15-11663-EE, 15-11996-FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff–Appellee

v.

MICHAEL CLARKE, as Chief Financial Officer of
Beekman Vista, Inc., et al.,
Defendants–Appellants

UNITED STATES OF AMERICA,
Plaintiff–Appellee

v.

ROBERT JULIEN, as President of Beekman Vista, Inc.,
Defendant–Appellant

ON APPEALS FROM THE ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

CORRECTED BRIEF FOR THE UNITED STATES

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Micheal Clarke, et al. v. United States

(11th Cir. Nos. 15-11663-EE; 15-11996-FF)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

C-1 of 2

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, counsel for the United States hereby certify that, to the best of their knowledge, information, and belief, the following persons not included in the certificate contained in the appellants' brief may have an interest in the outcome of this appeal:

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The Delia Moog Family Trust #2

Micheal Clarke, et al. v. United States

(11th Cir. Nos. 15-11663-EE; 15-11996-FF)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

C-2 of 2

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Moog, Christine

Moog, Delia

The Robert Julien Family Trust #2

United States of America, Appellee

Vitunac, Anne E., United States Magistrate Judge, Southern District of Florida

The 2005 Christine Moog Family Delaware Dynasty Trust

The 2005 Robert Julien Family Delaware Dynasty Trust

2020072 Ontario Ltd.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 11th Cir. R. 28-1(c) and Fed. R. App. P. 34(a), counsel for the United States respectfully inform this Court that they believe oral argument would be helpful to the Court in its resolution of this appeal.

TABLE OF CONTENTS

Page

Page

Page

Page

TABLE OF CITATIONS

Cases: **Page(s)**

* Cases or authorities chiefly relied upon are marked with asterisks.

Cases (continued): **Page(s)**

Cases (continued): **Page(s)**

* Cases or authorities chiefly relied upon are marked with asterisks.

Cases (continued): **Page(s)**

* Cases or authorities chiefly relied upon are marked with asterisks.

Cases (continued): **Page(s)**

Cases (continued): **Page(s)**

Statutes:

Statutes (continued): **Page(s)**

* Cases or authorities chiefly relied upon are marked with asterisks.

Statutes (continued): **Page(s)**

Treasury Regulations (26 C.F.R.):

Rules:

Miscellaneous:

GLOSSARY

Beekman	Beekman Vista, Inc.
CFO	Chief Financial Officer
Code or I.R.C.	Internal Revenue Code (26 U.S.C.)
DHLP	Dynamo Holdings Limited Partnership
FPAA	Notice of Final Partnership Administrative Adjustment
IRM	Internal Revenue Manual
IRS	Internal Revenue Service
TEFRA	Tax Equity and Fiscal Responsibility Act of 1982
Treas. Reg.	Treasury Regulations (26 C.F.R.)

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

1. Appeal No. 15-11663-EE: the "Clarke" cases

As part of an investigation of the tax liabilities of Dynamo Holdings Limited Partnership ("DHLP"), the Internal Revenue Service ("IRS") issued administrative summonses to: (1) Michael Clarke, as chief financial officer ("CFO") of Beekman Vista, Inc. ("Beekman"); (2) Michael Clarke, as CFO of Dynamo GP, Inc.; (3) Rita Holloway, as trustee for The 2005 Christine Moog Family Delaware Dynasty Trust; (4) Marc Julien, as trustee for The 2005 Robert Julien Delaware Dynasty Trust; and (5) Robert Julien. (Doc. 1-3 in each case.)[1] After

[1] Unless reference to one of the other cases is expressly indicated, all "Doc." references are to the District Court's docket entries in *United States v. Michael Clarke, as Chief Financial Officer of Beekman Vista, Inc.*, No. 9:11-mc-80456, the lead case in the five consolidated "Clarke" cases underlying appeal No. 15-11663-EE. The four other consolidated Clarke cases are *United States v. Michael Clarke, as Chief Financial Officer of Dynamo GP, Inc.*, No. 9:11-mc-80457; *United States v. Rita Holloway, as Trustee for The 2005 Christine Moog Family Delaware Dynasty Trust*, No. 9:11-mc-80459; *United States v. Marc Julien, as Trustee for The 2005 Robert Julien Family Delaware Dynasty Trust*, No. 9:11-mc-80460; and *United States v. Robert Julien*, No. 9:11-mc-80461. The "Julien" case underlying appeal No. 15-11996-FF, *United States v. Robert Julien, as President of Beekman Vista, Inc.*, No. 9:12-mc-80190, was filed after the Clarke cases and was not consolidated with them in the District Court.

the persons summoned failed to comply with the summonses, the United States filed five separate petitions for enforcement in the District Court. (Doc. 1 in each case.) The court granted DHLP's motions to intervene in each case, *see* § 7609(b) of the Internal Revenue Code (26 U.S.C.) ("I.R.C." or the "Code"),[2] and consolidated the five cases on September 16, 2011. (Doc. 18.) The District Court had jurisdiction over the petitions under I.R.C. §§ 7402(b) and 7604(a).

On April 16 and 17, 2012, the District Court entered separate orders enforcing the five summonses. (Doc. 24; Doc. 29, No. 11-80457; Doc. 20, No. 11-80459; Doc. 22, No. 11-80460; Doc. 24, No. 11-80461.) Clarke (as CFO of Beekman and as CFO of Dynamo GP, Inc.), Robert Julien, and DHLP timely appealed, and, on April 18, 2013, this Court vacated the orders and remanded the case to the District Court for further proceedings. (Doc. 43, No. 11-80456.) *See United States v. Clarke*, 517 F. App'x 689 (11th Cir. 2013). The Supreme Court granted the United States' petition for a writ of certiorari and, on June 19, 2014,

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[2] Unless otherwise indicated, all statutory references are to the Internal Revenue Code, as amended and in effect with respect to the time in question.

vacated this Court's judgment and remanded the case for further proceedings. *United States v. Clarke*, 134 S. Ct. 2361 (2014). On July 25, 2014, this Court remanded the case to the District Court for further proceedings consistent with the Supreme Court's opinion. (Doc. 54.)

On remand, on February 18, 2015, the District Court issued an order again enforcing the five summonses. (Doc. 63.) The court's order was a final order that disposed of all claims of all parties. *La Mura v. United States*, 765 F.2d 974, 983 (11th Cir. 1985). On April 16, 2015, Clarke (as CFO of Beekman and as CFO of Dynamo GP, Inc.), Robert Julien, and DHLP filed a timely notice of appeal. (Doc. 64.) *See* 28 U.S.C. § 2107. This Court has jurisdiction under 28 U.S.C. § 1291.

2. Appeal No. 15-11996-FF: the "Julien" case

As part of an investigation of the tax liabilities of Beekman, the IRS issued an administrative summons to Robert Julien, as president of Beekman. (Doc. 1-3, No. 12-80190.) After Julien failed to comply with the summons, the United States filed a petition for enforcement in the District Court. (Doc. 1, No. 12-80190.) The District Court had jurisdiction over the petition under I.R.C. §§ 7402(b) and 7604(a). On March 9, 2015, the District Court entered a final, appealable order

enforcing the summons. (Doc. 17, No. 12-80190.) On May 6, 2015, Julien filed a timely notice of appeal. (Doc. 18, No. 12-80190.) *See* 28 U.S.C. § 2107. This Court has jurisdiction under 28 U.S.C. § 1291.

IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,
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ON APPEALS FROM THE ORDERS OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

CORRECTED BRIEF FOR THE UNITED STATES

STATEMENT OF THE ISSUE

Whether the District Court properly exercised its discretion in ordering the enforcement of the IRS summonses in issue without holding an evidentiary hearing.

STATEMENT OF THE CASE

A. Course of proceedings and disposition in the court below

These consolidated appeals arise from six separate actions brought by the United States in the District Court to enforce summonses issued by the IRS pursuant to its authority under I.R.C. § 7602. Five of the actions (the "Clarke" cases) were consolidated by the District Court and relate to summonses issued by the IRS in 2010 to obtain information for its investigation of DHLP's tax reporting obligations. The sixth action relates to a summons issued in 2011 as part of the IRS's examination of Beekman's withholding tax liabilities.

1. In each of the Clarke cases, the United States provided a declaration from the investigating agent making out a prima facie case for enforcement, and the District Court issued an order requiring the summonee to show cause why the summons should not be enforced. After receiving briefing and evidentiary submissions from the parties, but without holding an evidentiary hearing, the court entered orders enforcing the summonses. On appeal, this Court, relying on circuit precedent that entitled a summons opponent to an evidentiary hearing based on a bare allegation of improper purpose, vacated the District

Court's orders and remanded with instructions that the court permit the summons opponents to "question IRS officials concerning the Service's reasons for issuing the summonses." *United States v. Clarke*, 517 F. App'x 689, 691 (11th Cir. 2013) (citation omitted).

After granting certiorari, the Supreme Court rejected this Court's categorical rule and articulated a standard for determining whether an evidentiary hearing in a summons case is warranted. It also vacated this Court's judgment and remanded the case for consideration of specified matters. *United States v. Clarke*, 134 S. Ct. 2361, 2368–69 (2014). On remand, the District Court ruled that an evidentiary hearing was not warranted under the Supreme Court's standard and again ordered the summonses enforced. Three of the summons opponents filed an appeal from the District Court's order (appeal No. 15-11663-EE).

2. In the Julien case, the United States also made out a prima facie case for enforcement through the investigating agent's declaration. Shortly after entering its order on remand in the Clarke cases, the District Court issued a show-cause order to Julien. After considering Julien's response, the court entered an order enforcing the summons,

without holding an evidentiary hearing, based on the reasoning in its final order in the Clarke cases. Julien filed an appeal (No. 15-11996-FF), which was consolidated with the appeals in the Clarke cases.

B. Statement of the facts

1. The Clarke cases

a. The issuance of the summonses in September and October 2010

During an IRS examination of DHLP's federal tax reporting obligations for its 2005, 2006, and 2007 tax years,[3] issues arose with respect to indebtedness that DHLP had reported on its returns, including questionable interest expenses in the amount of $17 million in both 2006 and 2007. (Doc. 1-2 ¶ 2.) To obtain relevant information, the IRS issued summonses under I.R.C. § 7602 to: (1) Michael Clarke, as CFO of Beekman; (2) Michael Clarke, as CFO of Dynamo GP, Inc.; (3) Rita Holloway, as trustee for The 2005 Christine Moog Family Delaware Dynasty Trust; (4) Marc Julien, as trustee for The 2005 Robert Julien Delaware Dynasty Trust; and (5) Robert Julien. (Doc. 1-2

[3] As a "partnership", DHLP was not directly subject to federal income tax; rather, it reported its items of income, deductions, and credits on an information return, I.R.C. § 6031, and those items were passed through to its partners, who must report and pay tax on their allocable share of those items, I.R.C. §§ 701–704.

¶ 3 in each case.) All of the summonses were issued on September 24, 2010, except the summons to Robert Julien was issued on October 25, 2010. (Doc. 1-2 ¶ 3 in each case.) The summonses directed the summonees to appear and give testimony and produce documents relating to the IRS's examination. (Doc. 1-3 in each case.) The dates set for those appearances were October 25, 2010, for Clarke, Holloway, and Marc Julien, and December 3, 2010, for Robert Julien. (Doc. 1-3 at 1 in each case.)

The IRS believed that the summonees had information relevant to DHLP's tax reporting obligations. (Doc. 1-2 ¶ 7 in each case.) Specifically, Beekman was the counterparty to the DHLP transactions being examined (Doc. 1-2 ¶ 7), and Dynamo GP, Inc., was DHLP's general partner (Doc. 1-2 ¶ 7, No. 11-80457). Therefore, Clarke, as the CFO of Beekman and Dynamo, should have pertinent information. Both Delaware Dynasty Trusts held large partnership interests in DHLP (Doc. 1-2 ¶ 7, Nos. 11-80459 and 11-80460), and Holloway and Marc Julien, as trustees, should have pertinent information. Robert Julien, as a beneficiary of one of the trusts and a large shareholder of Dynamo GP, Inc. (Doc. 1-2 ¶ 7, No. 11-80461) also possessed pertinent

information. The IRS therefore concluded that the information sought by the summonses was necessary to fully investigate DHLP's tax reporting obligations. (Doc. 1-2 ¶ 7 in each case.) None of the summonees, however, complied with the summonses. (Doc. 1-2 ¶ 6 in each case.)

b. The issuance of the FPAA in December 2010

On December 28, 2010, after the summonees failed to obey the summonses, and with the limitations period for assessing tax attributable to DHLP's partnership items drawing to a close, *see* I.R.C. §§ 6501, 6229, the IRS issued a Notice of Final Partnership Administrative Adjustment ("FPAA") to DHLP's tax matters partner. (Doc. 7-2.) *See* I.R.C. §§ 6223(a)(2) and 6226(a); *see generally United States v. Woods*, 134 S. Ct. 557, 562–63 (2013) (discussing the unified audit procedures for partnerships). The FPAA proposed numerous adjustments to items on DHLP's 2005–2007 returns. (Doc. 7-2.) On February 1, 2011, DHLP filed in the United States Tax Court a petition for readjustment of partnership items under I.R.C. § 6226, challenging the IRS's determinations. (Doc. 7-1.) That proceeding remains pending.

See Dynamo Holdings Ltd. Partnership v. Commissioner, No. 2685-11 (T.C.).

c. The summons enforcement actions

(i) The initial proceedings. On April 28, 2011, the United States filed five separate petitions in the District Court to enforce the summonses. (Doc. 1 in each case.) In support of its petitions, the United States provided the declaration of Revenue Agent Mary Fierfelder, who issued the summonses. (Doc. 1-2 in each case.) In her declaration, Agent Fierfelder stated: (1) the IRS had examined DHLP's tax returns for 2005–2007, and that she had issued the summonses "in furtherance of" that examination (Doc. 1-2 ¶¶ 2–3 in each case); (2) the testimony and information sought by the summonses were necessary to "properly investigate the correctness of the federal tax reporting by [DHLP]"; (3) the information sought was not already in the IRS's possession; (4) all administrative steps required by the Code had been followed; and (5) the summonses were "not issued to harass or for any other improper purpose." (Doc. 1-2 ¶¶ 7–10 in each case.)

The District Court found that the United States had made a prima facie case for enforcement and, therefore, issued show-cause orders

requiring the summonees to file written responses "stating why [they] should not comply with and obey the … IRS summons[es] and every requirement thereof," or, alternatively, to notify the court that they did not oppose enforcement of the summonses. (Doc. 4; Doc. 3, No. 11-80457; Doc. 3, No. 11-80459; Doc. 6, No. 11-80460; Doc. 3, No. 11-80461.) After the summonees filed responses to the petitions and show-cause orders, and the United States replied, the court granted DHLP's unopposed motions to intervene in each proceeding and consolidated the five cases, making case No. 11-80456 the lead case. (Doc. 18.)

In their responses, the summons opponents claimed that the summonses were issued for an "improper purpose" and should not be enforced. In this regard, the opponents alleged first that the summonses were an "improper subterfuge to obtain data for a prohibited duplicative examination of Beekman," and not for the examination of DHLP, and second, that the summonses were issued to "punish[ ] DHLP for refusing to agree to a further extension of the applicable statute of limitations" within which the IRS must assess any tax owed. To support the latter allegation, the opponents submitted a declaration by Clarke stating that "immediately" after DHLP had

declined to agree to a third extension of time, the IRS, "despite having not asked for additional information for some time, … suddenly issued" the summonses. (Doc. 8-1 ¶ 9.) The opponents further claimed that even if the summonses had been *issued* for the legitimate purpose of investigating DHLP's tax obligations, the IRS's need to investigate necessarily terminated with its issuance of the FPAA to DHLP in December 2010, and the IRS's later efforts to *enforce* the summonses were for the improper purpose of "evading the Tax Court limitations on discovery" in the litigation subsequently instituted by DHLP challenging the IRS's determinations in the FPAA. Claiming to have "raised in a substantial way the existence of substantial deficiencies in the summons proceedings," the opponents demanded "an evidentiary hearing in respect of the issues raised in the Petition and this Response, and discovery from the Government before such hearing." (Doc. 7; Doc. 14, No. 11-80457; Doc. 10, No. 11-80459; Doc. 12, No. 11-80460; Doc. 7, No. 11-80461.)

(ii) The District Court's original summons-enforcement orders. The District Court issued five separate orders enforcing the summonses

on April 16 and April 17, 2012. (Doc. 24.)[4] The court held that the summons opponents had failed to rebut the United States' prima facie case for enforcement under *United States v. Powell*, 379 U.S. 48, 85 S. Ct. 248 (1964). (Doc. 24 at 3.) The court explained that, because the United States had established its legitimate need for the summoned information, the possibility of an additional use for the information in a second examination of Beekman did not render the summonses unenforceable. (*Id.* at 4.) The court also held that the allegation of retribution for DHLP's refusal to extend the limitations period was "mere conjecture" and, even if true, would have no bearing on the propriety of summonses issued "for information that is clearly relevant to the issues being examined." (*Id.* at 4–5.) The court rejected as "incorrect as a matter of law" the summons opponents' contention that the United States' power to enforce the summonses terminated once the FPAA was issued or DHLP filed its Tax Court petition because the summonses might allow the Government to obtain more information than it could by the Tax Court's discovery procedures alone. (*Id.* at 5.)

[4] Because the court's orders are materially identical, we cite to the order in the lead case.

In this regard, the court explained that "[t]he validity of a summons is tested as of the date of issuance," and "[e]vents occurring after the date of issuance, but before enforcement, should not affect enforceability." (*Id.*) Finally, the court ruled that the summons opponents' allegations did not warrant discovery or an evidentiary hearing, and it ordered the summonses enforced. (*Id.* at 6–7.)

Clarke, Robert Julien, and DHLP (but not Holloway) appealed to this Court, which vacated the District Court's orders and remanded the case. (Doc. 43.) *See Clarke*, 517 F. App'x 689. This Court ruled that appellants' allegation that the summonses were issued "solely in retribution for [DHLP's] refusal to extend a statute of limitations deadline" constituted an allegation of an improper purpose and that, under "binding Circuit authority," this allegation required that appellants be given an opportunity "to explore their allegation of an improper purpose" in an evidentiary hearing, although they were "not entitled to discovery." *Id.* at 691 (citing *Nero Trading, LLC v. U.S. Dept. of Treasury*, 570 F.3d 1244, 1250 (11th Cir. 2009), and *United States v. Southeast First Nat'l Bank of Miami Springs*, 655 F.2d 661, 667 (5th Cir. 1981)). This Court, however, upheld the District Court's

ruling denying appellants' request for discovery, concluding that they had not met the higher standard governing discovery in a summons case. *Id.* at 691 n.3. This Court then directed that, on remand, appellants should be permitted to "question IRS officials concerning the Service's reasons for issuing the summonses." *Id.* at 691.

(iii) The Supreme Court's opinion. The Supreme Court granted the United States' petition for a writ of certiorari and subsequently vacated this Court's judgment and remanded the case for further proceedings. *Clarke*, 134 S. Ct. 2361. In so doing, the Supreme Court rejected this Court's "categorical rule" that "a bare allegation of improper motive entitles a person objecting to an IRS summons to examine the responsible officials." *Id.* at 2367, 2368. The Court explained, "[t]he balance we have struck in prior cases comports with the following rule, applicable here," for determining when an evidentiary hearing is warranted:

> As part of the adversarial process concerning a summons's validity, the taxpayer is entitled to examine an IRS agent when he can point to specific facts or circumstances plausibly raising an inference of bad faith. Naked allegations of improper purpose are not enough: The taxpayer must offer some credible evidence supporting his charge. But circumstantial evidence can suffice to meet that burden; after all, direct evidence of another person's bad

> faith, at this threshold stage, will rarely if ever be available. And although bare assertion or conjecture is not enough, neither is a fleshed out case demanded: The taxpayer need only make a showing of facts that give rise to a plausible inference of improper motive. That standard will ensure inquiry where the facts and circumstances make inquiry appropriate, without turning every summons dispute into a fishing expedition for official wrongdoing.

Id. at 2367–68. Accordingly, the Supreme Court remanded the case for this Court to "consider the respondents' submissions in light of" the applicable standard, taking into account "the District Court's broad discretion to determine whether a taxpayer has shown enough to require the examination of IRS investigators." *Id.* at 2368. Finally, the Supreme Court explained that the broad deference afforded to the District Court did not extend to any rulings on what constitutes an improper motive as a matter of law and, without expressing any opinion on the issues, noted that the United States had argued that, as a matter of law, taxpayer's unfair-advantage-in-Tax-Court-litigation and retaliation-for-declining-to-extend-the-statute-of-limitations arguments were unavailing. *Id.* at 2368–69.

This Court, in turn, remanded the case to "give the district court the opportunity in the first instance to apply the standard articulated by the Supreme Court." (Doc. 54 at 5.) *See United States v. Clarke*, 573

F. App'x 826 (11th Cir. 2014). It directed that, on remand, the District Court "should determine, in light of all of the evidence and affidavits highlighted by the Supreme Court, whether Appellants pointed to specific facts or circumstances plausibly raising an inference of improper purpose." (Doc. 54 at 5.) It further instructed that the District Court also consider "whether the improper purposes alleged by Appellants, *i.e.*, retaliating for [DHLP's] refusal to extend a statute of limitations deadline for a third time and seeking enforcement to avoid the Tax Court's discovery rules, are improper as a matter of law." (*Id.*) This Court expressly took no position on whether additional evidence should be allowed on remand, leaving it to the District Court to make that determination. (*Id.* at 5 n.1.)

(iv) The District Court proceedings on remand. On remand, the summons opponents filed a motion for a status conference, noting the Supreme Court's rejection of this Court's "'mere allegation' standard" and asserting that they "should be given a fair opportunity to present their case under the new standard." (Doc. 55 at 3.) Although this Court in its remand order had left it to the District Court to decide whether additional evidence should be allowed, the opponents did not identify

any evidence other than that which they had already adduced that they would like the District Court to consider. (*Id.*) They also argued that "supporting evidence … even now is not required by the standard established in this case by the highest court of the land." (*Id.*) They asked for "the opportunity to brief expressly the relevant issues under the new standard set forth by the Supreme Court … and "[t]o this end … request[ed] a fifteen (15) minute status conference with the Court to establish a schedule for the parties to complete such briefing." (*Id.*)

The District Court denied the summons opponents' request for a status conference and ordered the opponents to "brief their arguments and evidence" to the court, but not to "include any evidence not already presented to the Court." (Doc. 58 at 2.) The opponents then filed a supplemental brief arguing that they were entitled to an evidentiary hearing under the Supreme Court's recently articulated standard, based on their allegations that the summonses were issued for an improper purpose. (Doc. 60.) The opponents also argued that, because they had not "disclose[d] all of the evidence that they had" in their previous submissions, they should be allowed "to replead and provide additional evidence that they had previously, and even evidence they

have gathered since" in support of their allegations. (*Id.* at 4 & n.1.) Although the opponents acknowledged the District Court's ruling barring additional evidence, they did not offer any information about the substance of the purported additional evidence that they claimed they could proffer or attempt to make the offer of proof under Fed. R. Evid. 103(a) that is normally required to preserve an improper-evidence-exclusion claim for further review. (*Id.*)

The United States filed a response disagreeing with the summons opponents' position. The United States argued that the opponents' belated request to present additional evidence could not be reconciled with the District Court's show-cause order (Doc. 61 at 2–3) and that the request also should not be entertained because the opponents did "not identify the 'new' or previously undisclosed evidence that they now claim entitles them to a hearing" (*id.* at 3). The United States further argued that "most of the [summons opponents'] Supplemental Brief merely restates their prior pleadings without explaining how the Supreme Court's decision justifies a hearing." (*Id.*) The United States contended that the rehashed arguments were correctly resolved in the District Court's original order and that the opponents' request for an

evidentiary hearing failed under the Supreme Court's recently articulated standard. (*Id.* at 3–5.) The opponents then filed a reply. (Doc. 62.)

The District Court, applying the Supreme Court's recently articulated standard, denied the summons opponents' request for an evidentiary hearing and again ordered the summonses enforced. (Doc. 63.) The court noted that it had previously ordered "that Respondents could brief their arguments and evidence … but that said briefing was not to include any evidence not already presented in this Court." (*Id.* at 2.) On the merits, the court ruled that none of the grounds on which the opponents' allegations of improper purpose were based were improper "as a matter of law," including that the information obtained through the summonses might be used to open a second examination of Beekman. (*Id.* at 3.) As before, the court found that the opponents' claim that the summonses were issued in retaliation for DHLP not agreeing to a third extension of the limitations period on assessments was "unsupported by any evidence." (*Id.*) The court also rejected the opponents' claim that the summonses were improperly issued to avoid Tax Court discovery rules, again explaining that "[t]he validity of a

summons is tested at the date of issuance," and the summonses in this case were issued before any Tax Court proceeding was instituted. (*Id.*) The court likewise rejected other similar arguments made by the opponents that enforcement of the summonses would somehow interfere with the Tax Court proceedings (including that enforcement would "offend comity" with the Tax Court), would violate the intent of the Internal Revenue Manual (IRM), and was prohibited by a "pending adversary" rule. (Doc. 63 at 3–5.) The District Court found that the opponents' submissions "do not show facts giving rise to a plausible inference of improper motive regarding issuance of the summons[es]." (Doc. 63 at 5–6.) The court therefore denied their request for an evidentiary hearing and ordered the summonses enforced.

Clarke, Robert Julien, and DHLP now appeal.

2. The Julien case

a. The issuance of the summons

The IRS undertook an examination (the "second examination") of Beekman's withholding tax obligations for 2005 and 2006. (Doc. 1-1 ¶ 2, No. 12-80190.) The IRS had previously examined Beekman with respect to income tax and withholding tax issues different from those involved in the second examination. (*Id.* ¶ 3.) On January 10, 2011,

the IRS notified Beekman, in accordance with I.R.C. § 7605(b), that a second examination was necessary because information that could affect Beekman's tax liability had been developed since the prior examination. (Doc. 1-2, No. 12-80190.) During the second examination, issues arose regarding Beekman's obligations to withhold tax on income earned in the United States by foreign persons, including whether a $740,000,000 transfer by Beekman to DHLP was in substance a constructive distribution from Beekman to one or more foreign persons that was subject to withholding tax. (Doc. 1-1 ¶ 2, No. 12-80190.) On September 1, 2011, Agent Fierfelder (who had issued the summonses in the Clarke cases) issued a summons to Robert Julien, in his capacity as president of Beekman, directing him to appear on October 6, 2011, and give testimony and produce certain documents relating to the examination. (Docs. 1-3, 1-1 ¶ 4, No. 12-80190.) Julien failed to comply with the summons. (Doc. 1-1 ¶ 6, No. 12-80190.)

b. The summons enforcement action

(i) The United States' petition and Julien's response. On February 17, 2012, the United States filed a petition in the District Court to enforce the summons (Doc. 1, No. 12-80190), supported by a

declaration from Agent Fierfelder (Doc. 1-1, No. 12-80190). In her declartion, Agent Fierfelder explained that the summons was issued "in furtherance of" the IRS's examination of Beekman's withholding tax obligations for 2005 and 2006 and that a second examination of Beekman was necessary because the IRS had discovered additional information related to Beekman's withholding tax obligations after the first examination had closed. (*Id.* ¶¶ 3, 4.) She also declared that the testimony and documents sought by the summons were necessary to "properly investigate" Beekman's withholding tax obligations 2005 and 2006; the information sought was not already in the IRS's possession; all administrative steps required by the Code had been followed; and the summons "was not issued to harass or for any other improper purpose." (Doc. 1-1 ¶¶ 7–10, No. 12-80190.)

The District Court issued an order in which it found that the United States had made "a prima facie showing that the investigation is being conducted for a legitimate purpose, that the inquiries may be relevant to that purpose, that the information sought is not already within the IRS's possession, and that the administrative steps required by the Internal Revenue Code have been substantially followed" and

that "the burden of coming forward to oppose enforcement of the summons ha[d] shifted" to Julien. (Doc. 3 at 2, No. 12-80190.) The court accordingly scheduled a hearing to give Julien an opportunity to show cause why the summons should not be enforced (*id.* at 1) and required Julien to present "any defense" that he had in a written response before the hearing. (*Id.* at 2.)

Julien then filed a response unsupported by evidentiary submissions. (Doc. 11, No. 12-80190.) He contended that the summons was improperly issued because the IRS's investigation was an "unauthorized second audit" of Beekman. (*Id.* at 1, 4.) Parroting the arguments in the Clarke cases, he further asserted that enforcement of the summons would constitute an abuse of the court's process because, even if the IRS had a legitimate purpose for *issuing* the summons, the "real reason" the Government was seeking to *enforce* the summons was to "circumvent the discovery rules in the Tax Court." (*Id.* at 1–2, 4.) In that regard, Julien averred that the IRS had made adjustments to Beekman's returns after it issued the summons, and Beekman had instituted Tax Court litigation challenging those adjustments. (*Id.*) Julien raised related arguments that enforcement of the summons

would offend comity and deny his due process rights in the Tax Court. (*Id.* at 5–6.) Based on his allegations, Julien demanded an evidentiary hearing and discovery from the IRS prior to such hearing. (*Id.* at 6.)

The United States filed a reply contending that Julien had failed to rebut its prima facie showing that the summons was issued for a legitimate purpose and should be enforced. (Doc. 13, No. 12-80190.) In the interim, the District Court cancelled the show-cause hearing that it had previously set. (Doc. 9, No. 12-80190.)

(ii) The District Court's show-cause order, Julien's response, and the summons-enforcement order enforcing the summons. The day after the District Court entered its February 18, 2015 summons-enforcement order in the Clarke cases, it issued an order to Julien to "show cause … why the petition to enforce the Internal Revenue Summons should not be enforced in light of" the order. (Doc. 15, No. 12-80190.) Julien filed a three-page response, which, like his earlier response to the petition, did not include any evidentiary submissions. (Doc. 16, No. 12-80190.) Julien argued that the decision whether to enforce an IRS summons must be made "on a case by case basis" and that the allegations in Julien's case were "not identical" to those in the Clarke cases. (*Id.* at 1,

2.) Specifically, Julien alleged that the summons in his case was issued as part of an "improper second audit of [Beekman's] tax returns" and that, although this defense was "mentioned" in the Clarke cases, it "was not a central issue" in those cases. (*Id.* at 2.) Although the District Court's order in the Clarke cases barring additional evidence did not apply to the separate Julien case, Julien, who was a respondent in one of the Clarke cases, did not proffer the unidentified "additional evidence" that the summons opponents in the Clarke cases claimed would justify an evidentiary hearing. On March 9, 2015, the District Court entered a final order enforcing the summons "for the reasons stated" in its February 18, 2015, order on remand in the Clarke cases. (Doc. 17, No. 12-80190.)

C. Statement of the standard or scope of review

This Court reviews a district court's decision not to grant an evidentiary hearing in an IRS summons enforcement case for "abuse of discretion," except that whether an alleged illicit motive for enforcing a summons is insufficient as a matter of law to warrant an evidentiary hearing is a question of law subject to plenary review. *Clarke*, 134 S. Ct. at 2368. A district court's order enforcing an IRS summons will not

be reversed unless "clearly erroneous." *United States v. Morse*, 532 F.3d 1130, 1131 (11th Cir. 2008).

SUMMARY OF ARGUMENT

The District Court properly exercised its discretion on remand in enforcing the summonses in issue without holding an evidentiary hearing and without permitting the submission of additional unidentified evidence.

1. The District Court acted within its discretion in ruling that appellants' submissions failed to raise a plausible inference that the IRS issued the summonses in question "solely to punish" DHLP for declining to extend the limitations period for assessing tax. Appellants' assertion that the IRS had already completed its investigation of DHLP at the time it issued the summonses is implausible and was not supported by any credible evidence. To the contrary, the evidence in the District Court established that the IRS's investigation of DHLP's returns, and its need for the summoned information, was ongoing even after the IRS was compelled by statute-of-limitations considerations to issue the FPAA to DHLP without first having obtained all of the information it needed to fully investigate. The court found that the

information sought through the summonses was "clearly relevant" to the IRS's ongoing investigation, and it further found that appellants' allegation of retaliation was "unsupported by any evidence." Based on these findings, the court did not abuse its discretion in denying appellants' request for an evidentiary hearing.

2. The District Court also correctly held that appellants' allegation of improper purpose in enforcing the summonses, *i.e.*, for the alleged purpose of evading the Tax Court's discovery rules, was insufficient as a matter of law to warrant a hearing. Congress did not intend that the IRS's issuance of an FPAA or ensuing litigation in the Tax Court would restrict the IRS's summons power under § 7602, and additional restrictions should not be imposed absent unambiguous directions from Congress.

Moreover, appellants' argument is contrary to the Tax Court's own view of its discovery rules. The Tax Court, and not the district courts in summons cases, is the proper court to protect or enforce its discovery rules, and the Tax Court has categorically ruled that summonses issued prior to the commencement of litigation, as in this case, do not threaten the integrity of its discovery rules; rather, they benefit the Tax Court's

processes by resulting in a more fully developed factual background for consideration of the case or for settlement.

At all events, it is well settled that the relevant time for determining whether the IRS has a proper purpose for a summons under *Powell* is the date the summons is issued, and not when enforcement is sought. To the extent the courts may have recognized any exception to this rule, it has been only where a final, irrevocable determination of the taxpayer's liability has been made before enforcement is sought, which has not occurred in this case. Appellants' attempt to analogize the instant enforcement proceedings to other contexts is also unavailing.

3. The District Court did not clearly err in enforcing the summons in the Julien case after Julien failed to rebut the United States' prima facie case for enforcement. Julien's contention that the summons should not have been enforced because it was issued as part of an illegal second audit of Beekman was rejected by the court in the Clarke cases and, furthermore, lacks merit. The IRS, upon proper notice to Beekman, was authorized to conduct a second examination. Julien, moreover, failed to provide any evidence supporting his claim

that the issues involved in the second audit were the subject of a prior settlement with the IRS, and the investigating agent's unrebutted declaration filed with the court established that they were not.

4. Finally, by failing to make an offer of proof in the proceedings on remand, appellants waived any contention on appeal that the District Court abused its discretion in denying their request to supplement the record with additional purported evidence.

In any event, the court did not abuse its discretion in precluding additional evidentiary submissions on remand. This Court left it to the District Court to decide whether to take additional evidence, hold a hearing, or allow additional argument. The court's decision to allow appellants' request for additional argument, but not additional evidence that appellants had deliberately withheld and failed to even identify for the court, properly accounted for the fact that summons enforcement proceedings are meant to be summary in nature and that these proceedings had already been pending for over three years at the time of remand.

The record before the District Court also refuted appellants' concocted claim that they had withheld relevant evidence because they

had prepared their original submissions with the sole aim to satisfy the minimal standard of *Nero Trading* for warranting an evidentiary hearing. Appellants plainly sought to accomplish much more than that through their original submissions in that they also demanded discovery from the IRS, which appellants themselves had recognized in their original briefing required a much more rigorous evidentiary showing under this Court's precedent – a showing that appellants claimed to have satisfied through their original submissions. Because appellants' claim of reliance on the mere-allegation standard was flatly contradicted by the record, the District Court reasonably rejected it and refused to further prolong these proceedings by allowing additional evidence, which appellants have yet to identify.

ARGUMENT

The District Court properly exercised its discretion to order the summonses enforced without holding an evidentiary hearing

A. Introduction

1. The summons power is broad

Congress has "authorized and required" the Secretary of the Treasury "to make the inquiries, determinations, and assessments of all taxes" imposed by the Internal Revenue Code, I.R.C. § 6201(a),

including by making a "[c]anvass" of every internal revenue district and "inquir[ies] after and concerning all persons therein who may be liable to pay any internal revenue tax," I.R.C. § 7601(a). The Secretary has delegated this duty to the Commissioner of Internal Revenue. Treas. Reg. (26 C.F.R.) §§ 301.7602-1(b), 301.7701-9. To facilitate the performance of these statutory responsibilities, Congress has granted the IRS broad authority to issue summonses "[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax …, or collecting any such liability." I.R.C. § 7602(a). *See also* I.R.C. § 7602(b) (clarifying that these purposes include "inquiring into any offense connected with the administration of the internal revenue laws"). The IRS is authorized "[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 such testimony "as may be relevant" to such inquiry. *Id*.

The Supreme Court has repeatedly recognized that the IRS's summons authority is "broad" and "expansive" and serves a vital

information-gathering role in our federal tax system. *See, e.g.*, *Clarke*, 134 S. Ct. at 2365; *United States v. Arthur Young & Co.*, 465 U.S. 805, 814–15, 104 S. Ct. 1495, 1502 (1984). As the Court explained in *Arthur Young*:

> Our complex and comprehensive system of federal taxation, relying as it does upon self-assessment and reporting, demands that all taxpayers be forthright in the disclosure of relevant information to the taxing authorities. Without such disclosure, and the concomitant power of the Government to compel disclosure, our national tax burden would not be fairly and equitably distributed. In order to encourage effective tax investigations, Congress has endowed the IRS with expansive information-gathering authority; § 7602 is the centerpiece of that congressional design.

465 U.S. at 815–16. Thus, "[t]he courts have been hesitant to curtail the IRS' investigative power." *La Mura v. United States*, 765 F.2d 974, 979 (11th Cir. 1985).

2. Summons enforcement proceedings are summary in nature and should be concluded expeditiously

When a person refuses to comply with a summons, the IRS may file an enforcement action in district court. I.R.C. §§ 7402(b), 7604(a). When Congress authorized district courts to enforce § 7602 summonses, it did not "intend[ ] the courts to oversee the [IRS's] determinations to investigate." *Powell*, 379 U.S. at 56, 85 S. Ct. at 254. Rather, a district court's role in deciding whether to enforce a summons is limited to

determining whether the summons was issued in "good faith." *United States v. Stuart*, 489 U.S. 353, 359, 109 S. Ct. 1183, 1188 (1989). Namely, "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." *Powell*, 379 U.S. at 57–58, 85 S. Ct. at 255; *Morse*, 532 F.3d at 1132. The United States may satisfy its "minimal" burden to make this showing "merely by presenting the sworn affidavit of the agent who issued the summons attesting to" the foregoing *Powell* factors. *United States v. Medlin*, 986 F.2d 463, 466 (11th Cir. 1993); *accord Clarke*, 134 S. Ct. at 2367.

After the United States makes this minimal showing, the burden shifts to the party challenging the summons to "disprove one of the four elements of the government's prima facie showing or convince the court that enforcement of the summons would constitute an abuse of the court's process." *United States v. Leventhal*, 961 F.2d 936, 939–40 (11th Cir. 1992) (quoting *La Mura*, 765 F.2d at 979–80). The challenger's burden is a "heavy" one. *Leventhal*, 961 F.2d at 940. Unless the

challenger can show that the summons was issued for an improper purpose, or that enforcement would amount to an abuse of the court's process, the United States is entitled to enforcement of the summons. *Powell*, 379 U.S. at 58, 85 S. Ct. at 255; *Morse*, 532 F.3d at 1132.

Congress intended that summons enforcement proceedings would be "summary in nature." *Clarke*, 134 S. Ct. at 2367; *United States v. Elmes*, 532 F.3d 1138, 1146 (11th Cir. 2008); S. Rep. No. 97-494(I), at 285 (1982). Because the purpose of a summons is "not to accuse, much less to adjudicate, but only to inquire," *Clarke*, 134 S. Ct. at 2367 (quotation omitted), a swift resolution of summons disputes is essential "so that the investigation may advance toward the ultimate determination of civil or criminal liability, if any," *United States v. Kis*, 658 F.2d 526, 535 (7th Cir. 1981); *accord United States v. Barrett*, 837 F.2d 1341, 1349 (5th Cir. 1988). Consequently, courts have recognized that proceedings to enforce tax summonses are "most appropriate … for streamlined procedures." *Elmes*, 532 F.3d at 1144. As articulated by the Supreme Court in this case, an evidentiary hearing for the purpose of questioning IRS officials about their reasons for issuing a summons is warranted only where the party challenging the summons "can point to

specific facts or circumstances plausibly raising an inference of bad faith" and provides "credible evidence" sufficient to raise such an inference. *Clarke*, 134 S. Ct. at 2367.

B. The United States established a prima facie case for enforcement of the summonses

As the District Court correctly found (Doc. 24 at 3–4; Doc. 3 at 2, No. 12-80190), the United States established, through a declaration of Agent Fierfelder, all of the requisite *Powell* elements for enforcement in both the Clarke cases and the Julien case. First, Agent Fierfelder stated that the summonses were issued in furtherance of the IRS's examination of DHLP's tax reporting obligations, in the Clarke cases, and of Beekman's withholding tax obligations, in the Julien case, which are legitimate purposes under I.R.C. § 7602(a). (Doc. 1-2 ¶¶ 2–3 in each Clarke case; Doc. 1-1 ¶¶ 2, 4, No. 12-80190.) Second, Agent Fierfelder established in her declarations that the summonses sought information that may be relevant to the IRS's investigations, and the summons opponents have never contended otherwise. (Doc. 1-2 ¶ 7 in each Clarke case; Doc. 1-1 ¶ 7, No. 12-80190.) In her declaration, Agent Fierfelder also confirmed that the IRS was not already in possession of the summoned information, except as otherwise specified therein.

(Doc. 1-2 ¶ 8 in each Clarke case; Doc. 1-1 ¶ 8, No. 12-80190.) Finally, she declared that all administrative steps required by the Code for the issuance of the summonses had been followed and that the summonses had not been issued for any improper purpose. (Doc. 1-2 ¶¶ 9–10 in each Clarke case; Doc. 1-1 ¶¶ 9–10, No. 12-80190.)

The United States having thus established a prima facie case for enforcement, the burden shifted to the summons opponents to disprove one of the elements of that case or to convince the court that enforcement would constitute an abuse of its process. *See Morse*, 532 F.3d at 1132; *La Mura*, 765 F.2d at 979–80. As discussed below, the opponents failed to carry that "heavy" burden, *Leventhal*, 961 F.2d at 940, and the District Court properly exercised its discretion to enforce the summonses without holding an evidentiary hearing.

C. The District Court properly exercised its discretion in rejecting appellants' allegations of improper purpose without holding an evidentiary hearing

1. The District Court did not abuse its discretion in concluding that appellants failed to point to specific facts or circumstances plausibly raising an inference that the summonses were issued solely in retaliation for DHLP's refusal to extend the limitations period on tax assessments

As noted, under *Clarke*, an evidentiary hearing for the purpose of questioning IRS officials about their reasons for issuing a summons is warranted only where the party challenging the summons "can point to specific facts or circumstances plausibly raising an inference of bad faith" and provides "credible evidence" in support of that claim. 134 S. Ct. at 2367. The district courts have "broad discretion to determine whether a taxpayer has shown enough to require the examination of IRS investigators." *Id.* at 2368. Here, the District Court acted well within its discretion in ruling that appellants' submissions failed to raise a plausible inference that the IRS issued the summonses to punish DHLP for declining to extend the limitations period on assessments for a third time. (Doc. 63 at 3, 5–6.) The court found that appellants' allegation in this regard was "mere conjecture" (Doc. 24 at 4) and was "unsupported by any evidence" (Doc. 63 at 3).

On appeal, appellants contend that their submissions raised a plausible inference that the summonses were issued "solely to punish" DHLP for refusing to extend the limitations period and that the District Court's contrary conclusion was an abuse of its discretion. (Br. 24, 34–38.) Their acknowledgment that the alleged improper purpose must be the *sole* purpose recognizes long-established precedent of this Circuit holding that "if a multi-purpose summons is issued pursuant to a legitimate purpose under section 7602, it is enforceable." *United States v. First Nat'l Bank in Dallas*, 635 F.2d 391, 395 n.4 (5th Cir. 1981); *accord Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 318 n.5, 105 S. Ct. 725, 729 n.5 (1985); *United States v. Stuckey*, 646 F.2d 1369, 1375 (9th Cir. 1981) ("Even the co-existence of an improper purpose would not prevent enforcement of the summons if the existence of a legitimate purpose was not rebutted by the taxpayer.").

In support of their sole-purpose-of-retaliation contention, appellants argue that the IRS actually completed its investigation of DHLP's returns on or before August 11, 2010, because that is the date Agent Fierfelder signed the FPAA that was later issued to DHLP. According to appellants, there was thus no need for Agent Fierfelder to

have issued the summonses on September 24 and October 25, 2010, because the IRS had already completed its investigation. (Br. 36–37.) Appellants further assert that the summonses were issued "immediately" after DHLP declined the IRS's request for a third extension of the limitations period and that "these facts support the inference that the summonses were issued only to punish DHLP for refusing to agree to a third extension of the statute of limitations." (Br. 37.)

Appellants' argument is nonsensical. First, it leaves without any plausible explanation why the IRS would even ask for an additional extension of the limitations period if, as appellants contend, it had already completed its investigation in early August 2010. Under their alleged theory of the facts, the IRS would have had no reason to ask DHLP to extend the limitations period a third time, which was not set to expire until months later (sometime after December 28, 2010),[5] and

[5] The limitations period on assessments was open when the IRS issued the FPAA on December 28, 2010, and the District Court so found. (Doc. 63 at 2.) Moreover, the issuance of the FPAA, and DHLP's subsequent Tax Court action, suspended the running of the limitations period, which therefore remains open still. *See* footnote 7, *infra*.

the IRS certainly would have had no reason to retaliate for DHLP's refusal to extend that period if it had already completed its investigation. The only plausible explanation for the IRS's third request to extend the limitations period is that the IRS needed more time to complete its examination. And, this explanation is borne out by Agent Fierfelder's declaration, in which she testified that the IRS needed more information (which it sought through the summonses) to "properly investigate" DHLP's returns. (Doc. 1-2 ¶ 7 in each Clarke case.)

Significantly, the District Court found, and appellants do not dispute, that the information sought by the summonses "is clearly relevant to the issues being examined." (Doc. 24 at 5.) The undisputed relevance of the information sought through the summonses to the IRS's ongoing investigation is compelling evidence that they were issued for a legitimate purpose, and it further refutes the appellants' incredible allegation that the summonses were issued solely to punish DHLP.

Appellants' entire argument that the summonses were issued solely to punish DHLP rests on the false premise that Agent Fierfelder's

August 11, 2010, signature on the FPAA somehow signaled the end of the IRS's investigation, even though the FPAA was not in fact issued until December 28, 2010. An FPAA, however, is issued by the IRS as an institution, after an internal process of pre-issuance review during which time the FPAA is subject to modification. The FPAA in this case was not finalized until December 28, 2010, when it was signed by the Territory Manager, John W. Joseph. (Doc. 7-2 at 1–3.) Agent Fierfelder issued the summonses months before the FPAA was issued to DHLP, and all of the summonses specified return dates by which the summonees were required to comply that were also well in advance of the FPAA being issued. Therefore, if the summonees had complied with the summonses, Agent Fierfelder could have revised, or even withdrawn, the proposed FPAA she had signed based on the new information. As it turned out, there was no need for her to do so because the summonees failed to comply with the summonses. These circumstances in no way suggest that the IRS had completed its investigation of DHLP's returns in early August 2010 before issuing the summonses and four months before the FPAA was in fact issued.

Moreover, as discussed *infra*, pp. 52–54, even the issuance of the FPAA itself did not end the IRS's legitimate need to continue its investigation of DHLP's returns. *See PAA Management, Ltd. v. United States*, 962 F.2d 212, 217–19 (2d Cir. 1992). Rather, the IRS was compelled to issue the FPAA without first having obtained all the information it needed to fully investigate DHLP's returns,[6] *i.e.*, the information sought by the summonses (*see* Doc. 1-2 ¶ 7 in each Clarke case), because the limitations period on the IRS's ability to assess tax against DHLP's partners (based on their allocable share of DHLP's partnership items) was about to expire, and DHLP had refused to extend the assessment period.[7]

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[6] The IRS in the FPAA often took a protective position based on available information. *See*, *e.g.*, Doc. 7-2 at 12 ("[I]t has not been established that the disallowed amounts represent interest paid or accrued on bona-fide indebtedness."). *See also INDOPCO, Inc. v. Commissioner*, 503 U.S. 79, 84, 112 S. Ct. 1039, 1043 (1992) (explaining that "an income tax deduction is a matter of legislative grace and … the burden of clearly showing the right to the claimed deduction is on the taxpayer") (citation omitted).

[7] The IRS normally must assess any tax imposed by the Code within three years after the taxpayer files its return. I.R.C. § 6501(a). That period is extended for tax attributable to partnership items when the partnership return is filed after the taxpayer's return (*See* I.R.C. § 6229(a); *Curr-Spec Partners, L.P. v. Commissioner*, 579 F.3d 391, 396–

(continued...)

Finally, contrary to appellants' argument, there is nothing unusual or suspect about the fact that the IRS issued the summonses promptly after DHLP declined to extend the limitations period. As noted, the IRS has limited time within which to make tax assessments. I.R.C. §§ 6501, 6229. When a taxpayer is willing to agree to an extension of the assessment period, the IRS has the ability to seek information without resort to formal summons procedures. If, however, the taxpayer is unwilling to provide relevant information voluntarily, the summons procedures provide the appropriate means for the IRS to obtain that information. Where, as here, there are only a few months remaining before the limitations period is set to expire when the IRS learns that the taxpayer is unwilling to agree to an extension, and relevant information regarding sizable deductions (here, over $34

(…continued)
98 (5th Cir. 2009)) and also when the IRS and the partnership's tax matters partner so agrees (I.R.C. § 6229(b)). Once the FPAA is mailed, the running of any open period for assessment under I.R.C. § 6501 is suspended with respect to tax attributable to partnership items or affected items. I.R.C. § 6229(d). The suspension is for the period during which an action for judicial review of the FPAA may be brought (and, if an action is brought, until the court's decision has become final) and for one year thereafter. *Id.*

million) has not been provided, the prompt issuance of summonses to obtain that information is a natural consequence that is to be expected. Such circumstances do not give rise to a plausible inference of retaliation. Indeed, if such common circumstances were sufficient to warrant an evidentiary hearing, then such hearings would become routine in summons enforcement cases, thus permitting the very sort of "fishing expedition for official wrongdoing" that the Supreme Court warned against. *Clarke*, 134 S. Ct. at 2368.

Given the District Court's express finding that the information sought by the summonses was "clearly relevant" to the IRS's ongoing investigation of DHLP's returns (Doc. 24 at 5), and its additional finding that appellants' allegation of retaliation was "unsupported by any evidence" (Doc. 63 at 3), the District Court acted well within its broad discretion in denying appellants' request to question IRS officials about their implausible allegation that the summonses were issued solely to punish DHLP.

2. The District Court correctly held that appellants' allegation that enforcement of the summonses was for the improper purpose of evading the Tax Court's discovery rules was insufficient as a matter of law to invalidate the summonses

Appellants further argue that, even if the summonses were issued for a legitimate investigative purpose, the United States' "sole" purpose for seeking *enforcement* of the summonses is "evasion of the Tax Court discovery rules," constituting an "abuse of the district court's process." (Br. 24, 27–28.) The District Court correctly held that this allegation of improper purpose was insufficient as a matter of law to invalidate the summonses or warrant an evidentiary hearing.

a. The Supreme Court has repeatedly instructed that "restrictions upon the IRS summons power should be avoided absent unambiguous directions from Congress." *Tiffany Fine Arts*, 469 U.S. at 318, 105 S. Ct. at 729. In *Arthur Young*, the Supreme Court reversed a Second Circuit decision that limited the IRS summons power based on a work-product privilege for independent auditors, which Congress had not previously recognized. In reversing, the Court explained that "the very language of § 7602 reflects … a congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry" and

that "courts should be chary in recognizing exceptions to the broad summons authority of the IRS or in fashioning new privileges that would curtail disclosure under § 7602." 465 U.S. at 816–17, 104 S. Ct. at 1502 (emphasis in original). The Court further instructed that "[i]f the broad latitude granted to the IRS by § 7602 is to be circumscribed, that is a choice for Congress, and not this Court, to make." 465 U.S. at 817, 104 S. Ct. at 1502.

Appellants urge this Court to adopt a new rule to circumscribe the IRS's summons power based on an alleged interference with the Tax Court's discovery rules. The IRS's summons authority under I.R.C. § 7602, however, is not limited by the Tax Court's rules, and this Court should reject appellants' invitation to impose new restrictions that Congress plainly has not directed. If anything, Congress manifested its intent in I.R.C. § 6230(h) that litigation in the Tax Court should *not* curtail the IRS's summons power. That section provides:

> Examination authority not limited.—Nothing in this subchapter [*i.e.*, sections 6221–6233] shall be construed as limiting the authority granted to the [IRS] under section 7602 [the summons provision].

Sections 6221–6233 contain the provisions governing the IRS's issuance of an FPAA to make adjustments to the tax items reported on a

partnership return, § 6223(a)(2), and the provisions conferring jurisdiction on the Tax Court (and the district courts and the Court of Federal Claims) to review those adjustments, § 6226. Congress has thus provided that neither the issuance of an FPAA to a partnership nor a partnership's subsequent action in the Tax Court (or in the district court or the Court of Federal Claims) to challenge the FPAA limits the IRS's summons authority under I.R.C. § 7602, including its right to have the summonses enforced. *See PAA Management*, 962 F.2d at 217. Appellants' argument, however, if accepted, would have just that effect.

b. Moreover, unlike appellants, the Tax Court itself does not view summonses issued before the commencement of litigation in the Tax Court, as the instant summonses were, to pose a threat to the integrity of its discovery rules. In a fully reviewed decision,[8] the Tax Court, in *Ash* v. *Commissioner*, 96 T.C. 459, 472 (1991), established "standards" for determining when information obtained through an IRS

[8] A "reviewed" opinion of the Tax Court is analogous to an *en banc* opinion of an appellate court. 14 *Mertens Law of Fed. Income Tax*, § 50:6.

summons may circumvent its discovery rules. The court categorically held that "any administrative summonses issued by [the IRS] prior [to the filing of a Tax Court petition] do not pose a threat to the integrity [or effectiveness] of our Rules." *Id.* at 468. The court explained that, in this situation, "the parties on whom summonses were served were already under an obligation to provide the information called for pursuant to sections 7602 and 7609." *Id.* The court also observed that the development of additional evidence through IRS administrative summonses "will in fact benefit [the Tax] Court's processes because it will result in a more fully developed factual background" for consideration of the case or for settlement. *Id.* at 472. With respect to summonses issued *after* a Tax Court petition is filed, the court stated that it would "exercise [its] inherent power to enforce the limited discovery contained in our Rules … unless the [IRS] can show that the summons has been issued for a sufficient reason, independent of that litigation." *Id.* at 471.

Because the summonses here all were issued several months before DHLP filed its Tax Court petition, they are not, under the applicable Tax Court precedent, an improper attempt to circumvent the

Tax Court's discovery rules. Rather, as noted, the Tax Court considers the enforcement of summonses issued prior to the commencement of litigation to benefit its processes, resulting in a more fully developed factual background. Indeed, unlike most courts, the Tax Court relies heavily on a stipulation process. *See* Tax Court Rule 91. Its stipulation procedures contemplate that the IRS should have access to all of the relevant facts through its administrative examination, which summonses foster. S*ee also Schneider Interests, L.P. v. Commissioner*, 119 T.C. 151, 155 (2002) (recognizing the role that administrative summonses play in the fact-development process under the Tax Court's informal discovery rules).

Additional confirmation of the Tax Court's view in this regard is found in the District Court's order on remand, in which the court observed that the Tax Court in the DHLP litigation was aware of the pendency of these summons enforcement proceedings, as they were one of the grounds relied upon by the IRS to request a continuance of trial in that case, and the Tax Court had granted the IRS's request. (Doc. 63 at 4; Doc. 20-6 at 3.) Clearly, the Tax Court does not view the summonses in this case the same way appellants do. Appellants'

contention that enforcement of the summonses in this case somehow undermines the Tax Court's discovery rules, even though the Tax Court itself has categorically held that enforcement of such summonses does not, is devoid of any merit.

The Tax Court, and not the district courts in summons-enforcement cases, is the appropriate court to determine whether the use of information obtained through a summons would threaten its discovery rules at all events. As the Tax Court explained in *Ash*, it is fully capable of policing its own rules. 96 T.C. at 471. Therefore, even in those limited situations where the Tax Court has indicated that enforcement of a summons might interfere with its discovery rules, the appropriate remedy would be a protective order from the Tax Court limiting, in the Tax Court proceedings, the use of evidence obtained through the summons, not an order by the district court quashing the summons, as appellants seek here.

Appellants' related argument that the IRS's summons power provides the IRS with an "unfair advantage" in Tax Court litigation is a strange one. In tax cases, it is the taxpayer (or here, the partnership) that engages in the underlying transactions giving rise to the tax

controversy. The taxpayer thus has all the relevant information; the IRS, which was not a party to the transactions, does not have it. *See Bolich v. Rubel*, 67 F.2d 894, 895 (2d Cir. 1933) ("[A]ll the facts are in the taxpayer's hands.").[9] For that reason, Congress, in I.R.C. § 7602, empowered the IRS with authority to summon taxpayers and other persons to examine any books, papers, records, or other data, or obtain testimony, that may be relevant to a tax investigation. The Tax Court, which is well aware of this asymmetry of information in the taxpayer's hands, categorically held in *Ash* that summonses issued prior to the commencement of Tax Court litigation do not undermine its discovery rules; rather, they benefit the court's processes, resulting in a more fully

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[9] Appellants' reliance on *Bolich* (Br. 30–31, 38) is misplaced. There, after a taxpayer had filed petitions challenging deficiencies for 1926–1929 in the Board of Tax Appeals, the IRS opened a second examination for the same years and issued a summons, which a district court enforced. In affirming the district court, the Second Circuit held that although a case was pending in the Board when the IRS issued the summons, the summons remained "strictly inquisitorial" and "the Commissioner's summons power persists." 67 F.2d at 895. Significantly, the Second Circuit relied on its *Bolich* decision in *PAA Mangagment*, 962 F.2d at 217–18, in holding, contrary to appellants' position, that the issuance of an FPAA does not terminate the IRS's ability to enforce a summons.

developed factual background for consideration of the case or for settlement. 96 T.C. at 468, 472.

c. Appellants' argument that a validly-issued summons may not be enforced after Tax Court litigation has begun fails as a matter of law for another reason. As the District Court explained, "[t]he validity of a summons is tested at the date of issuance, and events occurring after the date of issuance but prior to enforcement should not affect enforceability." (Doc. 63 at 3.) The Supreme Court has recognized that "[t]he rights and obligations of the parties [become] fixed when the summons [i]s served." *Couch v. United States*, 409 U.S. 322, 329 n.9, 93 S. Ct. 611, 616 n.9 (1973). Consistent with that principle, this Court and numerous other courts of appeals have held that the relevant time for determining whether the IRS has a proper purpose under *Powell*, 379 U.S. 48, is the date the summons is issued. *United States v. Centennial Builders, Inc.*, 747 F.2d 678, 681 n.1 (11th Cir. 1984); *United States v. Garrett*, 571 F.2d 1323, 1327 (5th Cir. 1978); *United States v. Richey*, 632 F.3d 559, 564 (9th Cir. 2011); *PAA Management*, 962 F.2d at 219; *United States v. Gimbel*, 782 F.2d 89, 93 (7th Cir. 1986); *United States v. Rosinsky*, 547 F.2d 249, 254 (4th Cir. 1977); *United States v.*

Hodgson, 492 F.2d 1175, 1177 (10th Cir. 1974); *United States v. Held*, 435 F.2d 1361, 1364 (6th Cir. 1970). Appellants have not sought hearing en banc and are bound by this Court's well-reasoned precedents (*Centennial Builders* and *Garret*) cited above. *See Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n. 8 (11th Cir.2001) ("Under the well-established prior panel precedent rule of this Circuit, the holding of the first panel to address an issue is the law of this Circuit, thereby binding all subsequent panels unless and until the first panel's holding is overruled by the Court sitting en banc or by the Supreme Court."). Moreover, appellants have not provided any reason why this Court should revisit its precedent; indeed, they do not even mention it.

The IRS issued the instant summonses months before it was obliged (because the assessment period was otherwise about to expire) to issue the FPAA proposing adjustments to DHLP's partnership items and well before DHLP initiated action in the Tax Court to challenge those adjustments. If the summonees had complied with the summonses when they were required by law to do so, there would be no basis upon which appellants could even allege that Tax Court discovery procedures were circumvented. The IRS would have had all of the

summoned information it needed for its investigation well before the FPAA was issued and Tax Court litigation commenced. Thus, the widely-accepted rule, already adopted by this Court, that the validity of a summons is tested as of the date of issuance is a logical and salutary one that, among other things, prevents potential abuse and circumvention of the IRS's summons power.

To the extent that courts may have recognized any limitation on the United States' ability to enforce a validly-issued summons, it has been only where a "final, irrevocable determination of the taxpayer's liability" has been made before enforcement is sought. *Richey*, 632 F.3d at 565; *PAA Management*, 962 F.2d at 217–218; *Gimbel*, 782 F.2d at 93; *see also United States v. Admin. Enters., Inc. v. United States*, 46 F.3d 670, 672–73 (7th Cir. 1995) (rejecting the contention that there is a "staleness" defense to enforcement of a summons). Here, there clearly has been no such "final, irrevocable determination" because DHLP's action in the Tax Court is still pending. Thus, contrary to appellants' argument (Br. 39), neither the IRS's issuance of the FPAA proposing adjustments to DHLP's returns nor DHLP's commencement of Tax Court litigation to challenge those adjustments concluded the IRS's

investigative role or constituted a final, irrevocable determination of DHLP's partnership items. *PAA Management*, 962 F.2d at 217–219. As the Second Circuit explained in *PAA Management*:

> The FPAA is not "final" in the sense that its issuance necessarily obviates the need for further information, brings the curtain down on the IRS's administrative or investigative role, or muzzles the IRS from requesting that the court invoke its authority finally to determine partnership items.

Id. at 219. Here, the IRS was forced to issue the FPAA without first having obtained all the information it needed to fully investigate DHLP's returns (*see* Doc. 1-2 ¶ 7 in each Clarke case) because the summoned persons had failed to comply with the summonses served well before the issuance of the FPAA. DHLP then petitioned the Tax Court for a "readjustment" of the IRS's adjustments in the FPAA. (Doc. 7-1 at 1.) *See* I.R.C. § 6226(a). Because the Tax Court is vested with the "ultimate authority" to revise the IRS's determinations in the FPAA, *see PAA Management*, 962 F.2d at 218; I.R.C. § 6226(a), (f) (conferring jurisdiction "to determine all partnership items … for the partnership taxable year[s] to which the [FPAA] relates"), the IRS still has a legitimate investigative need for the information sought by the summonses, which appellants still have not provided, *see PAA*

Management, 962 F.2d at 219 (explaining that "the IRS's need to prepare its case by further examination is quite another matter from producing evidence in support of it") (internal quotation omitted). The District Court therefore correctly rejected appellants' allegation that the summonses were being enforced for an improper purpose as insufficient as a matter of law to invalidate the summonses or to warrant an evidentiary hearing.

d. Failing to find any meaningful authority to support its circumvention-of-Tax-Court-discovery-rules theory, appellants make misguided attempts to analogize the instant cases to other contexts.[10] They first invoke bankruptcy matters, where they assert that examinations may be limited after the commencement of adversary

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[10] Appellants also erroneously invoke (Br. 18, 43) "considerations of comity." "Principles of comity come into play when separate courts are presented with the same lawsuit." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 675 F.2d 1169, 1173 (11th Cir. 1982). The instant lawsuit, which consolidates proceedings under I.R.C. § 7604 to enforce third-party summonses, is a different lawsuit from DHLP's Tax Court petition under I.R.C. § 6226 for readjustment of partnership items. Moreover, the Tax Court lacks jurisdiction over summons-enforcement proceedings (I.R.C. § 7604(a); *Ash*, 96 T.C. at 462, 472) and therefore cannot decide the instant summons-enforcement matters. Conversely, DHLP may not challenge its underlying tax obligations in this summons proceeding. *See Morse*, 532 F.3d at 1132.

proceedings. (Br. 25–30.) But, in *United States v. Arthur Andersen & Co.*, 623 F.2d 725, 728 (1st Cir. 1980), the First Circuit rejected the argument (similar to appellants' argument here) that because the United States would have access to available bankruptcy discovery procedures, "IRS resort to section 7602 should be barred." In holding that the IRS did not lose its investigatory authority under a summons "simply because an investigatee has come within the jurisdiction of a bankruptcy court," the First Circuit observed that if the contrary proposition were valid, "we could envisage asylum sorties into bankruptcy whenever the IRS chase became too hot." *Ibid.* Likewise, adopting the new rule that appellants advocate here would encourage taxpayers generally to delay compliance with summonses in the hope of avoiding compliance entirely by later filing petitions in the Tax Court.[11]

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[11] Even if the courts' authority to limit Bankruptcy Rule 2004 examinations after the commencement of adversary proceedings were relevant here (and it is not), Rule 2004 examinations are not precluded by the prospect of future litigation. *See In re Mirant Corp.*, 326 B.R. 354, 357 (N.D. Tex. 2005); *In re Sutera*, 141 B.R. 539 (D. Conn. 1992). The validity of an IRS summons is tested as of the date of its issuance. *See Centennial Builders*, 747 F.2d at 681 n.1. Here, at the time the IRS issued the summonses, DHLP had not yet filed its petition in the Tax Court, and therefore no litigation was pending.

Appellants also invoke (Br. 33) the decision in *In re Grand Jury Proceedings*, 814 F.2d 61, 70 (1st Cir. 1987), but that case presents no meaningful analogy to the circumvention-of-Tax-Court-discovery issue that appellants have raised here. Among other things, in the instant cases, there are no implications that the rights of a criminal defendant would be violated by enforcing the summonses, which is an essential consideration in the grand jury case. Furthermore, to the extent that an improper criminal purpose were at issue in this case, Congress has resolved that issue by creating a rule for summonses that looks to whether a criminal referral to the Department of Justice was made by the IRS. *See* I.R.C. § 7602(d).

e. Appellants' invocation of the Internal Revenue Manual mixes apples and oranges. The Manual pages to which appellants cite (Br. 14–16, 27–28, 41–42) provide guidance for IRS agents regarding the situations in which they may "issue" summonses; they do not address the situation presented here in which the IRS seeks to *enforce* summonses issued months before the FPAA against summonees who improperly refused to comply with the summonses. Appellants also ignore the Manual's recognition that "The Tax Court has established a

framework for determining when it is appropriate to prevent summoned information from being entered into evidence if the Service's use of a summons conflicts with the court's interest in administering its discovery rules." (IRM § 25.5.4.4.8, quoted at Br. 15.) As we have previously discussed, that framework was established by the Tax Court in *Ash*, and, under *Ash*, the summonses at issue here are fully consistent with the Tax Court's discovery procedures. At all events, the Manual does not have the force of law and confers no right on taxpayers. *See Tavano v. Commissioner*, 986 F.2d 1389, 1390 (11th Cir. 1993); *Fargo v. Commissioner*, 447 F.3d 706, 713 (9th Cir. 2006); *Matter of Carlson*, 126 F.3d 915, 922 (7th Cir. 1997); *Marks v. Commisisoner*, 947 F.2d 983, 986 n.1 (D.C. Cir. 1991).[12]

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[12] Contrary to appellants' suggestion (Br. 14-15, 40), there is nothing improper about the participation of IRS Chief Counsel attorneys in the interview process for a summons (not here at issue) served in 2010 that the IRS was able to belatedly enforce in September 2011 after filing a summons-enforcement action. Such participation is expressly authorized by Treas. Reg. § 301.7602-1(b)(2). *See also* IRM § 25.5.2.5 (*reprinted at* Doc. 20-7 at 10). Although appellants suggest that an investigating agent did not attend the interview, the record shows that the revenue agent who served that summons was present at the interview. (Doc. 20-2 ¶ 8.)

In sum, appellants' improper-discovery theory fails as a matter of law, and District Court correctly declined to hold an evidentiary hearing to explore it.

D. The District Court properly enforced the summons in the Julien case because Julien failed to rebut the United States' prima facie case for enforcement

The District Court's order enforcing the summons issued to Robert Julien, as president of Beekman, was not clearly erroneous. *Morse*, 532 F.3d at 1131. As noted, the United States established its prima facie case for enforcement through the declaration of Agent Fierfelder, and the court so determined. (Doc. 3 at 2, No. 12-80190.) *See Powell*, 379 U.S. at 57–58, 85 S. Ct. at 255. The court therefore correctly ruled that "the burden of coming forward to oppose enforcement of the summons ha[d] shifted" to Julien. (Doc. 3 at 2, No. 12-80190.)

As in the Clarke cases, Julien's response to the United States' petition (Doc. 11, No. 12-80190) asserted that the summons should be dismissed as part of an "unauthorized second audit" of Beekman and that the IRS was seeking enforcement of the summons for the improper purpose of "circumvent[ing] the discovery rules in the Tax Court." Julien did not submit to the court any documentary evidence or

declarations to support these allegations, and the District Court correctly rejected them on the basis of its order enforcing the summonses on remand in the Clarke cases, in which the court had disposed of similar or identical claims.

On appeal, Julien contends that his case presented a "unique" defense that was not addressed in the Clarke cases; namely – that the summons issued to him was "part of an illegal second audit of Beekman." (Br. 33–34, 24 n. 8.) That same defense, however, was raised in the Clarke cases (*see* Doc. 7 at 4–5) and was also rejected by the District Court in its order on remand (Doc. 63 at 3). Moreover, the record shows that Julien's claim that the IRS was engaged in an illegal second audit of Beekman is itself meritless. "The decisions are numerous and without dissent that the Commissioner of Internal Revenue may re-examine and redetermine a taxpayer's liability within the period of limitations." *Hudock v. Commissioner*, 65 T.C. 351, 364 (1975). The IRS properly notified Beekman that a second examination was necessary because information that could affect Beekman's tax liability had been developed since the prior examination (Doc. 1-2, No. 12-80190), and that was all the IRS was required to do in order to

conduct a second examination of Beekman. I.R.C. § 7605(b). Julien cannot meet his burden to establish abuse in issuing the summons "by a mere showing … that the records in question have already been once examined." *Powell*, 379 U.S. at 58, 85 S. Ct. at 255.

Julien's suggestion (Br. 33) that the IRS's second examination was improper because it followed a purported "settlement of the issues in question" is also unsupported. Julien did not submit any evidence to the District Court of a prior "settlement," let alone a settlement with respect to the "issues in question" in the second audit.[13] On the other hand, Agent Fierfelder's declaration established that the issues under audit in the second examination were distinct from those involved in the first examination of Beekman. (Doc. 1-1 ¶ 3, No. 12-80190.) The District Court thus correctly rejected Julien's attempt to distinguish his case and ordered the summons enforced.

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[13] In fact, there was no prior "settlement." Beekman did execute an IRS Form 4549, but the only effect of that document is that Beekman consented to the immediate assessment and collection of deficiencies proposed therein. The execution of IRS Form 4549 does not constitute a settlement or final determination by the Commissioner of the taxpayer's tax liability. *Hudock*, 65 T.C. at 362–63.

E. Appellants' claim that the District Court abused its discretion in declining to allow additional evidence to be introduced in the remand proceedings is unavailing

When this Court remanded the Clarke cases to the District Court after the Supreme Court's decision, it took no position on whether additional evidence, briefing, or a hearing should be allowed in the further proceedings. (Doc. 54 at 5 n.5.) Thereafter, appellants filed a motion seeking "a status conference to establish a schedule for the parties to brief … the matters to be decided on remand." (Doc. 55 at 1.) In their motion and their reply to the United States' opposition to that motion, appellants did not identify any evidence that they might proffer in the further proceedings (Docs. 55, 57) and merely requested that the court prolong the proceedings (and the enforcement of the summonses) by having a status conference at which "the parties [would] explore … together" the issue on which this Court took no position. (Doc. 57 at 3.) Cognizant that these summary enforcement proceedings had been pending for over three years, the District Court declined to delay the proceedings further by holding a status conference, but it did order the briefing that appellants requested. (Doc. 58.) The court, having no showing of a need for additional evidence before it, also ordered that the

"briefing shall not include any evidence not already presented." (*Id.* at 5.) Appellants' claim that the District Court's order should be reversed because of this ruling is not well founded.

1. Appellants failed to preserve their claim that the District Court erred in excluding evidence because they failed to make an offer of proof

First of all, appellants' claim of error should not be considered because they have failed to preserve it. Federal Rule of Evidence 103(a) provides that, in order to preserve for appeal an objection to the exclusion of evidence, a party must "inform[ ] the court of its substance by an offer of proof, unless the substance was apparent from the context." The District Court's ruling of which appellants complain is one that excludes evidence, and they were required to satisfy Rule 103(a) to preserve any claim or error. They did not do so.

The substance of appellants' purported evidence was not apparent from the context of the proceeding, and they did not make an offer of proof or in any way reveal the substance of the evidence that they claimed they had. In their brief on appeal (at 45), the appellants point out that, in their brief on remand, they alleged that material received in response to a Freedom of Information Act request "bears on this case."

This conclusory allegation hardly constitutes an offer of proof and provides no clue as to the substance of the cited material. Accordingly, appellants' allegation does not satisfy the requirements of Rule 103(a). Moreover, this allegation shows that appellants, in the briefing subsequent to the District Court's evidence-exclusion ruling, could have identified the substance of the "new evidence" that they claimed that they had and thereby made an offer of proof. They simply did not do so. Thus, appellants have not preserved their claim that the District Court erred in excluding new evidence in the remand, and their claim should not be considered by this Court. *See United States v. Henderson*, 409 F.3d 1293, 1298 (11th Cir. 2005); *United States v. Winkle*, 587 F.2d 705, 710 (5th Cir. 1979).

2. In any event, the District Court did not abuse its discretion in declining to delay the resolution of these summary proceedings by allowing new evidence when appellants failed to identify the purported evidence and incorrectly represented that they had no reason to provide complete evidence with their initial submissions

Assuming, *arguendo*, that appellants have preserved their claim that the District Court erred in declining to receive new evidence, they still cannot prevail. The District Court did not abuse its discretion in

declining to prolong these proceedings by allowing appellants to present "new evidence" which they failed to identify and which they had every reason to adduce in their initial submissions.

As we discussed *supra*, pp. 30–33, summons enforcement proceedings are designed to be "summary in nature." *Clarke*, 134 S. Ct. at 2367; *Elmes*, 532 F.3d at 1146. Because the purpose of a summons is "not to accuse, much less to adjudicate, but only to inquire," *Clarke*, 134 S. Ct. at 2367 (quotation omitted), a swift resolution of summons disputes is essential "so that the investigation may advance toward the ultimate determination of civil or criminal liability, if any," *Kis*, 658 F.2d at 535; *accord Barrett*, 837 F.2d at 1349. And, "streamlined procedures" are appropriate. *Elmes*, 532 F.3d at 1144. In the Clarke cases, the United States filed its petitions for enforcement in April 2011, and the District Court entered its original orders enforcing the summonses in those cases in April 2012. Due to proceedings in this Court and the Supreme Court, in which a legal question was resolved, a prompt resolution, which is normally the rule in a summons case, did not occur. Indeed, when the case came back to the District Court on September 24, 2014, it had been pending for over three years. (Docs. 1,

54.) Accordingly, it was most appropriate for the District Court to take into account the need to expeditiously conclude this case when it addressed the question whether additional evidence should be entertained in these remand proceedings.

When appellants filed their post-remand motion, they failed to identify any evidence that they intended to present and, as far as their motion (and their reply) showed, any request to present new evidence was aimed at delaying the resolution of these proceedings. *See* pp. 61–62, *supra*. In addition, in their initial submissions, appellants had made the extra-ordinary request for discovery in a summons case, from which the District Court could infer that appellants had made a complete evidentiary showing with their initial submissions. (*E.g.*, Doc. 7 at 7–8.) This inference is reinforced by the District Court's initial show-cause order, which warned that "[a]t the show cause hearing, only those issues brought into controversy by the responsive pleadings and factual allegations supported by affidavit will be considered." (Doc. 3, No. 11-80457.) Accordingly, the District Court appropriately exercised its discretion when it issued its order declining to entertain new evidence from the parties on remand.

Contrary to what appellants now argue (Br. 44), their initial evidentiary submissions were not incomplete because they were prepared under the standard stated by this Court in *Nero Trading*, 570 F.3d 1244, in which a "mere allegation" of bad faith was sufficient to warrant an evidentiary hearing. Rather, in their original responses to the petitions to enforce, appellants demanded not only an "evidentiary hearing" but also "discovery from the Government before such hearing." (*E.g.*, Doc. 7 at 7–8.) This Court's precedents establish that to obtain discovery (as opposed to an evidentiary hearing) in a summons case, the summons objector "must raise in a substantial way the existence of substantial deficiencies in the summons proceedings." *Southeast First Nat'l Bank*, 655 F.2d at 665. And the appellants' original briefing demonstrates that they were well aware of the burden that they had to satisfy to obtain discovery. (*E.g.*, Doc. 7 at 7–8) (claiming that their evidentiary submissions "raised in a substantial way the existence of substantial deficiencies in the summons proceedings."); *see also* Doc. 22 at 4) (arguing that "the decisions that must be made in respect of these summons enforcement proceedings … require limited discovery just as in *U.S. v. Southeast First National Bank of Miami Springs*, 655 F.2d

6[6]1 (5th Cir. Unit B 1982).”). Indeed, the record shows that appellants made a multitude of evidentiary submissions with their original briefing, which confirms that appellants had not held back because they were relying on the mere-allegation rule. (*See* Docs. 7-1, 7-2, 8-1, 12-1, 12-2, 12-3, 12-4, 20-1, 20-2, 20-3, 20-4, 20-5, 20-6, 20-7, 20-8, 20-9.) In short, the record belies appellants' claim on appeal that they were merely attempting to satisfy the *Nero Trading* standard for an evidentiary hearing in their original submissions to the District Court.

Moreover, appellants have not explained how any unidentified evidence that they might possess could be legally relevant. First, the submission of any additional evidence in support of appellants' allegation that enforcement of the summons was for the improper purpose of evading the Tax Court's discovery rules would be futile because, as discussed above, pp. 43–58, that allegation is insufficient as a matter of law to warrant an evidentiary hearing. Similarly, as is also discussed above, pp. 38–42, unrefuted evidence establishes that there is a legitimate purpose for the summonses. The most that appellants' unidentified evidence might establish is that there is a multi-purpose

summons. Under this Court's precedent, such a showing, however, is insufficient to invalidate a summons. *First Nat'l Bank*, 635 F.2d at 395 n.4.

Finally, it can be inferred that the unidentified evidence would not have justified a hearing in any event. If the alleged evidence could have justified an evidentiary hearing, it is inconceivable that Robert Julien, who was a respondent in his personal capacity in one of the five Clarke cases (No. 11-80461) and who was represented by the same counsel in the Julien case as were appellants in the Clarke cases, would not have proffered the alleged evidence in the Julien case, in which there was no order precluding him from introducing the "evidence." Thus, as far as the record shows, appellants have no new relevant evidence to submit, and the only thing that would be accomplished by a remand would be to further delay the resolution of these summary enforcement proceedings, which already have been pending for over four years.

CONCLUSION

For the foregoing reasons, the orders of the District Court should be affirmed.

Respectfully submitted,

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OCTOBER 2015

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