a reasonable basis for the summons in this case.

As in the barter-exchange cases, all of the cases arising from the RS’s Offshore Credit Card Project have found a “reasonable basis” for suspecting non-compliance based on the RS’s experience with undisclosed foreign accounts, even in the absence of audits involving the summoned parties, because individuals using credit cards to repatriate funds from offshore bank accounts are likely to be engaged in tax evasion. *See, e.g., In re John Does*, No. 1:19-cv-3919, 2019 WL 3453813 (S.D. Fla. Oct. 3, 2019) (*American Express & MasterCard International, Inc.*) *In re John Does*, No. CV-19-49-MISC-PJH (N.D. Cal. 2019) (*VISA International*) *In re John Does*, No. 19-cv-44-CV-UNGARO-BENAGES (S.D. Fla. 2019) (*MasterCard International, Inc.*) *In re John Does*, No. 19-cv-1-CV-Martinez (S.D. Fla. 2019) (*Credomatic of Florida Inc.*) *In re John Does*, No. 19-cv-4-F-1548 (OES) (D. Col. 2019) (*First Data Corporation*) *In re John Does*, No. 19-cv-4-CV-UNGARO-BENAGES (S.D. Fla. 2019) (*TecniCard, Inc.*) and *In re John Does*, No. 19-cv-94-1 (CDL) (M.D. Ga. 2019) (*Total Systems Services, Inc.*).

Here, the evidence the RS has developed to date is reasonably suggestive of the possibility that the correct tax liability with respect to cryptocurrency transactions conducted through Kraken’s virtual currency exchanges may not have been properly reported. Declaration ¶ 4. Again, the RS knows that when third-party reporting is lacking, the incidence of tax non-compliance increases greatly. That concern is a valid one where Kraken, like many other virtual currency exchanges, does not issue Forms 1099 or otherwise engage in third-party transactional reporting to the RS. Additionally, as in the barter-exchange cases, the RS’s experience with cryptocurrency, especially with respect to the Coinbase John Doe summons, indicates a likelihood of non-compliance by Kraken customers. This suspicion is bolstered by the MTRDB search results. Moreover, Agent Cincotta is personally aware of several

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1 instances of previously unreported (and likely taxable) transactions involving Kraken users. *See*
 2 Declaration ¶¶ 81-84. Given all that, the IRS has far more than a mere suspicion that the John
 3 Doe Class includes taxpayers who are not complying with the law. Rather, the evidence strongly
 4 suggests that there has been, and continues to be, failure by certain Kraken users to comply with the
 5 internal revenue laws in reporting income from cryptocurrency transactions. The “reasonable basis”
 prong of § 9(f)(1) is therefore satisfied.

3. The Information Sought in the Summons Is Not Readily Available From Other Sources

8 The third numbered requirement of § 9(f) is “the information sought to be obtained from the
 9 examination of the records or testimony (and the identity of the person or persons with respect to whose
 10 identity the summons is issued) is not readily available from other sources.” The third prong of the test
 11 is met because the information sought in the summons to Kraken is not readily available from other
 12 sources. As noted above, there is no third-party reporting by Kraken to the IRS regarding the
 13 cryptocurrency transactions that are conducted on its exchanges. Declaration ¶ 3. The IRS also has
 14 reason to believe that a significant portion of such transactions are not being properly reported by the
 15 taxpayers themselves either, but the IRS is presently unable to audit such taxpayers because the r
 16 dentees are unknown. With these limitations, the only repository of the information sought by the
 17 summons that is readily available to the IRS is Kraken. *Id.* ¶ 85. *See American Bankers Insurance*
 18 *Group*, 3 WL 95318, at *1 (finding § 9(f)(3) met because “information sought by the IRS to
 19 continue the investment is not readily available through a means other than from [the summoned
 party] itself”).

1 Where, as here, the IRS is unable to identify the members of the John Doe Class, and one of the
 2 principal purposes of the summons is to discover the class members’ identities, courts have repeatedly
 3 found the § 9(f)(3) prong of the test to be satisfied. To give one common example, courts have
 4 approved summonses where the identities of the persons to be investigated are not readily available but
 5 are known to foreign institutions. *See In re Tax Liabs. of Does*, No. 11-cv- 18 -PJH, Dkt. No. 1
 (N.D. Cal. Apr. 11) (authorizing John Doe summons to HSBC Bank USA, N.A. seeking financial
 account records establishing the identities of U.S. taxpayers with interests in HSBC’s Indian bank

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1 ccunts); *MasterCard International, Inc*, WL 3 8 9613, t*1 (authorizing service of John Doe
summons seeking the identity of U S t xp yers who held cert in credit c rd ccunts with ties to
3 foreign b nks); *American Express & MasterCard International, Inc*, WL 3453813 , t*1
4 (identities of t xp yers not re dily v il ble except from American Express nd MasterC rd
5 Intern tion l, Inc , who possessed credit c rd inform aion for c rds issued by offshore b nks)

6 Even if it were theoretic lly possible for the IRS to obt in some of the inform aion sought in the
summons from l bor-intensive review of its own files, th t would not prevent § 6 9(f)(3) from being
8 s tisfied⁶ Courts t ke “pr ctic l” ppro ch when inform aion “c nnot without unre son ble burden,
9 expense nd unw r rnted del y be retrieved from the files of the Intern l Revenue Service” *Un ted i*
1 *States v. Repr nts, Inc*, 43 A F T R d 9-463, 19 8 WL 1 38 (N D G Nov 18, 19 8); *see also*
11 *Un ted States v. John G. Mutschler & Assocs., Inc*, 34 F d 363, 36 -68 (8th Cir 1984) (t king
1 “pr ctic l ppro ch to IRS ccessibility” in declining to order “m au l se rch of 18, opinion letter
13 p plic tions” to identify those prep red by summoned p rty, c lling th t “ n unre son ble nd imprecise
14 method” of loc ting inform aion); *Un ted States v. Berkowitz*, 488 F d 1 35, 1 36 (3d Cir 19 3) (per
15 curi m) (“To require the Intern l Revenue Service to review individu lly the millions of forms filed in
16 19 1” to loc te those sought by summons “is so obviously burdensome s to m ke the procedure
1 prohibitive” nd concluding “from pr ctic l st ndpoint those returns would not be re dily v il ble to
18 the government”)

19 The only entities possessing inform aion rel ting to virtu l currency tr ns ctions th t identify the
persons involved in the tr ns ctions, nd th t hold m æri l rel ting to the tr ns ctions, re the
1 exch ngers nd ny intermedi ries Therefore, it is logic l to summon Kr ken for this identifying nd
tr ns ction l inform aion reg rding Kr ken’s customers, which is not re dily v il ble from ny other
3 source

4 **4. The Summons Is Narrowly Tailored to Information That Pertains to the**
5 **Failure (or Potential Failure) of the Class to Comply with the Internal**
6 **Revenue Laws**

⁶ *Cf. Sugarloaf Fund ng, LLC v. U.S. Dept. of Treas.*, 584 F 3d 34 , 35 (1st Cir 9) (holding, in summons enforcement proceeding, th t “the IRS is entitled to obt in relev nt records from third p rties to comp re for ccur cy ny records obt ined from the t xp yer”)

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1 f n additional requirement that Congress added to § 79() in 19 is that a John Doe summons
 must be “narrowly tailored to information that pertains to the failure (or potential failure) of the person
 3 or group or class of persons referred to in paragraph () to comply with one or more provisions of the
 4 internal revenue law which have been identified for purposes of such paragraph.” This new narrow-
 5 tailoring requirement is met because the summons requests are specifically directed at information that
 will shed light on the potential non-compliance that the IRS is concerned about—non-reporting of
 7 cryptocurrency transactions and non-payment of associated tax—as well as the identities of those
 8 taxpayers who may not be in compliance. As mentioned above, this includes potential non-compliance
 9 with several provisions of the Internal Revenue Code, such as U.S.C. §§ 1, 451, and 111.

1 Congress added the new lush language at the end of § 79() as part of the Taxpayer First Act,
 11 Pub. L. No. 115-5, § 14(a), 133 Stat. 988 (2019), and it became effective on August 1, 2019.
 1 Congress’s intent was to ensure that “the information sought in the summons [is] at least potentially
 13 relevant to the tax liability of an ascertainable group,” and that the summons is not used “for the
 14 purposes of a fishing expedition.” H.R. Rep. No. 115-39, at 41 (2019). The added text “is not intended
 15 to change the *Powell* standard [*i.e.*, the showing the IRS must make in support of summons enforcement,
 1 *see United States v. Powell*, 379 U.S. 48 (1964)] or otherwise affect the IRS’s burden of proof.” *Id.* at
 17 4; *see also* Joint Committee on Taxation, *Description of H.R. 1957, the “Taxpayer First Act of 2019,”*
 18 at 15 (2019), [https://www.jct.gov/CMSPages/GetFile.aspx?guid=738784-d-434-a14c-](https://www.jct.gov/CMSPages/GetFile.aspx?guid=738784-d-434-a14c-c97477a)
 19 [c97477a](https://perma.cc/49QV-GWV) [<https://perma.cc/49QV-GWV>].

This new statutory requirement is satisfied here. Cincotta’s Declaration explains in detail
 1 the direct connection between each of the six items requested in the summons attachment and the IRS’s
 investigation concerning non-compliance with the internal revenue laws. *See* Declaration ¶¶ 87-1
 3 Those six document requests fit within two broad categories. *Id.* ¶ 89. The first category of requests is
 4 “directed at adequately identifying the John Doe class members so that transactional data can reasonably
 5 be associated with a particular person.” *Id.* ¶ 9. For example, Request #1 on the summons attachment,
 seeking account registration records, will assist the IRS in this process. *See id.* ¶¶ 93-97. The second
 7 category of requests is “directed at obtaining transactional information that may permit the IRS to
 evaluate whether a particular taxpayer complied fully with internal revenue laws.” *Id.* ¶ 91. For

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1 xampl , R qu st #5 on th summons attachm ent s ks all r cor s of account activity, inclu ing
transaction logs or oth r r cor s that r fl ct th particulars of a transaction such as th at , th amount,
3 th transaction typ , th account post-transaction balanc , an r qu sts or instructions to s n or r c iv
4 virtual curr ncy. Th s r cor s shoul contain th information n c ssary to t rmin th corr ct
5 f ral tax liability of applicabl Krak n us rs. *Id.* ¶ 1 1.

As th s an oth r mor tail xplanations in Ag nt Cincotta's D claration show, ach of th
it ms sought by th summons is sp cifically targ t towar obtaining information that may furth r th
8 IRS's inv stigation of th John Do Class an its memb rs' failur (or pot ntial failur) to comply with
9 th int rnal r v nu laws. Th narrow-tailoring r quir m ent of th n w flush languag in § 9(f) is
1 th r for satisfi .

11 **IV. CONCLUSION**

1 Bas on th for going, th gov rnm ent has m et all of th r quir m ents for a John Do summons
13 in § 9(f). Th Unit Stat s r qu sts that its p tition b grant an that th Court nt r th propos
14 or r approving th IRS to s rv th John Do summons on Krak n.

15 Dat this 3 th ay of March, 1

1 DAVID A. HUBBERT
Acting Assistant Attorn y G n ral

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18 /s/ Amy Matchison
AMY MATCHISON
19 Trial Attorn y, Tax Division
U.S. D partm ent of Justic

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