UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, Petitioner/Appellee, v. MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF BEEKMAN VISTA, INC., et al., Respondents/Appellants, And DYNAMO HOLDINGS LIMITED PARTNERSHIP, Intervenor/Appellant.	**Appeal Nos.: 15-11663-EE, 15-11996-FF** 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

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

APPELLANTS' BRIEF

MAILING ADDRESS:

JACK J. AIELLO
EDWARD A. MAROD
GUNSTER, YOAKLEY & STEWART, P.A.
777 S. Flagler Drive
Suite 500 East
West Palm Beach, FL 33401
561-655-1980
Attorneys for Appellants

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The following persons and entities have an interest in the outcome of this appeal:

Aiello, Jack J. (Appellate Counsel for Appellants)

Beekman Vista, Inc.

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)

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.

STATEMENT REGARDING ORAL ARGUMENT

Appellants/Respondents believe that oral argument would be of assistance to this Court in resolving this matter because this case raises, as an issue of first impression, the proper application of the standards set forth in the recently decided Supreme Court case of *USA v. Michael Clarke*, 573 U.S. ____, 134 S. Ct. 2361 (2014), for determining the right of a taxpayer to a limited hearing to obtain discovery to provide a meaningful opportunity to establish that the Government had issued or was seeking to enforce a tax summons for an improper purpose.

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STATEMENT OF JURISDICTION

The present case, as consolidated on appeal, involves six separate petitions filed by the Government to enforce summonses served on Respondents purportedly in support of the examination of the tax returns of DHLP filed in respect of the years 2005-2007 (the Clarke case) and in support of the examination of the tax returns of Beekman Vista, Inc., filed in respect of the years 2005 and 2006 (the Julien case). District court jurisdiction was based on 26 USC §§ 7402(b) and 7604(a) and 28 USC §§ 1340 and 1345. (Clark, DE 1, p. 1; Julien, DE 1, p. 1)

Jurisdiction over this appeal is in this Court based upon 28 USC § 1291. The decisions on appeal are final decisions of the United States District Court, Southern District of Florida.

The final order under review in the Clarke case was entered on February 18, 2015. (DE 63) The final order under review in the Julien case was entered on March 9, 2015. (DE 17) Respondent/DHLP's Notice of Appeal was timely filed in the Clark matter on April 16, 2015. (DE 64) Julien's Notice of Appeal in the Julien matter was timely filed on May 6, 2015. (DE 18)

This appeal is from final orders that dispose of all parties' claims.

PREFACE

Throughout this Brief, Appellants, Michael Clarke, as Chief Financial Officer of Beekman Vista, Inc., Michael Clarke, as Chief Financial Officer of Dynamo Holdings, Inc., and Robert Julien, shall be referred to collectively as "Respondents."

Intervenor/Filer, Dynamo Holdings Limited Partnership, shall be referred to as "DHLP."

Respondents and DHLP, when discussing the Clarke case, shall often be referred to collectively as "Respondents/DHLP."

Respondent, Robert Julien, shall be referred to as "Julien."

Appellee/Petitioner, United States of America, Internal Revenue Service, shall be referred to as "the Government" or "IRS."

All other persons, entities and documents shall be referred to as set forth in the Brief.

Citations to the Record on Appeal shall be in accordance with 11th Cir. R. 28-5.

STATEMENT OF THE ISSUES

I. WHETHER THE DEFENSES RAISED BY RESPONDENTS WERE SUFFICIENT AS A MATTER OF LAW.

II. WHETHER THE ALLEGATIONS OF FACTS AND CIRCUMSTANCES SUBMITTED BY RESPONDENTS WERE SUFFICIENT TO RAISE A PLAUSIBLE INFERENCE THAT THE IRS SUMMONSES WERE EMPLOYED FOR AN IMPROPER PURPOSE AND, THEREFORE, SHOULD BE DENIED ENFORCEMENT.

III. WHETHER, IN VIEW OF THE FACT THAT THIS COURT FOUND RESPONDENTS' ALLEGATIONS SUFFICIENT UNDER THIS COURT'S PREVIOUS STANDARD, AFTER WHICH THE MATTER WAS REMANDED TO BE CONSIDERED UNDER A NEW STANDARD ADOPTED BY THE SUPREME COURT, THE TRIAL COURT ABUSED ITS DISCRETION IN DECLINING TO ALLOW THE SUBMISSION OF ADDITIONAL ALLEGATIONS.

STATEMENT OF THE CASE

A. Course of Proceedings

Both the Clarke and Julien matters are before this Court on review of orders granting petitions to enforce six Government summonses. The Government filed six separate petitions, one for each of the administrative summonses. Five of the cases were consolidated for all purposes and remained consolidated after remand by this Court. The five consolidated matters are Case Nos. 9:11-mc-80456-KLR; 9:11-mc-80457; 9:11-mc-80459; 9:11-mc-80460; and 9:11-mc-80461. The

petition to enforce the IRS summons was filed at a later date in the Julien matter, and that case was not consolidated at the trial court level with the others.[1]

Respondents answered the petitions, and the Government replied. (Clarke, DE 7; DE 9; Julien, DE 11; DE 13)[2] The district court granted DHLP's motion to intervene on August 30, 2011. (DE 15) Thereafter, DHLP filed its answer, which adopted Respondent's response. (DE 16) DHLP and Respondent moved for summary dismissal or for scheduling of a pre-trial conference seeking, inter alia, a limited hearing before the district court pursuant to *Nero Trading, LLC v. United States,* 570 F. 3d 1244 (11th Cir. 2009). (DE 20) The Government responded, and Respondent and DHLP replied. (DE 21; DE 22) On April 16, 2012, without ever permitting discovery, holding an evidentiary hearing or holding any hearing at all, the district court entered its orders granting the petition to enforce IRS summonses and denying the motions for summary dismissal. (See DE 24, DE 29, DE 20, DE 22, and DE 24, in the five cases, respectively)

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[1] Only very limited proceedings took place in the Julien matter, although the district court did enter a final order.

[2] In the Clarke matter, all docket entry citations shall be to the civil docket for the lead case, case no. 80456, unless otherwise specified. (See DE 18, Case No. 80456, designating case as lead case and requiring motions and other papers to be filed in lead case only.) After remand from this Court, the parties continued to follow that procedure, filing motions and other papers only in the lead case. All docket entry citations to the Julien case shall follow the docket entry citations to the Clarke case.

Respondents/DHLP appealed the orders to this Court in June, 2012. (DE 28)

On appeal, this Court reversed the trial court's order enforcing the summonses and remanded with directions that the district court conduct the requested limited hearing. (DE 43) By order, the district court assigned the matter to the magistrate to hold the required hearing. (DE 42) In the meantime, the Government petitioned the Supreme Court of the United States to review the decision, and certiorari was granted. After hearing the case, the Supreme Court vacated the decision of this Court and announced a new standard to guide courts in deciding whether or not to permit a hearing of the type that Respondents seek. The Supreme Court did not order the reinstatement of the district court's decision but, instead, remanded the case to this Court for its consideration of the case under the new standard. This Court, in turn, remanded the case to the district court for consideration of the case under the new standard established by the Supreme Court "in the first instance." (DE 54, p. 10)

In reversing of the district court, this Court enforced the historical standard that existed in the Eleventh Circuit for determining when an evidentiary hearing is required. *See United States v. Clarke*, 517 F. App'x 689 (11th Cir. 2013) *cert. granted,* 134 S. Ct. 895, 187 L. Ed. 2d 701 (2014). Under that standard, a taxpayer was entitled to an evidentiary hearing when the taxpayer made a "mere allegation"

of bad faith by the IRS, even if lacking "factual support." That was the standard under which Respondents prepared their response to the petitions in this case. As in any case, providing allegations sufficient to meet the applicable standard for stating an entitlement to the relief sought is all that is required, and this Court found that Respondents had alleged enough under the then-existing standard to require a limited evidentiary hearing where they would be permitted to examine agents of the IRS and others in order to gather sufficient evidence to prove their defenses. *Id.* As in any other case, Respondents were not required to provide all evidence, allegations, or inferences available to them in their initial pleading, but merely sought to satisfy the applicable pleading standard.

In vacating this Court's decision, the new standard announced by the Supreme Court was as follows:

> 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.

Clarke, 134 S. Ct. at 2367 (emphasis added).

The Supreme Court also made clear that in making the inquiry, a court must consider the legal sufficiency of each particular defense that these facts were alleged to support. *Id.* at 2368-69.

In directing the district court to apply in the first instance the new standard established by the Supreme Court, this Court stated:

> We are unable to discern from the district court's order whether it asked and answered the relevant question. We will therefore give the district court the opportunity in the first instance to apply the standard articulated by the Supreme Court. Specifically, the district court should 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.
>
> On remand, the district court should also consider in the first instance whether the improper purposes alleged by Appellants, i.e., retaliating for Dynamo'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.

(DE 54, p. 10) This Court stated further, "We take no position regarding the nature of any further proceedings in the district court and *leave to it the question of whether to take additional evidence, hold a hearing,* or allow the parties an opportunity for additional argument." (Id.) (emphasis added)

In response to the mandate, Respondents/DHLP filed a motion for status

conference, seeking direction in the case. (DE 55) After setting forth the new Supreme Court standard to be applied, Respondents/DHLP requested the opportunity to present the case under that standard, stating:

> The record against which the Court previously decided this matter was created by Respondents with an eye to the former Eleventh Circuit standard. The Eleventh Circuit's reversal demonstrates that Respondents' showing was sufficient under that standard. Further, this Court's previous decision was based, *inter alia*, on the lack of supporting evidence, which even now is not required by the standard established by this case by the highest court in the land. Since the standard in effect when Respondents made their first submissions was a "mere allegation" standard and the standard now has changed, due process requires that Respondents be given a fair opportunity to present their case under the new standard.

(DE 55, p. 3) Respondents/DHLP requested a fifteen minute status conference to establish the ground rules and to set a schedule for further briefing. (Id.)

In response, the Government objected to the setting of a status conference, argued that no new evidence or allegations should be permitted to be filed by Respondents/DHLP, and asserted that the district court had already decided the legal issues relating to the sufficiency of the defenses the first time the case was before the court. (DE 56) Respondents/DHLP replied to the Government, pointing out that they had not had the opportunity to submit evidence, briefing or argument under the new standard, reminded the court that they had been found by this Court to have met the formerly applicable standard, and again requested that a

status conference be set. (DE 57, pp. 3-4)

In a key ruling in this proceeding, the trial court entered its order denying the motion for a status conference. (DE 58) While the court ruled that it would allow Respondents/DHLP to brief their arguments and already-submitted evidence under the new standard, critically, the court ruled that "said briefing shall not include any evidence not already presented to the court." (Id., p. 2) Holding that a status conference to simply set a briefing schedule was not necessary, the court established a briefing schedule. (Id.)

In accordance with the district court's order setting a briefing schedule, Respondents/DHLP timely filed their supplemental brief in support of their request for an evidentiary hearing. (DE 60) Limited to allegations of facts and circumstances that had already been submitted to the district court the first time around, Respondents/DHLP argued that the materials previously submitted met the new standard and entitled them to an evidentiary hearing. (DE 60, pp. 13-18) Respondents/DHLP also pointed out that in alleging sufficient matters to meet the former "mere allegation" of bad faith standard, Respondents/DHLP "did not in their response disclose all of the evidence that they had." (Id., p. 4) Respondents/DHLP stated:

> Since the standard that previously controlled has now been abrogated and a new standard announced, Respondents should be permitted to re-plead and provide additional evidence that they had previously, and even

> evidence they have gathered since. There is additional evidence that has been gathered that further supports Respondents' position. However, it is not provided because of the restrictions in this Court's order setting the briefing schedule.

(Id., p. 4, f.n. 1)

The IRS responded briefly, arguing that the district court had already heard all of this before and should decide it exactly the same way as the first time. (DE 61) Interestingly, the IRS criticized Respondents'/DHLP's supplemental brief, suggesting it contained only a "hint of any fresh argument," even though the district court expressly restricted Respondents'/DHLP's submission and its consideration to already-submitted materials. (*Id.*, p. 5)

Respondents/DHLP replied, arguing that the show cause order originally entered by the district court did not require Respondents/DHLP to submit every fact that it sought to rely upon in the proceeding. (DE 62, p. 3) Reminding the court that Respondents/DHLP followed the then-controlling precedent in the Eleventh Circuit, Respondents/DHLP again argued that they should now be permitted to proceed to make their case under the new standard. (Id.)

On February 18, 2015, the district court entered its Order on Remand, once again enforcing the summonses. (DE 63) Its order repeats much of the court's analysis from the first order granting the petition to enforce the summonses in April, 2012, before the first appeal to this Court. (Id.; see DE 20) However, a few

things about the order are very important for the present appeal. First, the district court acknowledged the Respondents'/DHLP's request for leave to re-plead and to provide evidence that was not previously presented to be weighed under the new standard established by the Supreme Court. (DE 63, p. 2) The court also made clear that it was denying the request to present additional "evidence." (Id.) What is not included in the order is any explanation by the district court as to why it denied the request to present additional information. (Id.)

Second, in re-weighing the original submissions against the new standard, the district court continually referred to the shortcoming of Respondents'/DHLP's submissions as insufficient "evidence." (See DE 63, pp. 2, 3 and 4) Although the district court recited the applicable standard from the Supreme Court decision in this case, the Court did not express any analysis of Respondents'/DHLP's submissions in terms of whether "specific facts or circumstances plausibly raising an inference of bad faith" were alleged, including whether sufficient "circumstantial evidence" may have been tendered. (DE 63)

Finally, ruling that Respondents'/DHLP's request for an evidentiary hearing would be denied, the district court asserted that its request fails under "both the prior standard" and the standard announced by the Supreme Court. (DE 63, p. 6) In ruling that Respondents'/DHLP's request failed even under the prior standard, the district court did not include any statement deferring to or even acknowledging

this Court's determination in the first appeal that Respondents'/DHLP's submissions and request for an evidentiary hearing *did* satisfy the prior standard. (Id.)

The day after the entry of its Order on Remand in the Clarke case, the district court entered an order to show cause in the Julien case, requiring the Respondent to show cause within ten days why the court should not enforce the IRS summonses based upon its February 18 order in Clarke. (Julien, DE 15)

In response to the Order to Show Cause, Julien argued that the court should not enter a similar order in Julien without undertaking further proceedings. (Julien, DE 16) Julien pointed out that the court had never analyzed the specific circumstances and allegations of the response in Julien in light of the new Supreme Court standard (or any other standard). (Julien, DE 16, p. 2) Julien pointed out that the circumstances of the summonses in that case were materially different in certain ways from the summonses in the Clarke case. (Id.) For example, Julien pointed out that the investigation as to which the summonses was issued was "an improper second audit of tax returns as to which the IRS and Beekman Vista had previously [made] a settlement agreement," with Beekman Vista paying the IRS more than $28 million. (Id.) Julien argued that he should be permitted to question representatives of the IRS concerning that and other defenses. (Id.) Julien pointed out that the result in the Clarke case was being appealed to the Eleventh Circuit

and argued that the resolution of this case should be deferred until the appeal was completed, allowing this court to then evaluate the factual circumstances of the Julien case in light of the Supreme Court decision and the analysis of this Court to be forthcoming in the present appeal. (Id. at p. 3)

Several days later, on March 9, 2015, the district court disagreed with Julien in its Order Enforcing Summons. (Julien, DE 17) The entire substance of the one-page ruling was that the IRS summons issued in the case would be enforced "for the reasons stated in the February 18, 2015 Order on Remand in the *United States of America v. Clarke*, Case No. 11-80456." (Id.)

Respondents/DHLP and Julien timely appealed both orders, and the appeals have been consolidated by this Court in the present matter.

B. <u>Statement of the Facts</u>

In Clarke, the five IRS administrative summonses purportedly were served in respect of the examination of the tax returns of DHLP for the calendar years 2005, 2006 and 2007. The summonses were issued in September and October, 2010. (See DE 24) As alleged in the petitions, none of the persons summoned appeared to be examined on the dates indicated on the summonses. (DE 24, p. 2) The government did not pursue enforcement proceedings in respect of these summonses within three days after the failure of the witnesses to appear. (DE 24, p. 2; DE 1) Instead, it proceeded to issue a Final Partnership Administrative

Adjustment (hereinafter "FPAA") for DHLP. (DE 7-2) An FPAA for a limited partnership like DHLP is the functional equivalent of a statutory notice of deficiency ("SND") for an individual or corporate taxpayer.[3] IRS Agent Mary Fierfelder ("Fierfelder"), in her declaration supporting the petitions, said, in the past tense, that the Government "has examined" the subject returns. (DE 1-2, ¶ 2)

After the FPAA was issued, DHLP commenced an action in the Tax Court seeking readjustment of partnership items adjusted in the FPAA pursuant to 26 USC § 6226. (DE 7-1) The government, through Special Trial Counsel David Flassing ("Flassing"), answered the petition in the Tax Court. Flassing commenced discovery in the Tax Court case. (DE 20-1) The district court, in the present cases, took judicial notice of the Tax Court Discovery Rules, which provide for discovery for both parties in Tax Court proceedings. (DE 12-1) DHLP believes, and advised the district court, that Flassing, in order to supplement the discovery available to him through the highly restrictive Tax Court Discovery Rules, was himself the impetus for the enforcement of the five summonses at issue here, as well as a sixth summons served upon Christine Moog, in New York. (DE 20, p. 3) Indeed, the summons enforcement actions filed below did not begin until six months after most of the summoned witnesses failed to appear, four months after the FPAA was issued, two months after the Tax Court case was filed, and a

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[3] *See White & Case v. U.S.,* 22 Ct. Cl. 734, 736 (Ct. Cl. 1991).

month after Flassing answered the Tax Court petition. (DE 20, p. 3)

DHLP pointed out to the district court some of the important differences between Tax Court discovery as permitted by the Tax Court Discovery Rules and the examinations the Government is seeking pursuant to the summonses. For example, in an examination pursuant to a Tax Court summons directed to third parties like the Respondents here, the target of the examination – in this case, DHLP – has no right to attend and interpose objections of the sort customary in litigation discovery depositions. (Id.) Examinations and document production pursuant to this procedure are available only to the government. (Id.) Taxpayers or other targets of IRS investigations have no right to such resources. (Id.) There are no limits on the scope of the examination other than that the questioning have some arguable connection to the examination of the tax returns mentioned in the summonses. (Id.) In contrast, under the Tax Court Discovery Rules, depositions of any kind are the exception rather than the norm.[4] However, the discovery methods that are available are equally available to the parties. (Id.)

While the Petitions to Enforce here suggest that enforcement is being sought independently of the Tax Court case by attorneys in the Department of Justice at the request of a local IRS agent, for "proper purposes," the truth plausibly appears to be otherwise. Christine Moog, the subject of the sixth summons, appeared and

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[4] *See, e.g. Tax Court Rule* 70(a)(1), at DE 12-1.

was examined in New York. (DE 20-2) Fierfelder, the agent who signed the declarations supporting all of the petitions swearing that enforcement of the summonses was needed for the proper purpose of the examination, did not appear. (Id.) Instead, Flassing appeared with another Government attorney, Lisa Goldberg. (Id.) Moreover, in the Tax Court case, Flassing: (1) refused to proceed to appellate conference (the functional equivalent of court-affiliated mediation) on the ground that he first needs the "discovery" sought by the summonses (DE 20-3); (2) opposed a Tax Court motion for protective order, *inter alia*, on the ground that there had not been complete responses to the instant summonses; and (3) through Goldberg,[5] sought a continuance of the trial of the Tax Court case because he must first obtain the "discovery" called for by the instant Government summonses. (DE 20-6)

The IRS publishes a manual, The IRS Manual (hereinafter, the "Manual"), that provides guidelines for the conduct of its agents. One portion of the Manual is referred to as the IRS Summons Handbook (hereinafter, the "Handbook"). (DE 20-7) It provides that an IRS summons should not be issued in respect of a particular examination after a statutory notice of deficiency has been issued or a Tax Court case commenced because to do so would be abusive. (DE 20-7, p. 21, § 25.5.4.4.8) That section provides:

[5] This was the same Goldberg who appeared at the examination of Christine Moog.

25.5.4.4.8 (10-04-2006)

Effect of a Statutory Notice of Deficiency Or a Tax Court Proceeding On a Summons

1. 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

2. If a summons is issued after a Tax Court petition is filed and that summons pertains to the same taxpayers and same taxable years as those before the court, the court will exercise its supervisory power and exclude the information, unless the Service can show the summons was issued for sufficient reason, independent of that litigation. If the post-petition summons pertains to different taxpayers or different taxable years as those before the court, the court will not normally exercise its supervisory power unless the taxpayer can show a lack of an independent and sufficient reason for the summons.

3. In all but extraordinarily rare cases, the Service must not issue a summons after a Statutory Notice of Deficiency (SND) is mailed to the taxpayer to continue the investigation of the same taxable periods and liabilities, covered by the SND. After an SND is mailed, the Service should no longer be in the process of gathering the data to support a determination because the SND represents the Service's presumptively correct determination and indicates the examination has been concluded. If the Service issues a summons after mailing the SND, this could be perceived as an effort to circumvent the Tax Court's discovery processes, which might lead the court to exclude the summoned evidence.

> Note:
>
> It may be appropriate to issue a summons after an SND has been mailed but before a Tax Court petition has been filed in rare situations in which an independent and sufficient reason exists to justify this action. An example of an independent and sufficient reason is when the Service is approached by a confidential informant after an SND is mailed. The informant identifies an issue that was not found during the examination, such as a hidden source of unreported income, and the Service needs to obtain evidence to prove the existence and amount of this income. In any case in which the Service seeks to issue a summons after an SND is mailed, the Service should obtain Associate Area Counsel's approval before issuing the summons. If field counsel approves the summons, the Service should make a record of its administrative file of the circumstances that gave rise to the post-SND summons and why field counsel concluded the circumstances justified the summons. This information may be necessary if the taxpayer seeks to exclude the summoned information from the Tax Court record.

(Id.) (emphasis added) While the Handbook does not have the force of law, it does constitute admissions of the Government about the normal circumstances of issuance and enforcement of IRS summonses.[6]

In order to support their position that the enforcement proceedings here were abusive, Respondents/DHLP requested from the Government several documents and dates for the depositions of witnesses who would have knowledge of relevant

[6] *Cunningham v. CIR,* 165 B. R. 599, 607 (N. D. Texas 1993).

facts. (DE 20-8) The Government refused to provide the documents or dates for the depositions. (DE 20-9) Because the district court granted the Government's petitions to enforce the IRS summonses (now, twice) and denied Respondents'/DHLP's earlier motion for summary dismissal, Respondents/DHLP never had the opportunity to conduct the discovery or to participate in a limited hearing to obtain from the IRS the evidence exclusively in its possession necessary to demonstrate that the issuance or enforcement of the summonses is improper under the circumstances.

In Julien, the single IRS administrative summons purportedly was served in respect to the examination of the tax returns of Beekman Vista, Inc. ("Beekman Vista") for the calendar years 2005 and 2006. (Julien DE 1, p. 1) The summons was issued in September, 2011. (Julie DE 1-3) As alleged in the petition, Julien did not appear to be examined on the date indicated on the summons. (Julien DE 1, p. 2) Just as in Clarke, the Government did not pursue enforcement proceedings in respect of the summons within three days after Julien's non-appearance. (Julien DE 1, pp. 1-2)

In response to the petition, Julien opposed the summons and asserted affirmative defenses stating, *inter alia*, the following: (1) the Government had previously examined and raised issues concerning Beekman Vista's tax returns for the two years at issue and settled the claims relating to those years by accepting a

payment in excess of $28 million; thus, the summons should be dismissed as part of a prohibited duplicative examination of Beekman Vista; (2) based upon the Government assertion that an adjustment needed to be made – even after the settlement – Beekman Vista timely filed a United States Tax Court petition; it is an abuse of process for the Government to seek discovery in the present proceeding that the Tax Court Rules would not permit. Even if the Government arguably had a legitimate purpose for issuing the summons when it was issued, the summons was never used for that purpose and may not be used now to evade the Tax Court limitations on discovery or to harass Beekman Vista and DHLP; (3) as in Clarke, this proceeding implicates considerations of comity as between the proceeding in the Tax Court and the summons proceeding in the district court; and (4) relatedly, there inheres a denial of due process in permitting circumvention of the Tax Court rules that otherwise would permit Beekman Vista certain procedural rights relating to the discovery of information relevant to that controversy. (Julien, DE 11)

Based upon the district court's enforcement of the summons in Julien as essentially a ministerial matter after the district court's Order on Remand in Clarke, Julien never had the opportunity to conduct discovery or to participate in a limited hearing to obtain the evidence exclusively in the possession of the Government that was needed to demonstrate that the issuance or enforcement of the summons is improper under the circumstances.

C. <u>Standard of Review</u>

This Court reviews *de novo* the district court's decision on the legal issue of whether the defenses raised by the Respondents are sufficient as a matter of law to warrant the granting of a limited evidentiary hearing. *See U.S. v Clarke*, 134 S. Ct. 2361, 2369 (2014) ("issues about what counts as an illicit motive" are "pure questions of law"). This Court reviews for abuse of discretion the district court's ruling about whether the taxpayer's submissions warrant an evidentiary hearing, including the questioning of IRS Agents. *Clarke, supra*, 134 S. Ct. at 2368.

<u>SUMMARY OF THE ARGUMENT</u>

After five years of Internal Revenue Service examination of its records relevant to its tax returns for the years ending 2005-07, DHLP refused a request that it agree to a third one-year extension of the statute of limitations with respect to the 2005 return. Unbeknownst to Respondents, on August 11, 2010, Internal Revenue Agent Mary Fierfelder signed a Final Partnership Administrative Adjustment (FPAA), the functional equivalent of a statutory notice of deficiency, reflecting the decision of the IRS to adjust the tax returns of DHLP so as to impose hundreds of millions of dollars of additional tax, interest and penalties. Thereafter, despite the fact that the FPAA had already been signed, and even though there had not been a request for additional information from DHLP for months, in September and October, 2010, the IRS issued six summonses seeking documents and

testimony from five individuals[7] affiliated with DHLP for no legitimate reason. According to Michael Clarke, CFO of DHLP, all documents in the possession, custody or control of DHLP and Beekman Vista relevant to the examination had been provided before the summonses were issued. In September, 2011, after already having once settled its tax dispute with Beekman Vista for the relevant tax years, the IRS issued another summons to Julien seeking numerous categories of documents, apparently dealing with the dispute already settled.

Now, after this Court previously found that the submission of the above and related facts and circumstances was sufficient under the then-existing standard to entitle Respondents to a limited evidentiary hearing in order to obtain information to support its defenses, and after the United States Supreme Court has reviewed that decision and created a new standard for measuring the facts and circumstances alleged by a taxpayer, the district court was asked to re-appraise Respondents' entitlement to a limited evidentiary hearing. In sending the matter back to the district court, this Court left to the district court to decide whether to permit additional allegations of facts and circumstances, to hold a hearing, or to consider additional argument.

In its subsequent review, the district court erred in three ways: 1) the court erred in its legal decision that the defenses posed by Respondents are not legally

[7] Clarke was summoned in two different capacities.

sufficient defenses to establish improper purpose for the issuance of the summonses (Section I, infra); 2) the court abused its discretion by refusing to permit Respondents to supplement (for the first time in the proceeding) their submissions in order to present their case under the new standard announced by the Supreme Court (Section III, infra); and 3) regardless of any new submissions, the district court abused its discretion in ruling that Respondents already-existing submissions do not satisfy the new standard, ruling, in fact, that the submissions do not even satisfy the old standard, directly contrary to the finding of this Court (Section II, infra).

First, the two main defenses alleged by Respondents are legally sufficient to demonstrate improper purpose. In its ruling on the allegation that the IRS issued the summonses as retaliation for the refusal to agree to a third extension to the statute of limitations, the district court ignored the significance of the statute of limitations. The court ruled simply that if the statute of limitations had expired, the IRS would have no alternative but to deal with that by instituting a formal summons process. That conclusion ignores the issue and suggests there are no regulations. The statutory framework governing IRS summonses makes clear that the summonses are authorized to be issued only for purposes listed in the authorizing statute. Retribution for not stipulating to waive a deadline or confer a benefit on the IRS as a litigant is not one of those purposes. As this Court stated in

its opinion in the first appeal, "if the IRS issued the summonses only to retaliate against Dynamo, that purpose 'reflect[s] on the good faith of the particular investigation' and would be improper." *See United States v. Clarke*, 517 F. App'x 689, 691 (11th Cir. 2013) *cert. granted*, 134 S. Ct. 895, 187 L. Ed. 2d 701 (2014) (citing *U.S. v. Powell*, 379 U.S. 48, 58 (1964)). On the abuse of process defense, the district court essentially disagreed with the principal that improper *enforcement* is a valid basis for denying enforcement, instead ruling that the validity of a summons is tested (and final) at the date of issuance. However, the law more strongly supports the logical proposition that if a summons, even though valid when issued, is left unenforced for the entire time that it might have been able to fulfill the proper purpose, and then is enforced later when its value is only to satisfy an improper purpose, the summons should be quashed.

Second, the district court abused its discretion in denying the submission of additional allegations of facts and circumstances to raise a plausible inference of bad faith. Although their sufficiency was rejected by the district court, the original submissions made by Respondents were found by this Court to meet the then-existing standard to warrant a limited evidentiary hearing. After the Supreme Court changed – and, arguably, heightened – the standard, on further delegated review from this Court, the district court's refusal to grant Respondents' request to supplement its original submissions in light of the new standard is a decision well

below the accepted standard for permitting a party to re-plead in federal courts. Even where the law does not change during the proceeding, courts will generally allow a party to re-plead unless re-pleading would be futile or it is clear that the request is in bad faith or of similar character. Where the law has changed during the proceeding, fairness requires much more strongly that a party be permitted to re-plead to meet the law as revised. Here, there is no arguable basis for futility or bad faith. In fact, as noted above, this Court found the original submissions to be sufficient under the then-existing standard. Under these circumstances, justice strongly demands an opportunity for Respondents' defenses to be considered on their merits by allowing them to be pled under the new standard, and it is an abuse of discretion for the trial court to not permit that process.

Finally, the district court abused its discretion in applying the new standard to the already-existing submissions. Because the two defenses are valid legal defenses and either would support denial of enforcement if proven, Respondents have alleged sufficient facts to be entitled to a limited evidentiary hearing to obtain further evidence of the type that would not ordinarily be available to a taxpayer without such discovery, in order to prove its defenses.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ITS DETERMINATION THAT THE DEFENSES RAISED BY THE RESPONDENTS WERE INSUFFICIENT AS A MATTER OF LAW

This Court reviews *de novo* the district court's determination that the defenses asserted by the Respondents are insufficient as a matter of law. Respondents have made two principal assertions. First, Respondents assert that, contrary to the general statements in the affidavit submitted with the petitions to enforce the summonses, the summonses were actually issued solely to punish Respondents for DHLP's refusal to agree to a third extension of the applicable statute of limitations. Second, Respondents assert that the enforcement of the summonses would constitute an abuse of the district court's process.[8] Each of these defenses constitutes an independent and sufficient legal defense to the enforcement of the summonses. The district court's decision to the contrary was erroneous.

On the first point, the district court essentially ignored the significance of the statute of limitations, stating, "If information remains to be gathered and the statute of limitation has expired, the IRS has no alternative but to institute a formal summons process." (DE 63, p.3) However, the statutory framework governing IRS

[8] As will be addressed later in this section, Julien asserted the third defense that the enforcement of the summons should be denied because it is part of an illegal second audit of Beekman Vista.

summonses makes clear that summonses are authorized to be issued only for purposes listed in the authorizing statute. In particular, 26 USC §7602(a) authorizes the issuance of IRS summonses "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 the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability . . .." *See also Nero Trading, supra,* 570 F. 3d at 1248. For purposes of this proceeding, the significance of this language is two-fold: first, none of the listed purposes is "to punish the taxpayer for refusing to grant a third extension of the statute of limitations applicable to a particular examination;" and, second, the statute of limitations runs from the last day of the year to which the tax return relates, not from the time of discovery of an error, so that if the statute of limitations expires, except in extraordinary circumstances not involved here, the Government no longer has any purpose to ascertain the correctness of the return. Thus, if the proposition were proven, as alleged by Respondents, that the summonses were issued solely for the purpose of punishing DHLP for refusing to grant a third extension, it would have proven that the summonses were issued for an improper purpose and should be quashed.

Articulating this proposition in the first appeal, this Court specifically stated:

> One of the reasons the IRS may have issued the summonses, according to Appellants, was solely in

> retribution for Dynamo's refusal to extend a statute of limitations deadline. Although Appellants raised the possibility of numerous improper purposes, federal pleading standards allow claims and defenses to be pled in the alternative, and do not require them to be consistent. See Fed. R. Civ. P. 8(d)(2) & (d)(3). If the IRS issued the summonses only to retaliate against Dynamo, that purpose "reflect[s] on the good faith of the particular investigation," and would be improper. See [US v.] Powell, 379 U.S. [48] at 58. [(1964)][9]

United States v. Clarke, 517 F. App'x 689, 691 (11th Cir. 2013) *cert. granted*, 134 S. Ct. 895, 187 L. Ed. 2d 701 (2014) and vacated and remanded, 134 S. Ct. 2361, 189 L. Ed. 2d 330 (2014). Moreover, during the oral argument in this Court, Judge Marcus even got counsel for the IRS to acknowledge that the issuance of an IRS summons solely for the purpose of punishing a taxpayer for refusing to grant an extension of the statute of limitations would not be an authorized purpose.[10] While the Supreme Court directed this Court specifically to consider the legal sufficiency of each defense raised by Respondents, it did not comment on the review of the

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[9] While this Court's opinion was vacated, the Supreme Court explained that its decision was not to be considered an expression of its views on whether this would be a legal defense. *Clarke,* 134 S. Ct. at 2368-69.

[10] While this Court does not make available transcripts of its arguments, it does make available audio recordings of them. The audio recording of the subject argument contains the following exchange between Judge Marcus and Mr. Metzler, counsel for the IRS: "Judge Marcus: Would that be an Improper Purpose to solely retaliate because they'd refused to extend the Statute of Limitations? Metzler: If that was the sole purpose . . . Judge Marcus: Yes, would that be an Improper Purpose? Metzler: If that the sole purpose. [Further argument to the effect that this is not a case asserting that this conduct was the sole purpose of the summonses omitted]."

legal sufficiency of that particular defense that this Court had already done. Moreover, the Supreme Court's new standard did not change any law in that regard. That defense remains a viable defense, and the district court erred in deciding otherwise.

On the second point, abuse of process, the district court disagreed with the principle that improper *enforcement* of summonses is grounds to deny enforcement, stating, "the validity of a summons is tested at the date of issuance, and the events occurring after the date of issuance but prior to enforcement should not affect enforceability." (DE 63, p.3) However, the Supreme Court has never held that summonses, authorized when issued, can later be enforced for an improper purpose. In fact, if the courts are to prevent their processes from being abused, they should not countenance enforcement for an improper purpose, regardless of the intent with which the summonses were first issued. "It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." *Powell,* 379 U.S. 48, 58 (1964) (emphasis added). As the IRS's own Handbook logically explains, "After the SND [FPAA, here] is mailed, the Service should no longer be in the process of gathering the data to support a determination because the [FPAA] represents the Service's presumptively correct determination and indicates the examination has been concluded. If the Service issues a summons after mailing the [FPAA], this could

be perceived as an effort to circumvent the Tax Court's discovery processes…" (DE 20-7, p. 21, § 25.5.4.4.8) It is fundamental that the use of a court's process for a purpose other than its intended purpose is abuse of process. From the facts identified by Respondents, a plausible inference can be drawn that the sole purpose of the enforcement – and possibly the issuance – of these summonses has always been the evasion of the Tax Court discovery rules and not the "inquiry" that the summonses were designed for. That would be an improper use of the district court's process and would justify quashing the summonses.

Preventing the IRS from using its investigative power to secure an unfair advantage in litigation in circumvention of court rules is also consistent with the approach courts have taken under the relatively analogous statutory scheme governing administrative discovery in the context of a bankruptcy. Specifically, under Bankruptcy Rule 2004, those involved in the administration of bankruptcy laws, such as trustees and other parties in interest, much as those involved in administering the tax laws are empowered under 26 USC §7602, are empowered to conduct wide-ranging discovery (even fishing expeditions) as long as it is plausibly related to the bankruptcy. However, once litigation on the subject of the Rule 2004 discovery is commenced between the parties to the Rule 2004 discovery, that rule cannot be used to circumvent discovery restrictions of the court in which the litigation is pending. *See In re Bennett Funding Group, Inc.,* 203 B.R. 24, 27-28

(Bankr. N.D.N.Y. 1996); *In re Szadkowski*, 198 B.R. 140, 141 (Bankr. D. Md. 1996).

The reasoning underlying this "pending adversary rule" is that the court in which the litigation is pending invariably has rules governing the discovery in cases pending before it. Those rules tend to be more restrictive than the rules governing Rule 2004 discovery, limiting parties to discovery relevant to the issues outlined in pleadings, which are themselves subject to limitations. *Snyder v. Society Bank of Ann Arbor, Michigan*, 181 B.R. 40 (S.D. Texas 1994) aff'd 52 F3d 1067, 1995 WL 241797 (5th Cir. 1995) (denying Rule 2004 discovery on subject matter of state court litigation between parties).[11] The decisions assume that the discovery rules of the courts handling litigation are entitled to respect and that use of Rule 2004 to get discovery relevant to such litigation is inherently wrong. This is so whether the Rule 2004 discovery is initiated before the litigation begins but only enforced after or if it is initiated after the litigation begins.

As has been accepted with respect to Rule 2004 discovery for many years, it is obvious that permitting the use of §7602 discovery relevant to litigation pending between the government and a taxpayer is inherently wrong. Permitting this sort of one-sided discovery under the administrative procedure while court proceedings

[11] Although the opinion on affirmance was not chosen for publication, under the rules of the Fifth Circuit Court of Appeals, unpublished decisions issued before January 1, 1996, are binding precedent. Fifth Circuit Court of Appeals Rule 47.5.3.

are pending on the same subject between the same parties fails to give due deference to the rules and procedures of the court in which the litigation is pending. To allow the IRS to get deposition-type discovery for the Tax Court case via totally one-sided administrative summonses after the commencement of the Tax Court case permits one party, the IRS, to obtain discovery that the rules of that court would not permit. It subverts the entire court system by use of administrative procedures totally unregulated by the court charged with determination of the controversy between the parties. When a court allows its process to be used for a purpose other than the purpose for which it is designed, the court allows its process to be abused. If the district court allows the IRS to use process designed to assist it in examining tax returns after they have already been examined solely for the purpose of evading the Tax Court's discovery rules, it allows its process to be abused.

Courts have plainly recognized that a summons under § 7602 is improper where abuse would result. *Zugerese Trading, L.L.C. v. Internal Revenue Service*, 579 F. Supp. 2d 781, 788-89 (E.D. La. 2008). Section 7602 is intended for use as an investigative and enforcement tool. *U.S. v. Arthur Young & Co.,* 465 U.S. 805, 814 (1984). However, [t]he purpose of [§7602] is not to accuse, but to inquire." Id. at 816 (citation omitted). Indeed, the IRS's power under § 7602 "is not a power to procure or perpetuate evidence at all." *Bolich v. Rubel*, 67 F. 2d 894, 895 (2d

Cir. 1933). Instead, "it is strictly inquisitorial…" *Id.* Because of the risk that parties could use § 7602, like Rule 2004, to circumvent the otherwise-applicable rules of discovery, the use of § 7602 during other pending litigation amounts to improper use. As such, the use of § 7602 during pending litigation is inconsistent with due process and fair play and should be prohibited.

While a few courts have identified narrow circumstances in which an analogous Rule 2004 examination may proceed notwithstanding the existence of other pending litigation, these narrow circumstances are not present in the instant case. Specifically, a few courts have permitted Rule 2004 examinations to proceed, notwithstanding the existence of other litigation, where the Rule 2004 examination could be limited specifically to issues which were unrelated to the pending litigation. E.g. *In re Buick,* 174 B.R. 299, 306 (Bankr. D. Co. 1994) (holding that a party "may conduct Rule 2004 examinations [despite other pending litigation] regarding issues in addition to or beyond the scope of [the other pending litigation]"); *In re Bennett Funding Grp., Inc.,* 203 B.R. 24, 29 (Bankr. N.D.N.Y. 1996) (recognizing that a Rule 2004 examination may proceed where it will not affect other pending litigation, but refusing to allow the discovery because "[i]t is difficult to see how the information demanded in the subpoena would not relate to matters in the Amended Complaint [in the other pending litigation]").

In the instant case, the information sought in the summons relates directly to

DHLP's Petition before the Tax Court. The summons seeks financial statements, stock ledgers, information regarding transfers to DHLP, and documents that may be relevant to ascertaining the nature of certain transfers to DHLP (which Mr. Clarke has said were previously produced). Attorneys from IRS District Counsel have alleged to counsel for DHLP that the loans from Beekman to DHLP forming the subject of the summons should be characterized as distributions, an allegation which relates directly to the IRS's attempts to obtain a possible deficiency and, thus, to DHLP's Petition pending before the Tax Court. Indeed, it seems intuitively incontestable that the prosecution of the enforcement of the summons was initiated at the direction of the attorneys who are defending the Tax Court Petition and that the sole purpose for doing so is to obtain sworn admissions of insiders of the taxpayers that they could not get under the Tax Court Discovery Rules. Accordingly, the exception to the pending litigation limitation where the examination is limited to wholly distinct subject matter does not impact the result in this case: the summons issued pursuant to § 7602 is improper in light of DHLP's Petition before the Tax Court.

Rule 2004 is not the only comparable wide-reaching discovery device with such restrictions on use once a claim is in litigation. Even in the grand jury context—where there is no requirement for an adversary hearing, and where unique considerations of secrecy preclude defendants from either substantiating

their allegations or meaningfully participating in a hearing—courts have created procedures roughly analogous to the hearings at issue here. When there are substantial allegations that their process is being abused, courts regularly review the available evidence, at least to the extent consistent with the independence and secrecy to which grand jury proceedings are entitled. *See In re Grand Jury Proceedings,* 814 F.2d 61, 71 (1st Cir. 1987) ("Despite these difficulties, neither we nor other courts have shirked the responsibility of deciding the merits of challenges to grand jury proceedings like the one raised here."). Thus, Respondents' second principal argument based on the IRS abuse of the district court's process by attempting to evade the restrictions of the Tax Court discovery rules is a sufficient legal defense to the enforcement of an IRS summons.

As for the Julien case, the above arguments relating to abuse of process, including the Government's attempted circumvention of the Tax Court Rules, and arguments about comity and denial of due process apply with equal force, as each of those issues was raised by Julien in his response to the Petition. (Julien DE 11) In addition, Julien raised the defense that the summons should be dismissed because a duplicative examination of Beekman Vista, after settlement of the issues in question with the IRS, should be prohibited. (Id., p. 4) In the district court's Order Enforcing Summons in Julien, while the court simply incorporated its reasoning from the Clarke final order, the court never addressed any of Julien's

defenses specifically, including the defense relating to the IRS's improper use of a summons after settling the matter. (Julien, DE 17) Julien submits that this Court should find that the unique defense posed by Julien is legally sufficient or, at the very least, should remand to the district court for the determination of the sufficiency of that defense.

II. **THE DISTRICT COURT ERRED IN DETERMINING THAT THE ALLEGATIONS OF FACTS AND CIRCUMSTANCES ORIGINALLY SUBMITTED BY RESPONDENTS WERE NOT SUFFICIENT TO RAISE A PLAUSIBLE INFERENCE THAT THE IRS SUMMONSES WERE EMPLOYED FOR AN IMPROPER PURPOSE AND, THEREFORE, SHOULD BE DENIED ENFORCEMENT**

While the Supreme Court did not decide whether sufficient facts or circumstances were alleged to give rise to a plausible inference of bad motive, the issue did come up during oral argument. As noted by Respondents below, Chief Justice Roberts said, at one point:

> They've got more -- you know, they've got more than just a bare allegation. . . . first of all, it's the third request for an extension. They've got the summons immediately after they refuse to grant it. They've got a contention that this is to circumvent the Tax Court's limits. They support that by the fact that when Moog came for the deposition, you only had the Tax Court lawyers there, not Mr. Freefielder who was – Fierfelder, who was running the investigation. That's more than just a bare allegation.

Transcript of Oral Argument at pp. 19-20, *United States v. Clarke,* 134 S. Ct. 2361 (2014) (No. 13-301).

In the district court's order, the court, seemingly unaffected by the ruling of the Supreme Court, continued to reject the Respondents'/DHLP's allegation of facts supporting improper purpose by finding that the allegations are "unsupported by any evidence." (DE 63, p.3, 4) To the contrary, the inquiry specified by the Supreme Court is not based on "evidence;" it is based upon whether a taxpayer can point to specific *facts or circumstances* plausibly raising an inference of bad faith and also held that *circumstantial evidence* can suffice to meet the burden. *See Clarke*, *supra*, 134 S. Ct. at 2367-68. As the Supreme Court noted, "Direct evidence of another person's bad faith, at this threshold stage, will rarely if ever be available." *Id.* The information referenced by the Chief Justice that moves the allegations of this case from "bare allegations" to allegations of "facts or circumstances plausibly raising an inference of bad faith" follows.

The Clarke case involves the attempt by the government to enforce five Internal Revenue Service summonses served in respect of the examination of the tax returns of DHLP for the years ending December 31, 2005, 2006 and 2007. The examination in respect of the year 2005 began shortly after the 2005 year end. The statute of limitations for the IRS to seek an adjustment of this return was extended twice, each time for a period of one year, at the request of the IRS. When the IRS sought a third one-year extension of the statute of limitations, DHLP refused. The summonses were issued promptly thereafter. (DE 8-1)

The IRS Summons Handbook, ("Handbook") provides that when a summons is not obeyed, the IRS is to promptly pursue enforcement (DE 20, Ex. E). The Handbook states that when a summoned witness fails to appear, the agent who issued the summons should "Report immediately, through channels to Associate Area Counsel, any refusal to comply." (DE 20, Ex. E, Handbook ¶25.5.10.3 (2)). There is no evidence that the IRS did this. The IRS should and would have done this if it had been truly interested in obtaining the information sought by the summonses for the proper purpose of completing its examination by the impending expiration of the statute of limitations.

It is also clear from the face of the FPAA that it had actually been completed and signed by the agent on August 11, 2010, a month before the first of the summonses under consideration was even issued. (DE 7-2, p. 5) The fact that the FPAA had already been completed and signed before the summonses were issued belies the idea that the information sought in them was needed to complete the FPAA. Further, agent Fierfelder, in her supporting declaration says that the IRS "has examined" the subject returns. (DE 1-2, ¶2). She makes no caveat that the IRS had started the examination, that it was not completed or that she was still working on it. Indeed, she could not truthfully say as much since, at the time of her declarations in April 2011, the government, on December 28, 2010, had already issued its FPAA, which had been signed by her on August 11, 2010. (DE

7-2, p. 5). From its name, i.e., "Final Partnership Administrative Adjustment," and its reference to the three years under examination identified in the summonses, it can be inferred that the examination was complete at the time the FPAA was signed – and definitely no later than December 28, 2010, the date it was issued by the IRS. (DE 7-2, p. 1). All of the summonses here were issued after Ms. Fierfelder signed the FPAA. While the FPAA may not formally have been issued until December, it is not logical that Ms. Fierfelder, having signed the FPAA already, would need to issue the summonses in question in order to complete her examination. As such, 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.

There was no attempt to enforce these summonses until April 2011, more than 8 months after the FPAA was signed by the IRS Agent overseeing the examination, 5 months after the due date of the last of the summonses, 4 months after the IRS issued that FPAA, more than 2 months after DHLP commenced an action in the Tax Court challenging the FPAA, and even after the IRS had answered the complaint in the Tax Court and promulgated discovery there. But the issuance of these summonses occurred immediately after DHLP declined the IRS's request for a third extension of the statute of limitations. (DE 8-1, ¶ 9) The extensive delay and "coincidence" of the issuance following close on the heels of

the rejection of the request for an additional extension of the applicable statute of limitations further support the idea that the IRS did not actually need the information sought by the summonses for any of the legitimate purposes listed in the authorizing statute and supports the inference that the purpose of the summonses was to punish Respondents for DHLP's refusal to extend the statute of limitations.

The fact that the enforcement effort began after the Tax Court case had been filed, after the IRS had answered and after the IRS had commenced discovery there, also supports the inference that the present enforcement proceeding is not for a legitimate purpose of "inquiring" about a tax matter, but is a blatant attempt at evasion of the Tax Court Discovery Rules. *See Bolich, supra,* 67 F. 2d at 895 (the IRS's power under § 7602 is not for the procurement or perpetuation of evidence but is "strictly inquisitorial…"). It cannot reasonably be disputed that the Tax Court Discovery Rules make it extremely difficult to get deposition testimony, while the administrative summons procedure makes obtaining oral testimony very easy and one-sided. Examinations pursuant to a summons provide the witness and the taxpayer no due process rights. Objections need not be honored. Cross-examination is not permitted. Yet, where the witness is a party or associated with a party, whatever testimony that is elicited is potentially admissible in evidence as an admission of a party. *See, e.g., Mary Kay Ash v. IRS,* 96 T. C. 459, 472-73 (1991).

Each of the Clarke case summonses states on its front page on a line marked "In the matter of" the name of "Dynamo Holdings Limited Partnership", suggesting that the purpose of the summons was limited to the examination of the tax returns of DHLP for the purpose of preparing an FPAA, which, as noted, had already been prepared and signed before the summonses were issued. Each also states on its front page on a line marked "Periods" the words "Calendar years ended December 31, 2005, December 31, 2006 and December 31, 2007." There is no dispute that the FPAA relating to the 2005-07 tax years of DHLP was issued in December 2010, and that a Tax Court action challenging that FPAA has been pending since February 1, 2011. *Dynamo Holdings Limited Partnership v. Commissioner,* Tax Court Docket No. 2685-11. (See also DE 7-1). As appears on the face of each summons, the information sought by the summonses is nothing other than information in dispute in the Tax Court, as reflected by the Tax Court petition and the IRS discovery tendered there. (DE 20-1, Composite Exhibit "A").

Discovery is available in the Tax Court proceedings under the Tax Court Discovery Rules of which the district court took judicial notice. (DE 12-1) Indeed, the IRS has commenced discovery in the Tax Court case. (See, e.g., DE 20-1).

In an examination pursuant to an IRS summons directed to a third party like the Respondents here, the target of the examination, in this case DHLP, has no

right to attend and interpose objections of the sort customary in litigation discovery depositions, and there are no limits on the scope of the examination other than that the questioning have some arguable connection to the examination of the tax returns mentioned in the summons. In contrast, under the Tax Court Discovery Rules, depositions of fact witnesses are generally not allowed absent stipulation of the parties or extraordinary circumstances. The IRS has never approached DHLP to seek a stipulation allowing the summoned witnesses to be deposed.

Further facts supporting the inference that the purpose of the IRS in enforcing these summonses was to evade the Tax Court discovery rules is found in the declaration of attorney Richard Sapinski. (See, DE 20-2, Exhibit "B") Sapinski represented Christine Moog, the subject of a sixth summons issued simultaneously with the five summonses at issue in Clarke concerning the same taxpayer and same tax years. Rather than resist the petition for enforcement, Moog appeared and was examined in New York. Ms. Fierfelder, the agent whose declaration supports all of the petitions here, who swears that the examination is needed to complete her examination, did not appear. (Id). Instead, the Special Trial Attorney representing the IRS in the Tax Court case appeared with another IRS attorney. (Id). Counsel for DHLP was not invited and was not offered the opportunity to object to questions nor to cross-examine. Moreover, in the Tax Court case, the IRS Special Trial Counsel has refused to proceed to appellate

conference (the functional equivalent of court affiliated mediation) on the ground that he first needs the "discovery" sought by the summonses, and has most recently sought a continuance of the trial of the Tax Court case because he must first obtain the "discovery" called for by the instant IRS summonses. (See DE 20-3, Exhibits "C" and "D"). In other words, the IRS through its Special Trial Counsel, in violation of the principle that IRS summonses are not for the purpose of preserving evidence but, rather, are only for the purpose of inquiry prior to the issuance of an SND or FPAA, is treating and considering the summonses and their enforcement to be adjuncts of discovery for the Tax Court case, without obeying the Tax Court Discovery Rules and without even providing the other parties an opportunity to participate.

In the Handbook, the IRS admits that an IRS summons should not be issued in respect of a particular examination after a statutory notice of deficiency has been issued or a Tax Court case commenced because to do so would be abusive. (DE 20-7, p. 21, Handbook, ¶25.5.4.4.8 (3)) ("After an SND is mailed, the Service shall no longer be in the process of gathering the data to support a determination because the SND represents the Service's presumptively correct determination and indicates the examination has been concluded").[12] With that admission, there can

[12] While the Handbook does not have the force of law, it does constitute admissions of the IRS in respect of the normal circumstances of issuance and enforcement of IRS summonses.

be no logical argument to be made that a summons issued the day before the FPAA is issued and not enforceable until after the issuance of the FPAA would not be abusive. It is also plausible to infer that the enforcement of summonses issued two or three months before the issuance of an FPAA that the IRS never even attempted to enforce until months after the FPAA was issued is likewise abusive.

In their argument below, the Government opportunistically argued that Respondents/DHLP made only a hint of a "fresh" argument since the first time the district court considered this matter. (DE 61, p.5) However, as set forth earlier, the Government vehemently opposed any supplemental submissions of facts or circumstances by Respondents/DHLP to address the new standard, succeeded in getting the court to deny any new submissions, and then argued that Respondents/DHLP made no "fresh" arguments! At the very least, Respondents/DHLP were entitled to a *fresh look* at whether their existing submissions meet the new standard. Indeed, the district court did rule Respondents'/DHLP's existing submissions do not meet the new standard. More surprisingly, though, is that the district court also said that Respondents' submissions did not meet the *old* standard – against this Court's ruling and authority. (DE 63, p. 6) It cannot reasonably be concluded that the district court objectively appraised whether the Respondents' existing submissions meet the new standards when the court would not even concede this Court's ruling that the

submissions met the *old* standard.

In the Julien case, as set forth above, the district court made no separate analysis of the submissions under the new standard or in light of the separately-stated defense alleged by Julien about improper duplicative examination of Beekman Vista. For that and the other reasons expressed above, the district court abused its discretion with respect to the appraisal of the submissions in light of the new standard.

III. IN VIEW OF THE FACT THAT THIS COURT FOUND RESPONDENTS' ALLEGATIONS SUFFICIENT UNDER THIS COURT'S PREVIOUS STANDARD, AFTER WHICH THE MATTER WAS REMANDED TO BE CONSIDERED UNDER A NEW STANDARD ADOPTED BY THE SUPREME COURT, THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE SUBMISSION OF ADDITIONAL ALLEGATIONS

This Court previously reversed the district court's denial of Respondents' request for a hearing and remanded with directions that the court conduct the requested evidentiary hearing. [DE 43] Thereafter, the Supreme Court of the United States vacated the decision, announcing a new standard to guide courts in deciding whether or not to permit an evidentiary hearing of the sort that Respondents seek. *United States v. Clarke*, 573 US ____, 134 S. Ct. 2361 (2014). Significantly, the Supreme Court did not order the reinstatement of the district court's decision. Instead, it remanded the case to this Court for its consideration of the case under the new standard. This Court, in turn, remanded to the district court

for consideration of those matters "in the first instance." (DE 54 at 10).

As observed by the Supreme Court, this Court's decision was based on the historical standard in this Circuit requiring an evidentiary hearing whenever a taxpayer made a "mere allegation" of bad faith by the IRS, even if lacking "factual support." *Clarke,* 134 S. Ct. at 2366-67 (citing *Nero Trading, LLC v. U.S. Department of Treasury, IRS,* 570 F.3d 1244, 1249 (11th Cir. 2009)). That, of course, was the standard under which Respondents prepared their response to the petitions in this case. As a result, while making sufficient allegations to require an evidentiary hearing under that standard, and consistent with the practice of attorneys throughout history, Respondents did not in their response disclose all of the evidence that they had. As this Court held in its original decision, Respondents had alleged enough under the previous standard to require a limited evidentiary hearing where they would be permitted to examine agents of the IRS and others in order to gather sufficient evidence to prove their defenses.

In this Court's Order of Remand to the district court, this Court left to the district court "the question of whether to take additional evidence, hold a hearing, or allow the parties the opportunity for additional argument." (DE 54, p. 10). Respondents/DHLP filed a motion for status conference and requested the opportunity to supplement its submissions to present the case under the new standard established by the Supreme Court. (DE 55). The Government objected to

Respondents'/DHLP's request to submit new evidence or allegations, and the district court ruled that any briefing relating to the new standard "shall not include any evidence not already presented to the Court." (DE 58, p. 2) That critical ruling was an abuse of discretion.

Respondents/DHLP apprised the district court that they had additional facts and circumstances to present to the court that had not previously been submitted, when the "mere allegation" standard governed. Among other things, Respondents advised the court:

> An affiliate of Respondents made an FOIA to the Government in 2011 that it did not respond to until after the Tax Court case was filed, and after the responses to the petition were filed. *See,* Case No. 9:12-CV-80346-KLR. Some of the materials [sic] obtained through this request bears on this case but was not available when the responses were filed.

(DE 62, p. 4, f.n.1)

The district court gave no explanation as to why it would not allow Respondents/DHLP to submit additional responsive materials to permit Respondents/DHLP, in accordance with due process, a fair opportunity to present their case under the law as it had now been changed by the Supreme Court. While permitting re-pleading is a matter committed to the discretion of the trial court, that discretion must be exercised with reason and fairness. In the typical circumstance of a complaint or defenses to a complaint, not permitting a single re-pleading is

ordinarily an abuse of discretion. (*See Fed. R. Civ. P.* 15(a)(2) (leave to amend should be freely granted); *See, e.g., Turkmen v. Ashcroft*, 2010 WL 3398965 (E.D. N.Y. 2010) (noting that courts will usually grant leave to amend and will deny leave only where there is evidence of "undue delay, bad faith, undue prejudice to the non-movant, or futility"). Respondents submit that not permitting a single re-pleading when the law about the standard for pleading has just changed is, therefore, even more clearly an abuse of discretion. In *Turkmen, supra,* the court discussed a motion for leave to amend to conform the party's pleadings to the new standard for evaluating Rule 12(b)(6) motions recently imposed by the Supreme Court. *Id.* at 6.[13] In an application of the federal policy permitting amendments to pleadings that applies with equal force here, the court stated:

> 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.

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[13] The new pleading standard announced by the Supreme Court was set forth in the decisions of *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).

Id. at 6 (internal citation omitted).

As mentioned above, not only did the district court refuse to permit supplemental submissions without providing a reason, the court also refused to accept this Court's appraisal of the existing submissions as having met the previously-existing "mere allegation" standard. (DE 63, p. 6). In fact, the district court said, "Respondents rehash prior argument that this Court has already considered and found to fail as a matter of law." (Id.) What the district court overlooks is that it had never considered Respondents' previous arguments and submissions or its revised arguments under the new law. It appears as if the district court simply applied its old ruling, disregarding this Court's determination that the prior submissions *were* sufficient under the then-existing standard. Based upon the district court's apparent confusion, its failure to acknowledge this Court's appraisal of Respondents' submissions, and the fact that this Court determined that Respondents' submissions were meritorious under a previous standard, it is not just or fair, and constitutes an abuse of discretion, that the district court would not permit Respondents to submit whatever additional pertinent information they have so that this matter may be resolved on the merits of Respondents' defenses.

IV. CONCLUSION

Any of the principal defenses asserted by Respondents, if proven, would be legally valid defenses to the enforcement of the summonses. The specific facts

identified by Respondents in support of their request for a limited evidentiary hearing plausibly raised an inference of bad faith, justifying at least a limited evidentiary hearing. In addition, the district court abused its discretion in refusing to permit Respondents the opportunity to offer additional submissions to attempt to make their case for a limited evidentiary hearing under the new standard adopted by the Supreme Court.

Based upon the foregoing, this Court should reverse the rulings of the district court enforcing the summonses and remand for the setting of a limited evidentiary hearing to gather the evidence solely in the possession of the Government to determine whether the Government issued or seeks the enforcement of the summonses for an improper purpose. Alternatively, this Court should remand to the District Court with directions to permit Respondents to supplement the original submissions with additional materials for consideration of their request for a hearing under the new standard established by the Supreme Court.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that pursuant to Fed. R. App. P. 32(a)(7) this Brief contains no more than 11,950 words.

/s/Jack J. Aiello
JACK J. AIELLO
Florida Bar No. 440566

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 14, 2015, I electronically filed the foregoing document with the Clerk of the Eleventh Circuit Court of Appeals. 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
Attorneys for Appellants
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

William E. Farrior, Esq.
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 14198
Ben Franklin Station
Washington, DC 20044-4198
Telephone: (202) 616-1908
Facsimile: (202) 514-9868
E-mail: william.e.farrior@usdoj.gov

Attorneys for United States of America

Robert L. Welsh, Esq.
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 14198
Ben Franklin Station
Washington, DC 20044-4198
Telephone: (202) 514-6068
Facsimile: (202) 514-9868
E-mail: Robert.L.Welsh@USDOJ.gov

Attorneys for United States of America

Jeffrey A. Neiman, Esq.
Law Offices of Jeffrey A. Neiman
100 Southeast Third Avenue, Suite 2612
Fort Lauderdale, FL 33394
Telephone: (954) 462-1200
Facsimile: (954) 688-2492
E-mail: Jeff@JNeimanlaw.com

Attorneys for Rita Holloway, Trustee and Marc Julien, Trustee