UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
NOS. 15-11663-EE, 15-11996-FF

UNITED STATES OF AMERICA, Petitioner/Appellee, v. MICHAEL CLARKE, as Chief Financial Officer of BEEKMAN VISTA, INC., et al., Respondents/Appellants, ROBERT JULIEN, Respondent/Appellant, DYNAMO HOLDINGS LIMITED PARTNERSHIP, Intervenor/Appellant.	L.T. Case: 11-mc-80456-Ryskmp/Vitunac Consolidated with Case No. 11-mc-80457- Ryskamp/Vitunac Case No. 11-mc-80459- Ryskamp/Vitunac Case No. 11-mc-80460- Ryskamp/Vitunac Case No. 11-mc-80461- Ryskamp/Vitunac and Case No. 12-mc-80190- Ryskamp/Vitunac

---

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

RESPONDENTS' MOTION FOR REHEARING AND REHEARING *EN BANC*

MAILING ADDRESS:
JACK J. AIELLO
EDWARD A. MAROD
MARTIN R. PRESS
GUNSTER, YOAKLEY & STEWART, P.A.
777 S. Flagler Drive, Suite 500 East
West Palm Beach, FL 33401
561-655-1980
Attorneys for Respondents

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Aiello, Jack J. (Appellate Counsel for Appellants)

Beekman Vista, Inc.

Christensen, Jacob E. (Appellate Counsel for Appellee)

Clarke, Michael (Respondent/Appellant)

Dynamo GP, Inc. (General Partner of Dynamo Holdings Limited Partnership)

Dynamo Holdings Limited Partnership (Intervenor/Appellant)

Farrior, William E. (Trial Counsel for Appellee)

Holloway, Rita (Respondent)

Hopkins, James M. (United States Magistrate Judge)

Hutter, Randolph L. (Appellate Counsel for Appellee)

Julien, Marc (Respondent)

Julien, Robert (Respondent/Appellant)

Marod, Edward A. (Trial and Appellate Counsel for Appellants)

Metzler, Robert W. (Appellate Counsel for Appellee)

Neiman, Jeffrey A (Trial Counsel for Rita Holloway and Marc Julien)

Press, Martin R. (Trial Counsel for Appellants)

Ryskamp, Kenneth L. (United States District Judge)

Snyder, Deborah K. (Appellate Counsel for Appellee)

Welsh, Robert L. (Trial Counsel for Appellee)

2020064 Ontario, Inc.

CERTIFICATE PURSUANT TO ELEVENTH CIRCUIT RULE 35-5(C)

This proceeding involves a question of exceptional importance: whether the rule governing the exercise of discretion in permitting a first amendment to a party's pleadings and submissions with respect to an IRS subpoena should follow this Court's general rule governing pleadings that it is an abuse of discretion to refuse to permit even a single amendment to a party's responsive submissions and even more correctly so when the applicable legal standard for asserting the claim or defense changes after the initial pleading and submissions are made.

/s/Jack J. Aiello
JACK J. AIELLO
Attorney of Record for Respondents

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Rules

STATEMENT OF ISSUE ASSERTED TO MERIT *EN BANC* CONSIDERATION

Whether it should be determined to be an abuse of discretion to refuse to permit even a single amendment to a party's responsive pleadings and submissions when the applicable legal standard changes after the initial response.

COURSE OF PROCEEDINGS, DISPOSITION OF CASE, AND FACTS

These consolidated appeals involve the IRS's petitions to enforce five summonses issued in late September 2010 (the Clarke cases), seeking documents and testimony from four individuals, and an additional summons issued in September 2011 (the Julien case). The 2010 summonses, on their faces, were limited to the examination of tax returns of Dynamo Holdings Limited Partnership ("DHLP") for the calendar years ending December 31, 2005, 2006, and 2007. The 2011 Summons, on its face, sought the examination of various tax documents of Beekman Vista, Inc. ("Beekman") for the tax years ending December 31, 2005 and 2006. However, before any attempt was made to enforce the Clarke summonses, the IRS had already issued a Final Partnership Administrative Adjustment (hereinafter "FPAA") for the relevant time period, claiming that hundreds of millions of dollars were due from DHLP, and DHLP had already filed a petition for readjustment in the Tax Court which the IRS had answered.

In April, 2012, the district court entered orders granting the petitions to enforce the Clarke summonses and denying Respondents' request for summary dismissal. Respondents appealed.

On appeal, this Court reversed the district court's order and ordered a limited

evidentiary hearing, finding that the district court had failed to follow controlling Eleventh Circuit precedent mandating a limited evidentiary hearing when allegations such as those put forward in this case are made. *United States v. Clarke* (Clarke I), 517 F. App'x 689 (11th Cir. 2013).

The Government then filed a petition for writ of certiorari in the Supreme Court of the United States. The petition was granted. After argument on April 23, 2014, the Supreme Court vacated this Court's decision; announced a new rule for evaluating allegations in opposition to summons enforcement; and remanded the case to this Court for further proceedings, including consideration of the existing allegations and evidence under the new standard and consideration of whether, as a matter of law, any of the defenses asserted by Summonees and DHLP were legally sufficient. *United States v. Clarke* (Clarke), 573 U.S. __, __, 134 S. Ct. 2361, 2367-68 (2014). Rather than address those issues in the first instance, this Court remanded to the district court to do so. *United States v. Clarke* (Clarke II), 573 F. App'x (11th Cir. 2014). In addition, this Court left to the district court the question of whether to take additional evidence or permit further argument. *Id.*

In its "Order on Remand," the district court, after declining, without stating a reason, Respondents' request to submit additional allegations and evidence based upon the new standard, once again ordered that the summonses be enforced. [D.E. 63] The district court ruled that neither the allegations that the IRS sought to enforce the summonses only to retaliate for Respondents' refusal to once again extend the limitations period nor the allegations that the IRS employed the summonses to circumvent the more stringent tax court discovery rules were

sufficient defenses to the summonses, as a matter of law. The district court also ruled that Respondents' existing submissions did not meet the standard established by the Supreme Court to justify a limited evidentiary hearing. [D.E. 63]

As for the Julien case, very little activity took place, and it remained essentially dormant until the conclusion of the appellate process with respect to the Clarke case. Ruling on the Julien summons enforcement proceeding for the first time, the district court declined any further submissions of allegations or evidence and enforced the summons, incorporating, as its entire opinion, the reasoning from the Order on Remand in the Clarke cases. (Julien, D.E. 17) The Clarke Respondents and Julien timely appealed the district court's respective rulings, and this Court consolidated the two appeals.

In its Opinion in the pending consolidated appeal, this Court disagreed with the district court's assessment of the sufficiency of Respondents' alleged defenses, ruling that the use of IRS summonses only to retaliate against a taxpayer or to circumvent tax court discovery "would be improper as a matter of law." (Opinion at 11, 13) While that ruling would cover the Julien Respondent's assertion of circumvention of the tax court discovery rules as an improper defense, this Court concurred with the district court's assessment of the other alleged improper purpose in the Julien case, the illegal second audit of Beekman, finding that it does not state a valid defense because a secondary use for requested information does not render the motive for issuing a summons improper. (Opinion at 10, f.n. 4)[1] This

[1] There is some confusion on this point. As we explain later in this motion, the Clarke Respondents also asserted the "illegal second audit" of Beekman defense

Court agreed with the district court that Respondents' existing submissions did not satisfy the new standard.

By this motion for rehearing or rehearing en banc, Respondents seek this Court's further review of the sufficiency of Respondents' existing submissions and of the Respondents' request to supplement its submissions in response to the new rule established by the Supreme Court in this matter, considering that the district court reviewed the existing submissions and declined additional submissions while laboring under the incorrect belief that the Respondents' alleged IRS purposes were not improper as a matter of law.

ARGUMENT AND AUTHORITIES

The issue Respondents raise in this motion for *en banc* consideration is whether, after the pleading standard has been *substantively* changed with respect to a cause by a higher court, the pleader should be entitled to replead or resubmit pursuant to the new standard. Respondents argued that issue in their briefs on appeal to this Court and will address it further in this motion. The main issue that Respondents pose for reconsideration by the panel is whether this Court misapprehended the law – or the application of the law – and the circumstances in this case as they pertain to the issue of whether the district court abused its

---

with respect to the DHLP documents sought in the Clarke cases. That is what the district court referred to as an improper defense based upon a secondary use. (D.E. 63, p. 3) In the Julien case, the documents sought related directly to Beekman's tax returns, and the "illegal second audit" of Beekman defense is the alleged primary (and sole) use of the requested information. (Julien, D.E. 1, p. 3, 6-24; and D.E. 11, p. 4)

discretion in its refusal to permit additional pleadings or submissions in light of the new *Clarke* standard.

I. The Clarke Cases

In ruling on the district court's refusal to permit any new submissions after a new standard was established by the Supreme Court in Clarke, this Court based its decision on a single reason. After noting that summons enforcement proceedings are intended to be "summary in nature," this Court ruled, "the district court's decision not to hold a status conference or permit additional information is appropriate in light of the summary nature of a summons enforcement proceeding." (Opinion at 13-14) Respondents respectfully submit that that ruling is rooted in a misapprehension of the application of that legal principle and of the circumstances in this case that make it much more inequitable to permit the district court's decision on the new submission issue to stand.

First, while the authority relied upon by this Court does state that summons enforcement proceedings are intended to be "summary in nature," and while Respondents do not contest that legal point, the point does not seem germane to the issue of whether the circumstances are such as to require the permission of additional submissions. Additional submissions aimed at satisfying the new *Clarke* standard would not transform the proceeding from one that is "summary in nature" to something more elaborate. The Supreme Court case relied upon by this Court, *United States v. Stuart*, 489 U.S. 353, 109 S. Ct. 1183 (1989), recites the language from 26 USC §7602(c) that the summons enforcement proceedings should be "summary in nature" to point out that it was not intended that these proceedings

should ordinarily result in "protracted litigation without any meaningful results for the taxpayer." *Id.* at 1193 (internal citation omitted). The Supreme Court acknowledged that the IRS's good faith is still at issue (and, therefore, may be challenged). *Id.* Other summary proceedings – for example, summary judgment – while aimed at preventing a full-blown trial, do not restrict the application of the Rules of Civil Procedure, limit pleadings, or limit submissions; and in such proceedings, the courts are required to be liberal in permitting a party a fair opportunity to submit information it has and to supplement submissions in pursuit of fairness. *See United States v. Powell*, 379 U.S. 48, 58, n. 18, 85 S. Ct. 248, 255 (1964) (Federal Rules of Civil Procedure apply to IRS summons proceeding).

Respondents' request to offer additional submissions is no different from a plaintiff seeking to replead after the standards or rules with respect to a cause of action have changed. In fact, that is what happened in *Turkman v. Ashcroft*, 2010 WL3398965 (E. D. N.Y. 2010), where the court permitted the plaintiff to replead after the Supreme Court had established a new standard for evaluating pleadings in its *Iqbal* and *Twombly* decisions. *See Ashcroft v. Iqbal*, ___ U.S. __, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). In *Turkman*, the district court said, "to deny Plaintiffs [the opportunity to conform their pleadings to the heightened standard only recently imposed by the Supreme Court] would require them to defend the adequacy of a pleading drafted before that heightened standard was established, even while they assert they now have sufficient evidence and information to meet the heightened standard." *Turkmen* at 6 (internal citation

omitted). In other words, that an IRS summons proceeding is intended to be summary in nature does not counsel against the parties being permitted to defend their rights according to the newly established rules.

Reversing the circumstances, for example, one can only imagine the outcry by the IRS if the Supreme Court established a new standard that required more specificity or precision in the elements of the agent's affidavit than was required by *Powell* and then the district court refused to permit the IRS to supplement its affidavit to justify the issuance of its summons. Respondents suggest that it would be hard to imagine the IRS not being permitted to do that, or that it would not be found an abuse of discretion by the district court. What Respondents sought to do here is no different with respect to the new standard as to their defenses. Nothing in the discussion by the Supreme Court in *Clarke* has changed the fundamental purpose of the rules of engagement with respect to summons proceedings. The court must fairly apply the Federal Rules of Civil Procedure to protect both the IRS' interest in having significant deference when it decides it has use for additional information from a taxpayer and the taxpayer's interest in being free from bad faith examinations and discovery practices by the IRS. Protecting both parties' interests and rights with respect to their fundamental submissions does not alter the summary nature of the proceeding but simply provides the appropriate protections (i.e. due process for this type of proceeding). Therefore, again, Respondents respectfully suggest that the reasoning of this Court on this issue misapprehends the import of the "summary in nature" objective of summons

enforcement proceedings and is not a logically appropriate basis to affirm the district court's ruling prohibiting additional submissions.

The basis upon which Respondents seek rehearing from the panel on this issue is that this Court, by its ruling, has changed the decisional environment under which the district court should rule both on the sufficiency of Respondents' present submissions and on whether to permit additional submissions pursuant to the new *Clarke* standard. This Court has now decided that the alleged improper purposes – retaliation for refusal to agree to a further extension of the limitations period and circumvention of the tax court discovery limitations – are, as Respondents argued, improper as a matter of law. (Opinion at 11, 13) On that point, this Court determined that the district court erred. When the district court considered Respondents' arguments in light of the new *Clarke* standard, the district court did so with the stated belief that Respondents' alleged improper purposes were not improper at all. (Opinion at 10) Because of that, further submissions aimed at supporting those defenses would have been irrelevant to the district court, and the present submissions were also irrelevant. While Respondents admit that the district court wrote of their present submissions as not being convincing, the district court was merely considering whether these submissions supported an alleged purpose that would not have been an improper purpose, anyway. And it is clear that the district court had no reason or incentive to permit additional submissions in pursuit of "proper" purposes by the IRS, notwithstanding the new *Clarke* standard. The question raised is how do we know that the district court would not have exercised

its discretion to allow Respondents to make new submissions had the court been instructed that the defenses raised by Respondents were valid as a matter of law?

When this Court remanded the case to the district court (Clarke II), this Court chose not to instruct the district court on the legal validity of the defenses. (D.E. 54, p. 10) Had this Court made the ruling on the defenses that it has now made in this appeal, we would have the answer to that question, and the abuse of discretion issue would be fairly teed up. As it is, however, it is wholly inequitable to judge the ruling of the district court on the current submissions and especially on the request to make new submissions when the rulings were essentially meaningless in the view of the district court, it having decided that the defenses were not valid as a matter of law. Therefore, Respondents submit that this Court should reconsider the circumstances as they existed when the district court made its ruling and the fact that the district court was not correct about the validity of the defenses, and remand for the district court to reconsider Respondents' legally valid defenses, permitting new submissions in pursuit of the Supreme Court's new *Clarke* standard.

II. The Julien Case

As to the separate Julien case, Julien alleged as improper purposes the circumvention of the tax court discovery rules and that the Beekman materials were sought to perform an improper second audit of Beekman. (Julien, D.E. 11, p. 4) Respondents in the Clarke cases also cited the improper second audit of Beekman as an additional alleged improper purpose for the summons of the *DHLP* material. (D.E. 7, p. 4) In this Court's Opinion, it rejected the illegal second audit

of Beekman alleged in the Julien case as an improper purpose by citing to the district court's decision in the Clarke cases. (Opinion at 10, f.n. 4) Julien respectfully submits that this Court misapprehended how this defense applies to the separate cases and that the illegal second Beekman audit was the *primary* purpose of the Julien summons. As to the Clarke Respondents, who were summoned to produce records with respect to the *DHLP* tax years 2005, 2006 and 2007, the use of those records for a second audit of Beekman can be labeled a secondary purpose to the primary purpose of addressing DHLP's tax returns. (See D.E. 1-2, ¶7) However, with respect to Julien, the summons sought records with respect to *Beekman's* tax returns for the years 2005 and 2006. (See Julien, D.E. 1, p. 3, ¶10, wherein the IRS asserts, "the testimony and documents described in the summons may be relevant to determine the correctness of the federal withholding tax reporting payment by Beekman Vista, Inc. for the taxable years ended December 31, 2005 and December 31, 2006…") Thus, for purposes of the Julien case, the illegal second audit of Beekman relates to, and is asserted by Julien to be, the primary purpose of that summons. (See also summons relating to Beekman documents, D.E. 1-3, pp. 6-24)

The second basis upon which this Court apparently agreed with the district court in enforcing the Julien summons is that, "as noted by the United States in its brief, Appellants did not provide any evidence that Beekman entered into a 'final' settlement of its tax liability that would preclude the opening of a second investigation under §7605(b)." (Opinion at 10, f.n. 4) Julien submits that basing a decision to enforce the summons on the failure to provide evidence of a matter that

is plainly alleged in Julien's answer, when that answer has never been amended, the standard for evaluating submissions in pursuit of a limited evidentiary hearing has been, during the case, changed by the Supreme Court, and the district court has denied the opportunity to make new submissions in pursuit of the new standard, is both unfair and overlooks an abuse of discretion by the district court. For the same reasons expressed herein that the Clarke Respondents should have been given an opportunity to make new submissions after the Supreme Court established a new standard for consideration of those submissions, Julien, whose case had never before been decided, submits that the same opportunity should have been accorded him. Based upon that, Julien submits that this Court should have found that his other defense, an illegal second audit of Beekman, is legally sufficient.

III. ***En banc*** **review: this Court should find it to be an abuse of discretion to refuse to permit even a single amendment of responsive submissions when the applicable legal standard has changed after the initial response**

This issue, for consideration by the panel and, if necessary, by the court *en banc*, questions what the law is, or ought to be, with respect to amendments to pleadings and submissions when, as here, the applicable legal standard for review of those submissions has been changed by the Supreme Court during the case. Raising the issue is especially appropriate here where a previous panel of this Court, in Clarke I, concluded that Respondents' submissions met the then-existing standard and that the district court erred in declining to hold a limited evidentiary hearing. (*Clarke I*)

Respondents briefed this issue to this Court, relying upon *Turkmen, supra*.

In that case, the District Court for the Eastern District of New York discussed the rule of liberal pleading amendments and then particularly addressed the circumstance that existed there, where the standard for pleading a cause of action had changed based upon the Supreme Court's decisions in *Iqbal* and *Twombly, supra*. The decisive quote from that case bears repeating:

> Defendants have failed to offer any persuasive reason why, having moved promptly after remand for leave to amend, Plaintiffs should not be permitted to conform their pleadings to the heightened standard only recently imposed by the Supreme Court. To deny Plaintiffs that opportunity would require them to defend the adequacy of a pleading drafted before that heightened standard was established, even while they assert they now have sufficient evidence and information to meet the heightened standard. The law, which encourages "liberal amendment in the interests of resolving cases on the merits," does not demand such a result.

Id. at 6 (internal citation omitted). That logic applies with equal force here. In fact, Respondents were unable to locate a case that disputed that logic or disputed the application of the rule favoring liberal pleading amendments to the situation where the applicable law changes after initial pleading.

Perhaps just as conclusive is the well-settled law about the permission of amendments to pleadings. This Court has found it to be an abuse of discretion, except in limited circumstances such as futility, not to permit at least one amendment to the parties' principal pleading before dismissing their claim (or

defense).[2] Relying upon the Supreme Court in *Connelly v. Gibson,* 355 U.S. 41, 47, 78 S. Ct. 99, 101, 2 L. Ed. 2d 80 (1957) and Fed. R. Civ. P. 15, which directs that leave to amend *all* pleadings be freely given when justice so requires, this Court has ruled that unless there is a substantial reason to deny leave to amend, a district court abuses its discretion when it does not permit amendment. *See Thomas v. Town of Davie*, 847 F. 2d 771, 773 (11th Cir. 1988). *See also Daniel v. Hancock County School District,* 626 Fed. Appx. 825, 835 (11th Cir. 2015) ("We have noted that if a more carefully drafted complaint might state a claim, the district court must provide the plaintiff with at least one chance to amend the complaint before dismissing the case with prejudice"). Further, where, as here, the district court does not state a reason for denying leave and it is not apparent, a refusal to grant leave to amend is an abuse of discretion. *See Thomas v. Farmville Manufacturing Co., Inc.*, 705 F. 2d 1307, 1308 (11th Cir. 1983) (internal citations omitted). And that is the rule even when there has been *no intervening change in the law or rules* applicable to pleading the issue involved in the case. Therefore, it follows that the rule should apply with even more force when there *has* been a change in the standards applicable to the issue.

Respondents submit that such a rule must exist under the circumstances to preserve fundamental fairness – due process – in the consideration of an issue that, while "summary in nature," is still adversarial. Nothing in the case law has

[2] While the district court may have considered the request to be futile because the court believed the defenses legally insufficient, this Court's ruling removes any argument of futility.

suspended the application of the Rules of Civil Procedure or the case law interpreting those rules. Thus, Respondents submit that the district court abused its discretion when it refused to permit Respondents in either of these consolidated cases to make new submissions pursuant to the new standard established by the Supreme Court. It was a request that would have involved little or no imposition on the court or the parties, could have been accomplished easily in a matter of days, and was necessary to properly balance the interests of the IRS and the taxpayers here. It is not a request that would have upset the policy of these summons proceedings to be "summary in nature," but would be merely the inclusion of additional information currently in possession of Respondents, whether it comes from materials that were available at the outset of the case or materials that were obtained during the case. This Court's recognition of the "Catch-22" position that the taxpayer typically finds itself in with respect to availability of information about the IRS's true purpose strongly counsels in favor of allowing Respondents to submit to the court the materials that it already has to attempt to meet the newly-established standard of the Supreme Court. *See United States v. Southeast First National Bank of Miami Springs*, 655 F. 2d 661, 667 (5th Cir. 1981) (in preserving some ability of the taxpayer to simply ask an IRS agent at the hearing questions relevant to the taxpayer's allegation of improper purpose, the Court used the well-known allusion to the book "Catch-22," when the Court stated that it would be unreasonable to require a taxpayer to show certain facts in order to obtain

discovery that are only available through the discovery);[3] *see also, Nero Trading v. United States,* 570 F. 3d 1244, 1250 (11th Cir. 2009) (stating again, "we will not saddle the taxpayer with this Catch 22").

Based upon the foregoing, this Court, either through the panel or by rehearing en banc, should either apply the existing rule, or establish the rule, that where the applicable pleading standard changes during the case, and legally valid defenses (or claims) have been stated, the litigant must be permitted at least one opportunity to replead or resubmit in an effort to meet that new standard. From there, this Court should find that the district court abused its discretion in refusing to permit new submissions and should remand to the district court with instructions to permit new submissions and to then reconsider the enforcement of the summonses.

CONCLUSION

Based upon the foregoing, this Court should reconsider its ruling and remand to the district court with instructions that the court permit new submissions by Respondents and then reconsider the enforcement of the summonses, or, in the alternative, vacate its Opinion and consider this matter en banc, establishing a rule permitting new submissions in circumstances like these, as set forth above, then remanding to the district court for reconsideration based upon any new submissions made by Respondent.

[3] In *Bonner v. City of Prichard,* 661 F. 2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 28, 2016, I electronically filed the foregoing document with the Clerk of the Eleventh Circuit Court of Appeals by using the CM/ECF system and fifteen (15) paper copies were sent to the Clerk via FedEx. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/Jack J. Aiello
JACK J. AIELLO
Florida Bar No. 440566
EDWARD A. MAROD
Florida Bar No. 238961
MARTIN R. PRESS
Florida Bar No. 164524
Attorneys for Respondents LP
GUNSTER, YOAKLEY & STEWART, P.A.
777 S. Flagler Drive, Suite 500 East
West Palm Beach, FL 33401
Telephone: (561) 655-1980
Facsimile: (561) 655-5677

Service List:

Randolph L. Hutter, Esq.
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 502
Washington, DC 20044
Telephone: (202) 514-2647
Facsimile: (202) 514-8456
E-mail: randolph.l.hutter@usdoj.gov

Attorneys for United States of America

Robert W. Metzler, Esq.
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 502
Washington, DC 20044
Telephone: (202) 514-3938
Facsimile: (202) 514-8456
E-mail: robert.w.metzler@usdoj.gov

Attorneys for United States of America

Jacob E. Christensen, Esq.
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 14198
Ben Franklin Station
Washington, DC 20044-4198
Telephone: (202) 307-0878
Facsimile: (202) 514-9868
E-mail: jacob.e.christensen@usdoj.gov

Attorneys for United States of America

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 15-11663 & 15-11996

D.C. Docket Nos. 9:11-mc-80456-KLR, 9:12-mc-80190-KLR

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

MICHAEL CLARKE,
as Chief Financial Officer of BEEKMAN VISTA, INC. and DYNAMO HOLDINGS LIMITED PARTNERSHIP,

Defendants–Appellants,

ROBERT JULIAN,

Defendant–Appellant,

DYNAMO HOLDINGS LIMITED PARTNERSHIP,

Defendant–Appellant.

Appeals from the United States District Court
for the Southern District of Florida

(March 15, 2016)

Before WILLIAM PRYOR and DUBINA, Circuit Judges, and ROBRENO,[*] District Judge.

DUBINA, Circuit Judge:

This consolidated appeal returns to us from the district court on remand from the United States Supreme Court. In *Clarke*, the Supreme Court vacated and remanded our previous opinion, *United States v. Clarke* (*Clarke I*), 517 F. App'x 689 (11th Cir. 2013), and provided a clear standard under which a taxpayer is entitled to an evidentiary hearing to examine Internal Revenue Service ("IRS") agents concerning their motives for issuing a summons. *United States v. Clarke* (*Clarke*), 573 U.S. ___, ___, 134 S. Ct. 2361, 2367–68 (2014). We remanded the case to the district court to determine whether Appellants' allegations of improper purpose were improper as a matter of law or sufficiently supported under *Clarke* to require a hearing. *United States v. Clarke* (*Clarke II*), 573 F. App'x 826 (11th Cir. 2014). The district court enforced the summonses, finding that Appellants neither alleged improper motives as a matter of law nor met their burden under *Clarke*. *United States v. Clarke* (*Clarke III*), 2015 WL 1324372, at *3 (S.D. Fla. Feb. 18, 2015). Appellants again appeal to this court. After reviewing the briefs and having the benefit of oral argument, we agree with the district court that Appellants failed to meet their burden under *Clarke* and affirm the district court's order.

[*] Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

I. BACKGROUND

This appeal challenges six actions brought by the district court to enforce summonses issued by the IRS in an investigation of Dynamo Holdings Limited Partnership ("DHLP") and Beekman Vista, Inc. ("Beekman").[1] As the facts and procedural history of this case have been well detailed in previous opinions, *Clarke*, 573 U.S. at ___, 134 S. Ct. at 2365–67; *Clarke III*, 2015 WL 1324372, at *1, we will provide only material facts as a predicate for our discussion.

A. Facts

The IRS has broad authority to conduct "inquiries, determinations, and assessments of all taxes" imposed by the Internal Revenue Code. 26 U.S.C. § 6201(a) (2012). The disputes in this case arise from the IRS's examination of the 2005–2007 tax returns for DHLP. Over the course of the investigation, DHLP agreed to two, one-year extensions of the three-year statute of limitation for the IRS's examination. In 2010, DHLP refused a third extension. Shortly thereafter, in the fall of 2010, investigating IRS Agent Fierfelder issued five administrative summonses to four individuals associated with DHLP. None of the summonees complied. The IRS did not seek enforcement of the summonses from the district

[1] The district court consolidated the enforcement proceedings for five IRS summonses issued to investigate DHLP. Order Granting Mot. to Consolidate, *United States v. Clarke*, No. 11-80456 (S.D. Fla. Sept. 14, 2011), ECF No. 18. A similar enforcement proceeding was brought against Robert Julien, as President of Beekman. *United States v. Julien*, No. 12-80190 (S.D. Fla. Feb. 2012). We consolidated the appeals from these two cases. Order, *United States v. Clarke*, Nos. 15-11663-EE & 15-11996-FF (11th Cir. June 5, 2015), ECF No. 67.

court prior to the expiration of the limitations period. Instead, the IRS issued a Final Partnership Administrative Adjustment (FPAA)[2] to DHLP on December 28, 2010. The FPAA proposed numerous adjustments to DHLP's returns. On February 1, 2011, DHLP filed its timely challenge to the FPAA in the tax court. The IRS filed its answer on April 7, 2011. Those proceedings were stayed by the tax court in light of the dispute at issue in the instant case.

B. Procedural History

On April 28, 2011, the IRS filed five petitions in the United States District Court for the Southern District of Florida to enforce the previously issued 2010 summonses. In support of these petitions, Agent Fierfelder submitted an affidavit stating that she followed all administrative steps of the tax code; required the information sought in the summonses to further her investigation; did not already possess the information; and did not issue the summonses for an improper purpose. The district court found that the IRS made a prima facie showing to enforce the summonses and issued orders to the summonees to show cause as to why the summonses should not be enforced. In response, Appellants requested a hearing to

[2] Title IV of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) addresses the assessment of partnership-related tax deficiencies by the IRS, relevant to the IRS's assessment of DHLP and Beekman in the instant case. *See* 26 U.S.C. §§ 6221–6232 (2012) (repealed by the Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (2015)). Under TEFRA, if any adjustments to a partnership return are required, the IRS must issue an FPAA notifying the partners of the adjustments. §6223(a)(2). An FPAA is the functional equivalent of a Statutory Notice of Deficiency for individual taxpayers.

examine Agent Fierfelder to determine whether the summonses were issued for the improper purpose to retaliate for DHLP's refusal to extend the limitations period or to circumvent tax court discovery limitations in light of the pending tax litigation.

The district court denied Appellants' request for a hearing and enforced the summonses, finding that Appellants failed to make any meaningful allegation that the IRS issued the summonses for an improper purpose. On appeal, we concluded that the district court abused its discretion by denying the request for an evidentiary hearing where, under Eleventh Circuit precedent, an allegation of improper purpose in issuing a summons was sufficient to require a hearing. *Clarke I*, 517 F. App'x at 691 (citing *Nero Trading, LLC v. Dep't of Treasury*, 570 F.3d 1244, 1249 (11th Cir. 2009)). We remanded the case to the district court to conduct an evidentiary hearing. *Id.*

The IRS appealed to the United States Supreme Court. The Supreme Court granted certiorari, noting that the Eleventh Circuit was alone in its view that a "bare allegation of improper motive entitles a person objecting to an IRS summons to examine the responsible officials." *Clarke*, 573 U.S. at ___, 134 S. Ct. at 2367. The Supreme Court rejected our view and provided the clear standard that a "taxpayer is entitled to examine an IRS agent when he can point to specific facts or circumstances plausibly raising an inference of bad faith." *Id.* at ___, 134 S. Ct. at 2367. The Supreme Court remanded the case to our court to consider Appellants'

allegations and evidentiary submissions in light of the new standard. *Id.* at ___, 134 S. Ct. at 2368. We too remanded, directing the district court on remand to "determine, in light of all of the evidence and the affidavits highlighted by the Supreme Court, whether Appellants pointed to specific facts or circumstances plausibly raising an inference of improper purpose." *Clarke II*, 573 F. App'x at 827. We further instructed the district court to determine "whether the improper purposes alleged by Appellants . . . are improper as a matter of law." *Id.*

After remand to the district court, Appellants requested leave to rebrief their arguments under the new *Clarke* standard and provide additional evidence not presented in the initial briefs. The district court permitted Appellants to brief their arguments under *Clarke*, but denied their request to present any new evidence concerning their allegations. *Clarke III*, 2015 WL 1324372, at *1.

Appellants' arguments on remand closely mirrored the defenses raised in response to the district court's show cause orders. To support their allegations of retaliation, Appellants stressed the timeline of the IRS's decision to seek enforcement—six months after the summonses were issued, four months after the FPAA was issued, and in the same month that the IRS answered the tax court petition. Appellants also noted that Agent Fierfelder signed the FPAA weeks before she issued the summonses. These facts, they argued, established that the information sought through the summonses was not necessary to Agent

Fierfelder's investigation and supported the inference that the summonses were only issued to punish DHLP.

Next, Appellants alleged that the IRS sought enforcement of the summonses to evade more stringent tax court discovery rules. Appellants provided evidence that Agent Fierfelder did not examine Christine Moog, a trust beneficiary who complied with an IRS summons in September 2011. Instead, lead IRS counsel in the pending tax litigation, David Flassing, conducted the examination. From this, Appellants argued, the court could infer that the summonses were not enforced for use in Agent Fierfelder's investigation, but instead to circumvent the tax court's discovery process.

In the Julien case, the IRS had closed its investigation for Beekman for the taxable years of 2005–2006. However, in September 2011 the IRS issued a summons relating to those years to Robert Julien, as President of Beekman. The purpose of the additional investigation was to reexamine Beekman's records regarding information uncovered during the examination of DHLP—namely, $740,000,000 in property transfers between the two companies. The IRS notified Beekman of the need to conduct a second examination of its records in accordance with 26 U.S.C. §7605(b) (2012). Julien did not comply with the summons, and in response to the district court's show cause order alleged that the Beekman and

DHLP summonses were issued to circumvent discovery and perform an "illegal second audit" of Beekman.

Ultimately, the district court found that none of the grounds on which Appellants challenged the IRS summons were improper as a matter of law.[3] In addition, the court found that none of Appellants' submissions showed "facts giving rise to a plausible inference of improper motive regarding issuance of the summons." *Id.* at *3. Accordingly, the district court denied Appellants' request for an evidentiary hearing and enforced the summonses. *Id.* This appeal followed.

II. STANDARDS OF REVIEW

We review "for abuse of discretion a trial court's decision to order—or not—the questioning of IRS agents." *Clarke*, 573 U.S. at ___, 134 S. Ct. at 2368. A district court abuses its discretion when it makes an error of law, and we must ensure the trial court applied the correct legal standards. *Id.* at ___, 134 S. Ct. at 2368 (citing *Fox v. Vice*, 563 U.S. 826, ___, 131 S. Ct. 2205, 2217 (2011)). The district court's conclusions of law are reviewed de novo. *Bok v. Mut. Assurance, Inc.*, 119 F.3d 927, 929 (11th Cir. 1997). "An order enforcing an IRS summons will not be reversed unless clearly erroneous." *United States v. Medlin*, 986 F.2d 463, 466 (11th Cir. 1993).

[3] The district court adopted its reasoning from *Clarke III* to its final order in the *Julien* case. Order Enforcing Summons, *United States v. Julien*, No. 12-80190 (S.D. Fla. Mar. 6, 2015), ECF No. 17.

III. DISCUSSION

The IRS's authority to investigate is extensive. *See United States v. Arthur Young & Co.*, 465 U.S. 805, 816, 104 S. Ct. 1495, 1502 (1984). Under 26 U.S.C. §7602(a), the IRS may issue a summons for 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." *See also United States v. Morse*, 532 F.3d 1130, 1132 (11th Cir. 2008).

The summons authority is subject to limitations. Under *Powell*, the IRS must make a four-part prima facie showing to obtain enforcement of a summons from the district court: that (1) "the investigation will be conducted pursuant to a legitimate purpose," (2) "the inquiry may be relevant to the purpose," (3) "the information sought is not already within the Commissioner's possession," and (4) "the administrative steps required by the Code have been followed." *United States v. Powell*, 379 U.S. 48, 57–58, 85 S. Ct. 248, 255 (1964). Afterward, "the burden shifts to the party contesting 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. La Mura*, 765 F.2d 974, 979–80 (11th Cir. 1985). However, a court reviewing an enforcement petition "may ask only whether the IRS issued a summons in good faith, and must eschew any broader role of 'oversee[ing] the [IRS's]

determinations to investigate.'" *Clarke*, 573 U.S. at ___, 134 S. Ct. at 2367 (alterations in original) (quoting *Powell*, 379 U.S. at 56, 85 S. Ct. at 254).

Under *Clarke*, a taxpayer is entitled to examine an IRS agent concerning the issuance of a summons only when he can "make a showing of facts that give rise to a plausible inference of improper motive." *Id.* at ___, 134 S. Ct. at 2368. Examples of an improper purpose to issue a summons include harassment of the taxpayer or "any other purpose reflecting on the good faith of the particular investigation." *Powell*, 379 U.S. at 58, 85 S. Ct. at 255.

On appeal, Appellants argue that they were entitled to provide new evidence under the more stringent *Clarke* standard and that the district court incorrectly applied *Clarke* to its submissions. We address the district court's legal conclusions, application of *Clarke*, and Appellants' remaining arguments below.

A. What Constitutes an Improper Purpose as a Matter of Law

The district court's order found that none of the improper purposes alleged by Appellants were an improper motive to issue a summons as a matter of law. *Clarke III*, 2015 WL 1324372, at *1. With regard to the allegations of retaliation and circumvention of tax discovery, we disagree.[4]

[4] We concur, however, with the district court's assessment of the purported "second illegal audit" of Beekman alleged in the Julien case. *See generally Clarke III*, 2015 WL 1324372, at *1 (noting that a secondary use for requested information does not render the motive for issuing a summons improper). Also, as noted by the United States in its brief, Appellants did not

1. *Retaliation*

The district court dismissed Appellants' retaliation arguments chiefly because "[i]f information remains to be gathered and the statute of limitation has expired, the IRS has no alternative but to institute a formal summons process." *Clarke III*, 2015 WL 1324372, at *2. While this conclusion may be germane to the case at hand, it fails to meaningfully address the legal issue of whether issuing a summons only to retaliate against a taxpayer would be improper as a matter of law. We believe that it would. Using the summons power to retaliate against a taxpayer is akin to improper harassment of the taxpayer. The Supreme Court did not disturb our conclusion in *Clarke I* that "[i]f the IRS issued the summonses only to retaliate against [DHLP], that purpose 'reflect[s] on the good faith of the particular investigation,' and would be improper." 517 F. App'x at 691 (third alteration in original) (quoting *Powell*, 379 U.S. at 58, 85 S. Ct. at 255). The factual difficulty in differentiating between a retaliatory summons and a summons issued after a taxpayer's refusal to extend the limitations period has no bearing on this legal question. We conclude that issuing a summons for the sole purpose of retaliation against a taxpayer would be improper as a matter of law.

---

provide any evidence that Beekman entered into a "final" settlement of its tax liability that would preclude the opening of a second investigation under §7605(b).

2. *Circumventing Tax Court Discovery*

Appellants argue that issuing an IRS summons in order to circumvent tax court discovery would be improper as a matter of law. There is ample case law in which taxpayers allege circumvention of tax discovery as an improper purpose to issue a summons. *See, e.g.*, *Ash v. Comm'r*, 96 T.C. 459 (1991). However, because it is well-established that the validity of a summons is tested at the date of issuance and "[p]roceedings in the tax court do not extinguish the Commissioner's summons power," this claim is rarely tenable. *United States v. Roundtree*, 420 F.2d 845, 848 n.3 (5th Cir. 1969)[5]; *United States v. Centennial Builders, Inc.*, 747 F.2d 678, 681 n.1 (11th Cir. 1984) (validity of a summons tested at date of issuance). This case is no different—Agent Fierfelder's summonses were issued pursuant to a valid investigation of Appellants, within the limitations period,[6] and before the tax proceedings commenced. That the summoned information may assist the IRS in preparing for its case in the tax court is of no consequence—the

[5] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[6] The statute of limitation to assess a partnership return is suspended during the period in which the taxpayer may challenge the FPAA in court, or, until the court's decision becomes final, and then for one year after. 26 U.S.C. §6229(d) (2012). The effect of this section in the instant case is that because the IRS issued the FPAA before the limitations period expired, its ability to assess and collect from DHLP is extended to one year following the tax court's final decision. Accordingly, despite Appellants' apparent arguments to the contrary, the limitations period to assess DHLP remains open.

taxpayer became obligated to provide that information well before the tax case commenced.

Notwithstanding the facts of the instant case, it would clearly be an improper purpose for the IRS to issue a summons in bad faith outside a legitimate investigation, with the sole motive of circumventing tax court discovery. *See United States v. PAA Mgmt., Ltd.*, 962 F.2d 212, 219 (2d Cir. 1992) (distinguishing a summons issued after the initiation of tax court proceedings). We stress that given our deference to the IRS's broad authority to investigate, the circumstances under which a taxpayer could successfully allege improper circumvention of tax discovery are exceptionally narrow. However, we will not limit courts from examining distinct scenarios that may plausibly support such allegations. Accordingly, we conclude that issuing summons in bad faith for the sole purpose of circumventing tax court discovery would be an improper purpose as a matter of law.

B. The District Court's Decision to Exclude New Evidence

Appellants argue that the district court's refusal to hear additional evidence in light of the new *Clarke* standard was an abuse of discretion. The instant case involves the right to examine an IRS agent in a summons enforcement proceeding, which, as the United States points out, is to be "summary in nature." *United States v. Stuart*, 489 U.S. 353, 369, 109 S. Ct. 1183, 1193 (1989). The district court's

decision not to hold a status conference or permit additional evidence is appropriate in light of the summary nature of a summons enforcement proceeding. Accordingly, we find no abuse of discretion.

C. Appellants' Submissions Under Clarke

Although the district court erred in finding that the allegations set forth by Appellants could not constitute an improper purpose as a matter of law, the district court correctly found that Appellants failed to meet their burden under *Clarke*. *Clarke* permits a taxpayer challenging the enforcement of a summons "to examine an IRS agent when he can point to specific facts or circumstances plausibly raising an inference of bad faith." *Clarke*, 573 U.S. at ___, 134 S. Ct. at 2367. Although circumstantial evidence may support a plausible inference, mere conjecture or bare assertion of an improper purpose is not sufficient. *Id.* at ___, 134 S. Ct at 2367–68.

Appellants' submissions raise many allegations, but no plausible inference of improper motive. First, the submission that the timeline of the issuance of the summonses supports an inference of retaliation by the IRS requires substantial conjecture that is both implausible and unsupported by the record. Further, none of Appellants' submissions suggest that the summonses were issued in bad faith anticipation of tax court proceedings rather than in furtherance of Agent Fierfelder's investigation. As conjecture and bare allegations of improper purpose are insufficient as a matter of law, we conclude that Appellants failed to meet their

burden under *Clarke* and the district court did not abuse its discretion denying Appellants' request for an evidentiary hearing.

D. Enforcement of the Summonses

The validity of a summons is tested at the date of issuance. *Centennial Builders, Inc.*, 747 F.2d at 681 n.1. Despite this, Appellants argue that the December 2010 issuance of the FPAA foreclosed the IRS's legitimate need for the summoned information. Appellants urge that the only conceivable use for the summoned information would be to improperly circumvent the tax court's discovery rules, and the enforcement of these summonses was an abuse of the district court's process that should be reversed.

We conclude that Appellants' argument is unpersuasive as it ignores Appellants' statutory duty to comply with the summonses and overstates the impact of an FPAA on the IRS's investigatory authority. *See* 26 U.S.C. §6230(h) (2012) ("Nothing in this subchapter [i.e., TEFRA] shall be construed as limiting the authority granted to the [IRS] under section 7602 [the summons provision]."); *United States v. Couch*, 409 U.S. 322, 329 n.9, 93 S. Ct. 611, 616 n.9 (1973) ("The rights and obligations of the parties [become] fixed when the summons [is] served."); *PAA Mgmt.*, 962 F.2d at 217 (issuance of an FPAA does not render a later summons illegitimate); *Sugarloaf Funding, LLC v. Dep't of Treasury*, 584 F.3d 340, 349 (1st Cir. 2009). Because neither the issuance of the FPAA nor the

initiation of a challenge in the tax court affects the IRS's investigatory authority under §7602, Appellants failed to rebut the IRS's prima facie showing under *Powell* to bar enforcement of the summonses. That the IRS could conceivably attempt to introduce evidence from these summonses in the pending tax litigation does not rise to the level of an abuse of process contemplated by *Powell*. Further, it is the domain of the tax court to control discovery in the pending tax litigation. *Ash*, 96 T.C. at 470–71. Our concern is whether the summonses were validly issued, and—as the district court correctly found—they were. Accordingly, the district court did not err in enforcing the summonses.

IV. CONCLUSION

Although we conclude the district court erred in its conclusion that allegations of retaliation or circumvention of tax court discovery are not improper purposes to issue a summons as a matter of law, the disposition of this case remains the same. Accordingly, based on the foregoing discussion, we affirm the district court's order denying Appellants' request for an evidentiary hearing and enforcing the six administrative summonses.

AFFIRMED.