that they will be irreparably harmed by any action of Defendants which prevents them, or even discourages them, from doing something they say they have never done and do not intend to do. Any claim of harm based on any further enforcement actions pursued by any of the Defendants is speculative and premature. At this time there is no way for the Court to know exactly what enforcement action may ultimately be pursued by Defendants or granted by the Courts of the States under whose laws Defendants act.

[5, 6] Plaintiffs are also unable to establish they are likely to prevail. The jurisdictional issues raised by Defendants alone raise doubt about the likelihood that Plaintiffs will prevail in this Court. The Court also has serious concerns regarding the breadth of religious freedom Plaintiffs' claim. Plaintiffs' allege violations of their religious freedom as a "religious organization" "offering" a product (in exchange for a church contribution) to the public either through their television show or the internet. They effectively argue that as long as representations made about a product are based on their claim of a sincerely held religious belief the government has no right whatsoever to test the validity of their representations. Such a broad interpretation of religious freedom is especially concerning as it relates to alleged representations regarding the safety and efficiency of products the church is "offering" in exchange for contributions. The Court finds that such a broad interpretation opens the door to the criminally inclined to fraudulently market products to the harm and detriment of the consumer public under the protection and subterfuge of religious freedom. The fact that the church unilaterally considers purchasing consumers to be church partners does not eliminate this concern. While caution and deference should define the government's approach in these situations, at least some governmental inquiry into representations concerning product offerings by "religious organizations," including an inquiry into the basis and sincerity of the representations being made, and the safety of the product for use by the public, seems appropriate. A review of the requests received by Plaintiffs from the Defendants at this time appears to the Court to be within the bounds of reasonable inquiry and focused on the protection of constituents of the governmental entities conducting the investigation. The public interest is served by having consumer protection laws enforced against those who might abuse and misuse the protection of religious freedom under the First Amendment. The actions taken by Defendants regarding Plaintiffs and their offering of Silver Solution products during the COVID-19 pandemic thus far are narrowly focused so as to serve the public interest.

WHEREFORE, for the reasons set forth herein, the Court **DENIES** Plaintiffs' motion for a temporary restraining order. The Court will issue a subsequent ruling on the pending motions to dismiss once those motions have been fully briefed.

IT IS SO ORDERED.

UNITED STATES of America, Plaintiff,

v.

Claude HIDY and Rosemarie Hidy, Defendants.

8:18CV536

United States District Court, D. Nebraska.

Signed 07/07/2020

Background: United States filed action against taxpayers to collect unpaid Report

of Foreign Bank and Financial Accounts (FBAR) penalties with interest, penalties for late payment, and fees for non-willful failure to timely report financial interest in and authority over numerous foreign bank accounts. United States moved for summary judgment, taxpayers responded, and United States filed reply.

Holdings: The District Court, Robert F. Rossiter, J., held that taxpayers violated Bank Secrecy Act (BSA) and implementing regulations by failing to timely file FBAR for multiple years without reasonable cause.

Motion granted.

1. Federal Civil Procedure ⚿2470.1

A party cannot defeat a summary judgment motion by asserting the mere existence of some alleged factual dispute between the parties; the party must assert that there is a genuine issue of material fact. Fed. R. Civ. P. 56(a).

2. Federal Civil Procedure ⚿2543

On a motion for summary judgment, the district court views the facts in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts.

3. Federal Civil Procedure ⚿2544, 2546

For a nonmoving party in a motion for summary judgment to show a genuine dispute of material fact, a party must provide more than conjecture and speculation; they have an affirmative burden to designate specific facts creating a triable controversy.

4. Federal Civil Procedure ⚿2470.1

Only disputes over facts that might affect the outcome of a suit under the governing law will properly preclude the entry of summary judgment.

5. Federal Civil Procedure ⚿2466

If the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, summary judgment should be granted.

6. Currency Regulation ⚿17

Taxpayers violated Bank Secrecy Act (BSA) and implementing regulations by failing to timely file Report of Foreign Bank and Financial Accounts (FBAR) for multiple years without reasonable cause, and therefore their non-willful failure to comply with BSA subjected them to civil penalties and interest; taxpayers deposited and actively managed wages in foreign bank accounts, taxpayers, primarily taxpayer-wife, prepared and filed own tax returns, wife incorrectly answered "no" to question that asked whether they had any financial interest in or signatory authority over any foreign bank accounts, even if she did not understand question she made no effort to learn what it meant or seek professional advice, and taxpayer-husband did even less, signing tax forms without reading them. 31 U.S.C.A. §§ 3717(a), 3717(e), 5314, 5321.

7. Internal Revenue ⚿4470

A taxpayer who signs a tax return will not be heard to claim innocence for not having actually read the return, as he or she is charged with constructive knowledge of its contents.

Casey S. Smith, Lauren Darwit, U.S. Department of Justice, Washington, DC, for Plaintiff.

Dana C. Bradford, III, Houghton, Bradford Law Firm, Omaha, NE, for Defendants.

MEMORANDUM AND ORDER

Robert F. Rossiter, Jr., United States District Judge

This matter is before the Court on the United States of America's ("government")

Motion for Summary Judgment (Filing No. 26) against defendants Claude Hidy ("Claude") and Rosemarie Hidy ("Rosemarie" and together, the "Hidys"). The government seeks to collect outstanding civil penalties assessed against the Hidys for their alleged non-willful failure to timely report their financial interest in and authority over certain foreign bank accounts. *See* 31 U.S.C. §§ 5314 and 5321. The Hidys maintain (Filing No. 36) there are material issues for trial. For the reasons explained below, the government's motion is granted.

I. BACKGROUND

A. Facts [1]

Before retiring in 2013, Claude worked as an airline pilot for an international freight company. Rosemarie is a nurse who also has a degree in psychology. Both are United States citizens. Neither has any training in accounting or tax preparation.

The Hidys met in Saudi Arabia in 1990 and married on November 22, 1992. They moved to Stratton, Nebraska, in 1996 and later had two sons. In 2000, Claude accepted a position that required him to relocate to the United Kingdom ("U.K."). Rosemarie joined him in 2001. They later moved to the Netherlands. In 2009, Rosemarie and the children moved back to Nebraska. Claude remained in the Netherlands until 2012.

While in Europe, Claude was paid in British pound sterling. In 2000 or 2001, Claude opened his first foreign bank account in the U.K., so he could deposit his wages. Over time, the Hidys opened several other foreign accounts in banks in the U.K., the Isle of Man, and Guernsey. Having lost some money due to a bank failure, the Hidys deposited their money in several different banks to make sure the funds would be insured.

As the government lays out in detail in its statement of facts, between 2009 and 2013, the Hidys "each had a financial interest in, were co-owners of record of, and had signatory authority over" ten different accounts at eight different foreign banks with aggregate maximum account balances of about a million dollars a year. In that same time frame, Claude individually also had an interest in, ownership of, and authority over two other foreign accounts with maximum account balances ranging from $67,704 to $404,419. Despite their considerable holdings, the Hidys did not research whether they needed to report their foreign accounts to the United States.

Since the Hidys married in 1992, Rosemarie has prepared their joint federal in-

1. The facts are primarily drawn from the government's Statement of Material Facts submitted pursuant to Federal Rule of Procedure 56 and Nebraska Civil Rule 56.1(a). As the government points out, the Hidys did not concisely respond to or specifically controvert the government's fact statements as required by Local Rule 56.1(b). Accordingly, the government's properly referenced facts are deemed admitted for purposes of summary judgment. *See id.*; *Tramp v. Associated Underwriters, Inc.*, 768 F.3d 793, 799 (8th Cir. 2014) (concluding the "court properly considered the movant's material facts admitted" when the nonmovant failed to respond as required by Local Rule 56.1(b)); Fed. R. Civ. P. 56(e)(2), (3) (explaining that when "a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may ... consider the fact undisputed for purposes of the motion" and "grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it"). The Court also agrees with the government that the Hidys did not properly present and support the bulk of their own statement of facts. *See* NECivR 56.1(b)(1); Fed. R. Civ. P. 56(c) and (e). The Court has not relied on such unsupported facts in deciding this motion.

come tax returns, which they both sign and submit by mail. They have never hired a professional tax preparer. In preparing their returns, Rosemarie generally relies on Internal Revenue Service ("IRS") instructions to figure out how to complete the requisite tax forms and to decide whether a specific line item applied to them.

For example, when the couple moved to the U.K., they began claiming an exclusion for foreign earned income, which reduced their taxable income. Rosemarie learned about the exclusion from IRS instructions and other online resources. She likewise consulted those sources before claiming tax credits for residential-energy efficiency and deductions for moving expenses and unreimbursed business expenses.

As pertinent here, Rosemarie prepared the Hidys' joint federal income tax returns for tax years 2009, 2010, 2011, 2012, and 2013. For each year, she attached Schedule B, a form for declaring "Interest and Ordinary Dividends." Part III of that form, labeled "Foreign Accounts and Trusts," plainly requires the taxpayer to state whether they have any foreign accounts. More specifically, a question at Line 7a asks whether the taxpayer, at any time during the tax year, had "a financial interest in or signature authority over a financial account (such as a *bank account*, securities account, or brokerage account) located in a foreign country."[2] (Emphasis added). The applicable forms also included additional instructions related to foreign accounts and the taxpayer's reporting obligations.

On every Schedule B the Hidys completed for tax years 2009 through 2013, they answered the question at Line 7a, "No." In other words, the Hidys incorrectly reported they did not have any financial interest in or signatory authority over a foreign account. They now admit they should have answered "Yes" but made a mistake that they then repeated each year.

Rosemarie states that even though she did not understand the question, she did not consult the available instructions or do any research before answering it. Claude says he did not review the couple's returns. He would simply sign the signature page at Rosemarie's request. Claude described Rosemarie as "very diligent" and "conscientious" in preparing their returns. The Hidys did not seek any advice about reporting their foreign bank accounts until fall 2014, when they engaged a lawyer after receiving notices under the Foreign Account Tax Compliance Act ("FATCA"), 26 U.S.C. § 1471 *et seq.*

Federal regulations in place between 2009 and 2013 required the Hidys to report their foreign bank accounts to the IRS by filing a Report of Foreign Bank and Financial Accounts ("FBAR") by June 30 of the following year. *See* 31 C.F.R. §§ 103.24(a) (1987), 103.27(c) (1989), 1010.306(c) (2011), and 1010.350(a) (2011).[3] The Hidys did not timely file FBARs for 2009, 2010, 2011, 2012, and 2013.

On or about February 20, 2015, the Hidys received an IRS audit notice. At that point, they had still not filed the required FBARs. In August 2015, Claude filed FBARs for 2009 through 2013. The Hidys maintain their failure to timely file the required FBARs was reasonable because they did not know they had to file them.

On December 15, 2016, a delegate of the Secretary of the Treasury ("Secretary") assessed civil FBAR penalties totaling $112,543 against Claude and $50,000

2. The language on the form varied slightly—but not materially—over time.

3. The regulations were transferred and reorganized effective March 1, 2011. *See* 75 Fed. Reg. 65806-01.

against Rosemarie pursuant to 31 U.S.C. § 5321(a)(5)(B)(i) for failing to properly report their financial interests in foreign bank accounts for calendar years 2009 through 2013.[4] *See also id.* at § 5314. The Hidys received notice of the penalties and a demand for payment but have not yet fully paid them.

As of January 22, 2020, Claude's unpaid balance related to his FBAR penalties is $136,303.14. Rosemarie's unpaid balance is $60,864.39.

B. Procedural History

On November 13, 2018, the government filed this action (Filing No. 1) to collect the Hidys' unpaid FBAR penalties with interest, "penalties for late payment, and fees under 31 U.S.C. § 3717(a) and (e) . . . for their non-willful failure to timely report their financial interest" in and authority over numerous foreign bank accounts for calendar years 2009 through 2013. In their answer (Filing No. 10), the Hidys alleged that "for most of the years" at issue, they were unaware of the rules regarding foreign bank accounts and FBARs and that once they became aware, "they acted in good faith and tried to meet their obligation[s]."

On January 24, 2020, the government moved for summary judgment (Filing No. 26). The Hidys have responded (Filing No. 36), and the government has filed a reply (Filing No. 41). This matter is now fully briefed and ready for decision.

II. DISCUSSION

A. Standard of Review

[1] Under Rule 56(a), summary judgment is required "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." "A party cannot defeat a summary judgment motion by asserting 'the mere existence of some alleged factual dispute between the parties'; the party must assert that there is a 'genuine issue of material fact.' " *Quinn v. St. Louis County*, 653 F.3d 745, 751 (8th Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

[2, 3] The Court views the facts "in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts." *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc) (quoting *Ricci v. DeStefano*, 557 U.S. 557, 586, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009)). "To show a genuine dispute of material fact, a party must provide more than conjecture and speculation." *McConnell v. Anixter, Inc.*, 944 F.3d 985, 988 (8th Cir. 2019) (quoting *Zayed v. Associated Bank, N.A.*, 913 F.3d 709, 720 (8th Cir. 2019)). They have "an affirmative burden to designate specific facts creating a triable controversy." *Id.* (quoting *Crossley v. Ga.-Pac. Corp.*, 355 F.3d 1112, 1113 (8th Cir. 2004)).

[4, 5] "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Doe v. Dardanelle Sch. Dist.*, 928 F.3d 722, 725 (8th Cir. 2019) (quoting *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505). "If the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, summary judgment should be granted." *Smith-Bunge v. Wisconsin Cent., Ltd.*, 946 F.3d 420, 424 (8th Cir. 2019).

B. FBAR Penalties

[6] The Bank Secrecy Act ("BSA"), 31 U.S.C. § 5311 *et seq.*, and its implementing regulations "require certain reports or records where they have a high degree of

4. Again, the details are set forth in the government's statement of facts.

usefulness in criminal, tax, or regulatory investigations or proceedings." As mandated by § 5314(a), the Secretary requires U.S. citizens like the Hidys who have "a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country" to report that interest or authority to the IRS each year. *See* 31 C.F.R. §§ 103.24(a) and 1010.350(a). That reporting requirement is met by filing an FBAR "on or before June 30 of each calendar year with respect to foreign financial accounts exceeding $10,000 maintained during the previous calendar year." *See id.* §§ 103.27(c) and 1010.306(c).

Failing to timely file a required report can result in civil penalties of up to $10,000 per violation.[5] *See* 31 U.S.C. § 5321(a)(5). But the government cannot impose a penalty if the "violation was due to reasonable cause, and . . . the amount of the transaction or the balance in the account at the time of the transaction was properly reported." *Id.* § 5321(a)(5)(B)(ii).

The Hidys do not deny they failed to timely report their financial interests in foreign bank accounts from 2009 through 2013 and would otherwise be subject to civil penalties. Rather, they contend they should not be penalized because, in their view, their violations were "due to reasonable cause." *Id.*

Neither the BSA nor its implementing regulations define "reasonable cause." The government urges this Court to follow those courts that have interpreted the phrase to have the meaning it has "as used in the Internal Revenue Code, namely 26 U.S.C. § 6651(a) and 26 U.S.C. § 6664(c)(1)." *See, e.g.*, *Jarnagin v. United States*, 134 Fed. Cl. 368, 376 (2017); *United States v. Ott*, No. 18-CV-12174, 2019 WL 3714491, at *2 (E.D. Mich. Aug. 7, 2019); *Moore v. United States*, No. C13-2063RAJ, 2015 WL 1510007, at *4 (W.D. Wash. Apr. 1, 2015) ("There is no reason to think that Congress intended the meaning of 'reasonable cause' in the Bank Secrecy Act to differ from the meaning ascribed to it in tax statutes."). According to the government, to avoid summary judgment under that standard, the Hidys "must show that they exercised ordinary business care and prudence or made an effort to assess their proper FBAR reporting obligations." *Cf. United States v. Boyle*, 469 U.S. 241, 245, 105 S.Ct. 687, 83 L.Ed.2d 622 (1985) (explaining a taxpayer's burden of proving "reasonable cause" to avoid a statutory penalty is a heavy one).

The Hidys briefly take issue with the government's proposed definition of "reasonable cause" but fail to substantiate their criticism or propose an alternative. In any event, the Court finds the government's proposed standard—drawn from well-reasoned decisions on the meaning of reasonable cause in § 5321(a)(5)—is appropriate here.

The Court also agrees with the government that the Hidys have failed to adduce sufficient evidence to colorably establish reasonable cause for their admitted failure to file the required FBARs for calendar years 2009 through 2013. For years, the Hidys consciously deposited and actively managed Claude's wages in foreign bank accounts for protection, convenience, and financial gain. In time, they amassed more than one million dollars held in numerous accounts at different foreign banks.

Over the years, the Hidys prepared and filed their own tax returns, with Rosemarie taking the lead. In general, she researched relevant issues online and relied on IRS instructions in determining their eligibility for tax benefits and preparing their returns. In completing Part III of

5. Enhanced penalties apply if a violation is willful. *See id.* § 5321(a)(5)(C).

Schedule B each year, Rosemarie incorrectly answered "No" to the question at Line 7a that asked whether the Hidys had any financial interest in or signatory authority over any foreign bank accounts.

That question and the accompanying instructions notified the Hidys they had a duty to report their interests in their foreign bank accounts to the IRS. *See, e.g.*, *United States v. Sturman*, 951 F.2d 1466, 1477 (6th Cir. 1991) (noting Schedule B and related resources indicate a taxpayer could "quite easily" learn of the reporting requirements and concluding "[i]t is reasonable to assume that a person who has foreign bank accounts would read the information specified by the government in tax forms" and investigate further if necessary); *United States v. McBride*, 908 F. Supp. 2d 1186, 1206-08 (D. Utah 2012) ("A taxpayer's signature on a return is sufficient proof of a taxpayer's knowledge of the instructions contained in the tax return form and in other contexts."); *Jarnagin*, 134 Fed. Cl. at 378. Both Hidys ignored that obligation. *See Moore*, 2015 WL 1510007, at *6 ("[N]o fact finder could conclude that ignoring the question on Schedule B ... was an exercise of ordinary business care or prudence").

Rosemarie now says she did not understand the question. Even if true, she admits she made no effort to learn what it meant, research the issue (as she had done for other matters that inured to the Hidys' benefit like taking the foreign tax credit), or seek professional advice or assistance. Her actions do not demonstrate ordinary care and prudence. *See Ott*, 2019 WL 3714491, at *2 (finding the defendant had "not met her burden of establishing a material question of fact as to whether she had reasonable cause for the failure to disclose her foreign financial accounts" where she failed to show "she took any steps to learn whether she was required to report her foreign financial accounts").

[7] Claude did even less. He signed the tax forms his wife prepared—and thus affirmed the correctness and completeness of each inaccurate Schedule B—without even reading them. *See Moore*, 2015 WL 1510007, at *6 (noting that had the taxpayer "at least read ... the instructions (as the question [at 7a] directed him), he would have discovered that he should" have answered "Yes"). "A taxpayer who signs a tax return will not be heard to claim innocence for not having actually read the return, as he or she is charged with constructive knowledge of its contents." *United States v. Williams*, 489 F. App'x 655, 659 (4th Cir. 2012) (quoting *Greer v. Comm'r of Internal Revenue*, 595 F.3d 338, 347 n.4 (6th Cir. 2010)).

"[A]ny individual exercising ordinary business care and prudence would have" identified the errors in the Hidys' answers to the question at 7a and investigated their FBAR reporting obligations further. *Jarnagin*, 134 Fed. Cl. at 378 ("A reasonable person ... would not have signed their income tax returns without reading them, would have identified the clear error committed by their accountants, and would have sought advice regarding their obligation to file [an FBAR].").

In opposing summary judgment, the Hidys assert that "[u]pon learning of the FBAR filing obligation in 2014," they began to research the issue with "every intention of complying" and worked hard to correct their mistakes. The Court has no reason to doubt those assertions. But they largely miss the point. First, the Hidys face penalties for non-willful violations under § 5321(a)(5). Such violations do not require an intent to not comply or some other illicit motive—and no one has attributed one to the Hidys.

Second, by its terms, § 5321(a)(5)(B)(ii)'s reasonable-cause exception focuses on the reasons for the violation at the time it took

place, not the reasonableness of a party's post-violation efforts somewhere down the line. And the Hidys fail to cite any authority indicating that even the most-diligent post-violation conduct allows a party to avoid a statutory civil penalty imposed for a non-willful violation of the FBAR reporting requirements on the undisputed facts of this case.

III. CONCLUSION

The Hidys violated the BSA and its implementing regulations by failing to timely file FBARs for calendar years 2009 through 2013 without reasonable cause. *See* 31 U.S.C. § 5314. Their non-willful failure to comply with the BSA subjects them to civil penalties and interest under §§ 5321 and 3717.[6] Accordingly,

IT IS ORDERED:

1. The government's Motion for Summary Judgment is granted.
2. The government is entitled to recover from defendant Claude Hidy civil penalties under 31 U.S.C. § 5321(a)(5), accrued interest, late-payment penalties, and associated fees totaling $136,303.14, plus any interest and statutory additions allowed by law from January 22, 2020, to the date of payment.
3. The government is entitled to recover from defendant Rosemarie Hidy civil penalties under 31 U.S.C. § 5321(a)(5), accrued interest, late-payment penalties, and associated fees totaling $60,864.39, plus any interest and statutory additions allowed by law from January 22, 2020, to the date of payment.
4. The government is also entitled to recover the reasonable costs it incurred in pursuing this case.
5. A separate judgment will issue.

Dorothy KOTALIK, Individually and on behalf of estate of John Kotalik, deceased, Plaintiff,

v.

A.W. CHESTERTON COMPANY, et al., Defendants.

Catherine Selfors, individually and on behalf of estate of Duane Selfors, Plaintiff,

v.

Apollo Piping Supply, Inc., et al., Defendants.

Case No. 3:18-cv-246, Case No. 3:18-cv-251

United States District Court, D. North Dakota.

Signed 07/08/2020

Background: Plaintiff-wives in two survival and wrongful death actions alleging husbands sustained injuries and died because of workplace exposure to asbestos brought suits in state court against various defendants. Following removal to federal district court based on federal officer jurisdiction, defendants moved to enforce plaintiffs' compliance with disclosure requirements of North Dakota's Asbestos Bankruptcy Trust Transparency Act. Plaintiffs moved for certification of question to North Dakota Supreme Court re-

6. Having effectively conceded the government's statement of facts and failed to adequately support their own, the Hidys also fail to raise a triable issue on the government's calculation of the penalties and interest owed.