UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 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, And 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

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

APPELLANTS' REPLY BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, counsel for Appellants certify that, to the best of their knowledge, information, and belief, that the Certificate of Interested Persons and Corporate Disclosure Statements contained within both Appellants' Principal Brief and Appellee's Corrected Brief is complete.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Rules

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.

ARGUMENT

I. INTRODUCTION

The United States Supreme Court saw the issue raised here as an important one of due process and fairness to the concerns of taxpayers, together with the IRS's permissible objectives, taking jurisdiction and ultimately setting forth a standard aimed at balancing the interests and rights of the two sides. Nevertheless, when the case was returned to the district court, it was quickly apparent that the district court did not truly agree with the importance of the issue raised here, with the Supreme Court's analysis, or even with the portions of this Court's analysis and decision in the first appeal under the then-existing standard that were not disturbed by the Supreme Court's decision. Instead, the district court entered essentially the same ruling on the same evidence, not even entertaining a presentation of allegations and evidence that would be relevant only under the new standard. And the Government has taken advantage of the district court's approach by arguing evidentiary rules concerning *waiver*, quite ironically, as though an evidentiary proceeding has taken place – when the entire focus of the case before the district court, this Court, and the Supreme Court is whether an evidentiary hearing should be permitted. The Government argues as though there should be a presumption against the concerns of the taxpayer and in favor of whatever assertions the IRS makes, regardless of the reasonable implications of the available

facts and circumstances. The Government makes an argument that in several ways demonstrates why at least a limited evidentiary hearing should be available in a case like this one.

II. 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 AND EVIDENCE

As set forth in Respondents/DHLP's Brief, when this Court remanded the case back to the district court, it did so with the direction to apply the new standard established by the United States Supreme Court to guide courts in deciding whether or not to permit an evidentiary hearing. (See Respondents' Brief at 43-47; DE 54 at 10) The Supreme Court decision was issued after this Court's decision in the earlier appeal that 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." *See U.S. v. Clarke*, 573 U. S. __ 134 S. Ct. 2361, 2366-67 (2014) (citing *Nero Trading, LLC v. U.S. Department of Treasury, IRS*, 570 F. 3d 1244, 1249 (11th Cir. 2009)). And, of course, that was the standard under which Respondents prepared their response to the petitions in this case – the only response that they have ever prepared or been permitted to prepare. In that first appeal, this Court disagreed with the district court and held that

Respondents/DHLP *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. In its decision, the Supreme Court expressly disclaimed any decision on its part on that issue under either the former standard in this Court or under its new standard.

After the Supreme Court decision and remand to the district court from this Court, Respondents/DHLP, in order to move the case to conclusion, filed a *motion for status conference* and, in that motion, requested the opportunity to replead – to supplement its submissions – clearly signaling that they had additional allegations and evidence to present the case under the new standard established by the Supreme Court. (DE 55) The Government objected to any new allegations or submissions. The district court followed with the ruling that Respondents/DHLP contend was an abuse of discretion. The district court ruled that any arguments submitted to the court relating to the new standard "shall not include any evidence not already presented to the court." (DE 58, p. 2) The district court gave no explanation as to why it would not allow repleading or the submission of responsive materials in order to present Respondents' case under the standard as it had now been changed by the Supreme Court.

In its brief, the Government takes some harsh positions about Respondents/DHLP's desire to replead under the new standard, notwithstanding

the liberal policy of pleading amendments under federal law, particularly where a pleading standard has been changed. First, the Government claims that Respondents/DHLP, when they approached the district court on remand, did not immediately apprise the district court of new evidence or submissions that could be offered. (Government's Brief at 61) In making that argument, the Government treats Respondents/DHLP's request for a status conference, which respected this Court's suggestion that it would be up to the trial court to decide whether new allegations should be permitted, *U.S. v. Clarke*, 573 Fed. Appx. 826, 827 n. 1 (11th Cir. 2014), as a command performance to lay out its case. In fact, the motion for a status conference was a customary and reasonable procedural motion filed just days after the remand from this Court to the district court, to ask the court to set the ground rules for the new consideration of the summons and defenses to them under the new law established by the United States Supreme Court. It was not a pleading; it was an innocent and appropriate request to set procedures and to be *permitted* to replead under the new standard – as a litigant would be expected to do after the standard governing a case has been changed by a higher court, especially where this Court left it to the trial court to decide in the first instance whether that should be permitted. *See e.g. Turkmen v. Ashcroft,* 2010 WL 3398965 (E.D. N. Y. 2010) (wherein court determined that Plaintiffs should be permitted to replead in light of the heightened standard recently imposed by the Supreme Court in *Iqbal* and

Twombly) (referring to *Ashcroft v. Iqbal*, 556 U.S. 662 129 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)). Respondents/DHLP's request was quickly made futile as the district court summarily ruled that there would be no additional evidentiary allegations or submissions, stating that any "briefing shall not include any evidence not already presented to the court." (DE 58-5)

The Government argues that the district court ruled that it would not entertain any additional evidence because there was no showing of the need for additional evidence in the *motion for a status conference*. (Government's Brief at 61, 62) That argument spins the district court's pre-disposition to decide this case and does not adequately explain or justify the district court's ruling. In fact, the district court gave Respondents/DHLP no reasonable chance to replead under the new standard, making clear that it would not consider matters not already presented. That is completely contrary to the policy of liberal pleading amendments and to the much stronger policy that exists where the law has been changed. As explained in the Initial Brief, the district court ignored this Court's first ruling reversing it, and, in essence, declined to follow the instruction to apply the new Supreme Court standard. (Initial Brief at 47; De 63, p. 6) For whatever reason, the district court decided to apply the same standard to the same evidence. That was not an appropriate decision in light of the Supreme Court's ruling and

direction from this Court on remand to the district court.

Next, the Government argues that Respondents/DHLP failed to preserve as error the district court's exclusion of evidence by not making an "offer of proof." (Government's Brief at 62-63) The Government cites Fed. R. Civ. P. 103(a), which addresses rulings on evidence at *trials and evidentiary hearings*. The Government also relies upon two case authorities. Both of those cases were criminal cases that proceeded to a jury trial at which, the losing parties contended, the trial court erroneously excluded evidence. *See U. S. v. Henderson,* 409 F. 3d 1293, 1298 (11th Cir. 2005) (criminal trial for use of excessive force in which defendant sought to admit bias evidence regarding a detective involved in the case and did not proffer such evidence); *U. S. v. Winkle,* 587 F. 2d 705, 710 (5th Cir. 1979) (Medicare fraud jury trial, in which trial court excluded certain evidence which was not thereafter proffered).

The fallacy in the Government's argument is that the present case does not involve a trial, jury or otherwise. The irony of the Government's argument is that the present case does not arise from an evidentiary hearing, but involves a *request* for an evidentiary hearing--which the Government opposes – and a paper request for permission to provide the additional evidence and allegations sufficient to meet the newly announced standard. This case is only in the pleading/preliminary showing stage, and the objective of Respondents/DHLP has solely been to get to a

limited evidentiary hearing at which it might obtain additional evidence (and then, theoretically, be confronted with the potential obligation to proffer something) to combine with the evidence it had previously gathered to make its case. The Government's harsh position requires intellectually converting this pleading-stage proceeding into a completed trial or evidentiary hearing.

The Government's argument about the requirement of a proffer to preserve exclusion error at trial does accomplish a purpose: it underscores the unfairness of the ruling made by the district court. It buttresses Respondents/DHLP's argument that there should be an evidentiary hearing. Yet the district court will not even consider what Respondents/DHLP have to say to meet the new standard for setting a limited evidentiary hearing. Respondents/DHLP agree that once a limited evidentiary hearing is conducted and they have gathered the information held exclusively by Petitioner relevant to their claims, they will be subject to meeting the proffer rules to preserve any objection to the exclusion of evidence. The Government's argument, treating this case as though a final evidentiary hearing has taken place, and Respondents/DHLP's arguments in favor of such a hearing, both militate in favor of reversal of the district court's decision.

From there, the Government goes on to speculate how Respondents/DHLP presumably had every reason to include evidentiary proffers in its paper – a paper that was simply a request for a status conference. (Government's Brief at 66-68)

However, when that request was submitted, this Court's mandate did not allow that to be done, but, instead, left it to the discretion of the trial court to allow it or not. The only proper basis for the district court to decide that issue was the basis presented in the request for status conference – Respondents/DHLP included in their previous pleadings allegations they deemed sufficient to meet the previous standard, this Court found them sufficient under the previous standard, the Supreme Court announced a new standard, and they would have presented additional allegations of fact to support their position if that new standard had previously been in effect. The legal memorandum which the district court later permitted the parties to submit was expressly not permitted to include that additional evidence, denying Respondents/DHLP's right to due process.

The Government then speculates why additional support was not submitted in the Julien case, which the Government says was not yet subject to a ruling by the district court that no new evidence would be considered. While a very good argument exists that such an attempt to replead in the Julien matter would have been futile based upon the ruling the trial court made in Clarke, it is also the case that the Clarke suit was already on appeal, and Mr. Julien made the reasonable decision, instead, to ask the Court to stay its decision on that case pending the outcome of the appeal in Clarke. The district court responded by entering its piggyback order granting enforcement of the summons, incorporating the

reasoning from its Clarke decision.

Putting the procedural posture in the case in perspective, the rule that comports with due process is the pleading standard rule relied upon in *Turkmen, supra*, where 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.

Turkmen, supra, at 6. (internal citation omitted) Here, where the district court not only refused to permit supplemental submissions without providing a reason, but also refused to accept this Court's appraisal of the existing submissions as having met the previously-existing "mere allegation" standard, it is apparent that the district court believed in its initial ruling and was not swayed by the ruling of the Supreme Court or the direction of this Court to reconsider the case under the new standard and in light of the public policy of fairness with respect to pleading under a new standard. In such way, the district court abused its discretion, and this case should be remanded to the district court with directions to permit Respondents/DHLP to replead and resubmit under the new standard established by

the Supreme Court.

III. THE DISTRICT COURT ERRED IN ITS DETERMINATION THAT THE DEFENSES RAISED BY RESPONDENTS WERE INSUFFICIENT TO ESTABLISH IMPROPER PURPOSE AS A MATTER OF LAW

As set forth in the Initial Brief, this Court reviews *de novo* the district court's determination that the defenses asserted by Respondents are insufficient as a matter of law. (Respondents' Brief at 19) The two principal assertions made by Respondents are: 1) contrary to the general statements in the affidavits 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 to the applicable statute of limitations; and 2) the enforcement of the summonses would constitute an abuse of the district court's process. In deciding that neither of these defenses is legally sufficient, the district court erred.

On the statute of limitations issue, the district court misapprehended 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) As explained below, this statement, on its face, is incorrect; if the statute of limitations has expired, absent new information suggesting fraud, the IRS has no right to institute a formal summons process with respect to the matters under examination. Furthermore, and importantly, summonses are authorized to be issued only for purposes listed in the

authorizing statute. In particular, 26 U.S.C. § 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…" The Government overlooks that limitation on an IRS summons in its argument that certain other rules do not limit the IRS's summons authority. Such argument is a red herring. (See Government's brief at 44-45) To the point, nothing in the governing statute includes as a valid purpose "punishing a taxpayer for refusing to grant an extension to the statute of limitations with respect to a particular examination."

As noted above, the statute of limitations for the IRS to issue an FPAA with respect to a particular tax return runs from the last day of the year to which the tax return relates, not from the time of discovery of an error. Thus, if the statute of limitations expires, the Government ordinarily has no continuing purpose to ascertain the correctness of the return. Summonses become irrelevant to any legitimate purpose at that point. Therefore, any summons issued after that time was issued for an improper purpose and should be quashed. This Court recognized as much in the first appeal when it 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…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*.

U. S. 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).[1] In addition, as noted in Respondents' Brief, the IRS attorney, at oral argument before this Court, admitted that issuance of the summons solely to retaliate for the refusal to extend the statute of limitations would be an improper purpose. (Respondents' Brief at 26)

On the second point, abuse of the court's 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) There is no Supreme Court decision supporting the idea that a summons, authorized when issued, can later be enforced for an improper purpose. The Supreme Court said in *Powell*, "It is the court's process which is invoked to enforce the administrative summons and a court may

[1] 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.

not permit its process to be abused." *See U. S. v. Powell*, 379 U.S. 48, 58 (1964).[2] Respondents/DHLP submit that regardless of the validity of the purpose initially, if that purpose is vitiated, it is an act of bad faith by the IRS to then seek to enforce the summons for an improper purpose. The words written by the U.S. Supreme Court in *Powell* support that conclusion.

The Government points out that the summonses were issued months before the Government was "obliged" to issue the FPAA proposing adjustments to DHLP's partnership items. (Government's Brief at 51) What the Government overlooks and continues to largely ignore is that it is undisputed that the FPAA was completed and signed on August 11, 2010, and the summonses were not issued until a few months after that, even though there had not been any requests for additional information from DHLP for months. (DE 7-2, pp. 1, 5) Thereafter, the IRS did not even seek to enforce the summonses before the FPAA was later issued unchanged. (DE 7-2, p. 1; DE 1) The summons enforcement proceedings were not filed until four months after the FPAA was issued. (DE 20, p. 3) Those facts alone cast suspicion on the Government's purpose in seeking enforcement and are not explained away by any argument the Government makes now or in the past.

[2] Since only the district court has the authority to grant or deny enforcement of a summons, the references to the "court" in this observation, necessarily refer to the district court and requires the district court to consider whether its process would be abused by enforcing the summons.

The consolidated Julien matter, in addition to the arguments made in the Clarke case, raises the additional defense that the summonses should be dismissed because it constitutes a duplicative examination of Beekman Vista, after settlement of the issues in question with the IRS. (Julien DE 11, p. 4) The district court did not address that defense in its ruling, simply and essentially incorporating the Clarke ruling as the basis of its decision in the Julien matter. (Julien, DE 17)

The Government, addressing the separate defense of the illegal second audit, dismisses it by explaining that the facts do not support it. (Government's Brief at 59-60) The Government argues that the matter with Beekman Vista was not settled and that Julien did not submit evidence of a settlement. (Id.) In effect, the Government asks this Court to accept, as a fact, that there was no settlement or that it has not yet been proven – in a proceeding where the Government has been thus far successful at preventing an evidentiary hearing at which such a matter may be explored. As discussed earlier above, this matter was resolved at the pleading stage. Julien alleged that there was a settlement such that a summons in pursuit of another audit would be improper. Even under the new Supreme Court standard, such allegations would be sufficient for purposes of this stage of the litigation. The Government may contest in an evidentiary hearing whether there was a settlement, but it is not appropriate at this stage for the Government to demand that the parties and the court(s) simply accept its factual conclusion about that. Like its earlier

arguments, the Government's argument here continues to demonstrate why there should be at least a limited evidentiary hearing in this matter.

IV. 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

In addition to the arguments which Respondents/DHLP make in their brief on this point, Respondents/DHLP wish to point out a few other matters in response to the Government's argument. First, the Government makes a speculative argument, that it essentially asks this Court to accept in lieu of an evidentiary hearing, that the IRS would have had no reason to seek an extension of the deadline if the FPAA was internally accepted as final when it was signed in August, 2010. (Government Brief at 37-38) However, the Government still does not explain why no summons enforcement proceeding was initiated before the FPAA was issued in December, 2010. Second, while the Government trumpets the district court's finding that Respondents/DHLP's allegation of improper purpose was mere conjecture and "unsupported by any evidence," the district court's ruling continues to fail to apply the Supreme Court ruling on the analysis of taxpayer submissions. 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. *See Clarke, supra*, 134 S.

Ct. at 2367-68. The Supreme Court also held that *circumstantial evidence* can suffice to meet the burden. *Id.* 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 Government argues that there is no significance to the fact that the IRS summonses were issued promptly after DHLP declined to extend the limitations period. (Government's Brief at 41) That position is logically unsupportable. While Respondents/DHLP do not assert that that temporal proximity of the issuance of the summonses could somehow be dispositive, it is both probative and consistent with Respondents/DHLP's theory of improper purpose. Courts seeking to ascertain motive in other circumstances have recognized that temporal proximity between two events is probative of causation, tending to suggest that the second act was a reaction to the first. *See, e.g., Posada v. James Cello, Inc.*, 135 Fed. App'x. 250, 252 (11th Cir. 2005) (ruling that summary judgment for employer in discrimination case was not appropriate where only one month had elapsed between the protected activity and termination, and explaining that this temporal proximity was sufficient to establish causation to defeat summary judgment). Again, while Respondents/DHLP do not suggest that temporal proximity of the issuance of the summonses with the declination of the limitations extension establishes causation without more, it cannot reasonably be argued, as the

Government suggests, that there was no probative value to that evidence in a determination of whether a limited evidentiary proceeding is warranted to take the next step in exploring the IRS's purpose, including examination of the IRS personnel responsible for issuing the summonses at issue.

Finally, to the extent the district court and, in this appeal, the Government, expressed the view that the matters alleged – without benefit of even a limited evidentiary hearing – are not sufficient to raise a plausible inference of improper motive, they are not in consonance with the apparent belief of the Chief Justice of the United States Supreme Court. As cited in Respondents' Brief, 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 – Fierfielder, who was running the investigation. That's more than just a bare allegation.

Transcript of Oral Argument at pp. 19-20, *U. S. v. Clarke,* 134 S. Ct. 2361 (2014) (No. 13-301). Respondents/DHLP have plausibly raised an inference of bad faith on the present record. In any event, however, the district court abused its discretion by not permitting the reasonable next step of re-pleading under the standard established by the Supreme Court.

On the record, the decisions below should be reversed and remanded with instructions to conduct a limited evidentiary hearing to permit Respondents to obtain from the IRS the evidence they need to fully substantiate their claims. At the very least, this matter should be reversed and remanded to the district court with instructions to permit repleading and resubmission pursuant to the new standard and guidelines established by the Supreme Court in *Clarke, supra*.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that pursuant to Fed. R. App. P. 32(a)(7) that this Brief contains no more than 5,234 words.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 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.

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