No. 13-301

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL CLARKE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an unsupported allegation that the Internal Revenue Service (IRS) issued a summons for an improper purpose entitles an opponent of the summons to an evidentiary hearing to question IRS officials about their reasons for issuing the summons.

PARTIES TO THE PROCEEDINGS

The petitioner is the United States of America.

The respondents are Michael Clarke, as Chief Financial Officer of Beekman Vista, Inc.; Michael Clarke, as Chief Financial Officer of Dynamo GP, Inc.; Dynamo Holdings Limited Partnership; Rita Holloway, as Trustee for the 2005 Christine Moog Family Delaware Dynasty Trust; Marc Julien, as Trustee for the 2005 Robert Julien Family Delaware Dynasty Trust; and Robert Julien.

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The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is not published in the *Federal Reporter* but is reprinted in 517 Fed. Appx. 689. The order of the district court in the lead case in these consolidated actions (App., *infra*, 10a-19a) is not published but is available at 111 A.F.T.R.2d 2013-1697. The orders of the district court in the remaining cases (App., *infra*, 20a-63a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 2013 (App., *infra*, 7a-9a). On July 5, 2013, Justice Thomas extended the time within which to file

a petition for a writ of certiorari to and including August 16, 2013. On August 12, 2013, Justice Thomas further extended the time to September 6, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 85a-90a.

STATEMENT

1. Congress has "authorized and required" the Secretary of the Treasury "to make the inquiries, determinations, and assessments of all taxes" imposed by the Internal Revenue Code (Code) that "have not been duly paid by stamp at the time and in the manner provided by law." 26 U.S.C. 6201(a); see 26 U.S.C. 7601 ("The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax."). The Secretary has delegated that duty to the Commissioner of Internal Revenue. 26 C.F.R. 301.7602-1(b), 301.7701-9.

As the Secretary's delegate, the Internal Revenue Service (IRS or Service) has broad statutory authority to issue summonses in furtherance of its investigatory responsibility. "For the purpose of ascertaining the correctness of any return, making a return where none has been made, [or] determining the liability of any person for any internal revenue tax," the Commissioner is authorized "[t]o examine any books, papers, records, or other data which may be relevant or material to such inquiry" and to summon any person

to appear and produce such documents and to give relevant testimony. 26 U.S.C. 7602(a)(1)-(3). Section 7602(b) further provides that the IRS may issue a summons, examine documents, or take testimony for "the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws." The IRS thus "has broad authority to examine the accuracy of federal tax returns," including the authority to issue summonses. *Church of Scientology* v. *United States*, 506 U.S. 9, 10 n.2 (1992); see *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 815-816 (1984) ("In order to encourage effective tax investigations, Congress has endowed the IRS with expansive information-gathering authority; § 7602 is the centerpiece of that congressional design."); *United States* v. *Euge*, 444 U.S. 707, 716 n.9 (1980) ("Congressional intent to provide the Secretary with broad latitude to adopt enforcement techniques helpful in the performance of his tax collection and assessment responsibilities is expressed throughout the Code.").

When a summoned party fails to comply with a summons, the United States may petition a federal district court to enforce the summons. 26 U.S.C. 7402(b), 7604(a). Congress intended summons-enforcement proceedings to be "summary in nature." *United States* v. *Stuart*, 489 U.S. 353, 369 (1989) (quoting S. Rep. No. 494, 97th Cong., 2d Sess. Pt. 1, at 285 (1982)). The purpose of a summons-enforcement proceeding is not to determine guilt or tax liability, but to obtain information relevant to the IRS's fulfillment of its statutory obligation to examine tax returns. In order to enforce a contested summons, the IRS must demonstrate that: (1) "the investigation

will be conducted pursuant to a legitimate purpose"; (2) "the inquiry may be relevant to the purpose"; (3) "the information sought is not already within the Commissioner's possession"; and (4) "the administrative steps required by the [Internal Revenue] Code have been followed." *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964). Such a showing demonstrates "good faith in issuing the summons." *Stuart*, 489 U.S. at 359; see *United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298, 318 (1978).[1]

The government generally satisfies its initial burden of demonstrating good faith by filing an affidavit from the investigating agent attesting to the *Powell* factors. *United States* v. *Medlin*, 986 F.2d 463, 466 (11th Cir.), cert. denied, 510 U.S. 933 (1993); *United States* v. *Garden State Nat'l Bank*, 607 F.2d 61, 68 (3d Cir. 1979); see *Stuart*, 489 U.S. at 360 (noting that affidavits filed by the IRS "plainly satisfied the requirements of good faith [the Court] set forth in *Powell* and [later] repeatedly reaffirmed"). Once the United States has made its initial showing of good faith, the burden is on the party challenging a summons to either disprove one of the *Powell* factors or to demonstrate that enforcement of the summons would constitute an abuse of the court's process (because, for example, it was issued for an improper purpose). *Powell*, 379 U.S. at 57-58; see *Stuart*, 489 U.S. at 360.

2. a. IRS agents examined the information returns of Dynamo Holdings Limited Partnership (DHLP) for the 2005-2007 tax years. App., *infra*, 10a-11a, 21a,

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[1] The IRS may not issue a summons or initiate an enforcement proceeding if the Service has referred the relevant taxpayer to the Department of Justice for potential criminal prosecution 26 U.S.C. 7602(d).

32a, 43a, 54a. During the examination, questions arose about debt that DHLP had reported on its returns, including interest expenses totaling $34 million over two years. *Id.* at 11a, 21a, 32a, 43a, 54a. In September and October 2010, as part of an effort to obtain information for the investigation, the IRS issued five summonses to third parties connected to DHLP whom the government had reason to believe had information and records relevant to DHLP's tax-reporting obligations during the tax years at issue. *Id.* at 11a-12a, 21a-22a, 32a-33a, 43a-44a, 54a-55a; Gov't C.A. Br. 4-5. The summonses directed the recipients to give testimony and to produce for examination certain books, records, papers, and other data relating to the investigation. App., *infra*, 11a-12a, 21a-22a, 32a-33a, 43a-44a, 54a-55a. None of the recipients complied with the summonses. *Ibid.*

In December 2010, pursuant to 26 U.S.C. 6223, the IRS issued to the partnership a notice of Final Partnership Administrative Adjustment (FPAA) that proposed adjustments to items on the partnership's tax returns for 2005-2007. App., *infra*, 12a, 22a, 33a, 44a, 55a. For partnerships, an FPAA serves the same purpose that a notice of deficiency serves for an individual taxpayer, and it is generally a prerequisite to any assessment by the IRS of a deficiency attributable to the partnership. See 26 U.S.C. 6221-6223. The issuance of an FPAA gives partners in the relevant partnership the right to challenge the adjustment in the United States Tax Court, a district court, or the Court of Federal Claims. 26 U.S.C. 6226(a); see App., *infra*, 12a, 22a, 33a, 44a, 55a. In February 2011, the partnership filed a petition for readjustment in the Tax Court, challenging the determinations in the

FPAA. App., *infra*, 12a, 22a, 33a, 44a, 55a. That proceeding remains pending. See *DHLP* v. *Commissioner*, No. 2685-11 (T.C.).

b. Because none of the recipients of the IRS's summonses responded, the United States filed five petitions for enforcement in the United States District Court for the Southern District of Florida. App., *infra*, 12a, 22a, 33a, 44a, 55a. The United States attached to each petition a declaration, attesting to satisfaction of the *Powell* factors, executed by the IRS agent who had issued the relevant summons. See *id.* at 12a-14a, 22a-24a, 33a-35a, 44a-46a, 55a-57a. DHLP intervened as a respondent, and several respondents moved for summary dismissal of the petitions or alternatively for the scheduling of a pretrial conference to allow discovery. See *id.* at 11a, 21a, 32a, 43a, 54a; Gov't C.A. Br. 2-3.

In support of those requests, respondents asserted that "[t]here must have been some ulterior motive" (*i.e.*, other than for a legitimate investigatory purpose) for the IRS's issuance of the summonses. App., *infra*, 72a. Respondents identified several possible motives, including "retribution for DHLP's refusal to grant a further extension of the applicable statute of limitations, a subterfuge to gather information related to [another party], in order to justify reopening the examination of its returns for the same periods or part of a larger scheme on the part of the government to send out such summonses in hopes of being able to use them to subvert the Tax Court Discovery Rules once a Tax Court case was commenced." *Ibid.* Respondents argued that they were entitled to explore their allegations through discovery and an evidentiary hearing. *Id.* at 73a-75a. They did not identify any evidence

already available to them that would support their allegations.

c. The district court ordered the summonses enforced. App., *infra*, 10a-63a. The court held that respondents had failed to rebut the United States' prima facie case for enforcement under *Powell*. *Id*. at 13a, 23a, 34a, 45a, 56a. The court also rejected respondents' various allegations of ulterior motive as legally irrelevant, conjectural, or incorrect as a matter of law. *Id.* at 13a-17a, 23a-27a, 34a-38a, 45a-49a, 56a-60a.

Finally, although the district court acknowledged that respondent is entitled to an adversarial hearing, it denied respondents' requests for an evidentiary hearing and discovery. App., *infra,* 17a-18a, 27a-28a, 38a-39a, 49a-50a, 60a-61a. The court explained that a district court is not required to hold an evidentiary hearing "upon a mere allegation of improper purpose," noting that this Court upheld a district court's discretionary decision not to hold a hearing in a challenge to an IRS summons when the court determined that "an evidentiary hearing on the question of enforcement was unnecessary." *Id.* at 17a-18a, 27a-28a, 38a-39a, 49a-50a, 60a-61a (quoting *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 324 n.7 (1985)). The district court explained that, because respondents had made "no meaningful allegations of improper purpose" that warranted discovery or an evidentiary hearing, it declined to order either. *Id.* at 18a, 28a, 39a, 50a, 61a.

3. The court of appeals reversed in an unpublished per curiam opinion. App., *infra*, 1a-6a. Although the court agreed with the district court that respondents were not entitled to discovery, it held that the district

court had abused its discretion by declining to hold an evidentiary hearing based on respondents' bare allegation that the IRS "may have issued the summonses * * * solely in retribution for [one respondent's] refusal to extend a statute of limitations deadline." *Id.* at 5a-6a & n.3. In the view of the court of appeals, respondents were "entitled to a hearing to explore their allegation of an improper purpose" and "to ascertain whether the [IRS] issued a given summons for an improper purpose." *Id.* at 5a-6a (quoting *Nero Trading, LLC* v. *U.S. Dep't of Treasury*, 570 F.3d 1244, 1249 (11th Cir. 2009)). The court also stated that, "in situations such as this, requiring the taxpayer to provide factual support for an allegation of an improper purpose, without giving the taxpayer a meaningful opportunity to obtain such facts, saddles the taxpayer with an unreasonable circular burden, creating an impermissible 'Catch 22.'" *Id.* at 5a (quoting *Nero Trading, LLC*, 570 F.3d at 1250).

REASONS FOR GRANTING THE PETITION

Before the IRS is entitled to have a district court enforce a summons issued pursuant to 26 U.S.C. 7602, the IRS must establish that the summons was issued in good faith by demonstrating that the factors this Court set forth in *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964), have been satisfied. Under the court of appeals' decision, however, such a showing of good faith is insufficient to obtain an enforcement order in the Eleventh Circuit if a summons opponent alleges that the IRS issued the summons for an improper purpose, even if the allegation is wholly speculative and lacking in evidentiary support. In the court of appeals' view, such an allegation standing alone entitles the summons opponent to an evidentiary hearing

at which it may question IRS agents about their motives for issuing the summons. That holding is inconsistent with the effective enforcement of federal tax laws, with this Court's decisions construing the IRS's summons authority, and with decisions of every other court of appeals with jurisdiction over IRS summons actions. Review is warranted to correct the Eleventh Circuit's erroneous decision, to resolve a conflict among the courts of appeals, and to prevent potential serious impairment of the IRS's ability to enforce our tax laws within the Eleventh Circuit.

A. An Unsupported Allegation That The IRS Issued A Summons For An Improper Purpose Does Not Entitle A Summons Opponent To An Evidentiary Hearing At Which It May Question IRS Agents About Their Motives For Issuing The Summons

1. The court of appeals held that, whenever a summons opponent alleges that the challenged summons was issued for an improper purpose, and requests an opportunity to cross-examine the responsible IRS officials about their motives for issuing the summons, a district court abuses its discretion if it declines to hold an evidentiary hearing at which such questioning may take place. That holding has no basis in, and would impede the effective implementation of, the statutory scheme governing enforcement of our tax laws.

Congress has both "authorized and required" the IRS "to make the inquiries, determinations, and assessments of all taxes" imposed by the Internal Revenue Code, 26 U.S.C. 6201(a), including by making a "[c]anvass" of every internal revenue district and "inquir[ies] after and concerning all persons therein who may be liable to pay any internal revenue tax," 26

U.S.C. 7601. In furtherance of those statutory responsibilities, Congress has granted the IRS broad authority to issue summonses "[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax * * * , or collecting any such liability." 26 U.S.C. 7602. This Court has repeatedly recognized that the IRS's summons authority is broad and serves a vital information-gathering role in our federal system of taxation. See, *e.g.*, *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 814-815 (1984); *United States* v. *Euge*, 444 U.S. 707, 714 (1980); *United States* v. *Bisceglia*, 420 U.S. 141, 145-146 (1975).

As the Court explained in *Arthur Young & Co.*:

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

465 U.S. at 815-816; see *Bisceglia*, 420 U.S. at 146 (noting that investigations pursuant to Section 7601, enforced through the summons authority of Section 7602, "are essential to our self-reporting system"). Accordingly, "this Court has consistently construed congressional intent to require that if the summons authority claimed is necessary for the effective perfor-

mance of congressionally imposed responsibilities to enforce the tax Code, that authority should be upheld absent express statutory prohibition or substantial countervailing policies." *Euge*, 444 U.S. at 711.

When a taxpayer refuses to comply with an IRS summons, the IRS may file an enforcement petition in a federal district court. See 26 U.S.C. 7402(b), 7604(a); *Donaldson* v. *United States*, 400 U.S. 517, 524 (1971). This Court has recognized, however, that when Congress authorized district courts to enforce Section 7602 summonses, it did not "intend[] the courts to oversee the [IRS's] determinations to investigate." *Powell*, 379 U.S. at 56. A district court's role in deciding whether to enforce a summons is limited to determining whether the summons was issued in good faith—*viz.*, whether the investigation will be conducted pursuant to a legitimate purpose, whether the summons inquiry may be relevant to that purpose, whether the information sought is not already in the possession of the IRS, and whether the administrative steps required by the Code have been followed. *Id.* at 57-58. If the IRS makes that showing, it is entitled to have its summons enforced.

A summons opponent may challenge the enforcement of a summons on "any appropriate ground." *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964). A summons opponent is entitled to a reasonable opportunity, including if appropriate an in-person adversary hearing, to present legal argument as to why a summons should be quashed. If a summons opponent alleges that a summons was issued for an improper purpose, he is also entitled to a reasonable opportunity to apprise the court of evidence already in his possession that substantiates the allegation.

It does not logically follow, however, that a summons opponent should in every instance be entitled upon request to cross-examine IRS officials about their reasons for issuing a summons. Congress intended that summons-enforcement proceedings would "be summary in nature." *United States* v. *Stuart*, 489 U.S. 353, 369 (1989) (quoting S. Rep. No. 494, 97th Cong., 2d Sess. Pt. 1, at 285 (1982)). Summons proceedings do not accuse any taxpayer of wrongdoing, *Bisceglia*, 420 U.S. at 146, and enforcement of a summons is not a determination of guilt or liability. The purpose of the summons scheme is "to inquire," *ibid.*, and swift resolution of summons disputes is essential "so that the investigation may advance toward the ultimate determination of civil or criminal liability, if any," *United States* v. *Kis*, 658 F.2d 526, 535 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982).

Congress's intent that summons proceedings be resolved expeditiously is reflected in its enactment of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324. In *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), this Court held that the IRS could not issue a summons if the Service had already made an "institutional commitment" to refer the relevant taxpayer to the Department of Justice for possible criminal prosecution. *Id.* at 313-318. In the ensuing four years, that holding "spawned protracted litigation" in summons proceedings about the IRS's motivations for issuing particular summonses, "without any meaningful results for taxpayers." S. Rep. No. 494, *supra*, at 285.

TEFRA expanded the IRS's summons authority to encompass the investigation of "any offense" as long as the IRS has not actually referred the matter to the

Department of Justice. See TEFRA § 333, 96 Stat. 622; 26 U.S.C. 7602(b) and (d). To reduce the volume of litigation associated with enforcement of IRS summonses, Congress thus replaced the prior "institutional commitment" standard, which turned in part on IRS officials' subjective intent regarding potential criminal referrals, with an objective standard that turns on the presence or absence of an actual referral. By vesting summons opponents with the right to question IRS officials about their motives for issuing summonses, the Eleventh Circuit's inflexible rule frustrates Congress's purposes in enacting that provision.

2. The court of appeals' decision also finds no support in this Court's precedents. Although the court of appeals relied on *Powell*, see App., *infra*, 3a-5a (citing *Powell*, 379 U.S. at 48, 58), the Court in *Powell* made clear that a summons opponent bears a heavy burden in challenging the enforcement of a summons. The Court explained that the IRS is entitled to judicial enforcement of a summons once it establishes (by showing compliance with the *Powell* factors) that the summons was issued in good faith. 379 U.S. at 57-58. A court may thereafter inquire into the IRS's motive for issuing a summons, but it is required to do so only if the taxpayer satisfies his "burden of showing an abusive use of the court's process." *Id.* at 58. A taxpayer cannot satisfy that burden with bare assertions, but must "raise[] a substantial question that judicial enforcement of the administrative summons would be an abusive use of the court's process." *Id.* at 51.[2]

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[2] This Court has never squarely confronted the question whether a district court has discretion not to hold an evidentiary hearing to explore unsupported allegations of improper motive. In *Tiffany*

When (as in this case) a summons opponent asserts that an IRS summons was issued for an improper purpose, but offers no evidence in support of that allegation, a district court should have discretion not to hold an evidentiary hearing. Such a rule—adopted in nearly every court of appeals, see pp. 15-16, *infra*—is consistent with the longstanding principle that "[e]very public officer is presumed to act in obedience to his duty, until the contrary is shown." *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 33 (1827). "The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926); see *United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001). Courts therefore may not infer wrongdoing on the part of a government official based on a mere allegation of improper motive.

Even when an allegation of improper motive is ultimately rejected on the merits, protracted inquiry

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Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985), however, the Court noted that "it was well within [a] District Court's discretion to conclude, after reviewing the submissions of the parties" alleging that summonses were issued for an improper purpose "and holding oral argument, that an evidentiary hearing on the question of enforcement was unnecessary." *Id.* at 324 n.7. The Court explained that "the burden of showing an abuse of the court's process is on the taxpayer," *ibid.* (quoting *Donaldson*, 400 U.S. at 527), and it concluded that the allegation of improper purpose, "[e]ven if factually true, * * * did not provide a basis for quashing the summonses," *ibid.* As the United States argued in the court of appeals, see Gov't C.A. Br. 23-45, the same is true here because respondents' allegations, even if substantiated, would not provide a basis for quashing the summonses at issue.

into that charge may impede the effective conduct of the government's business. For that reason, this Court observed in a related context that "[t]he justifications for a rigorous standard for the elements of a selective-prosecution claim * * * require a correspondingly rigorous standard for discovery in aid of such a claim." *United States* v. *Armstrong*, 517 U.S. 456, 468 (1996). Although the court of appeals in this case held that respondents were "not entitled to discovery," App., *infra*, 5a n.3, it required the district court to convene an evidentiary hearing at which respondents will be allowed to question IRS officials regarding their motives for issuing the summonses at issue here. To treat unsupported allegations of improper motive as triggering such a requirement cannot be reconciled with the presumption of regularity.

B. The Court Of Appeals' Decision Conflicts With Decisions Of Every Other Court Of Appeals With Jurisdiction Over IRS Summons Actions

1. The court of appeals' decision conflicts with decisions of the eleven other courts of appeals that exercise jurisdiction over summons-enforcement actions. In each of those circuits, a district court has discretion not to hold an evidentiary hearing to inquire into the IRS's motive for issuing a summons if a summons opponent produces only a bare allegation of bad faith. See *United States* v. *Judicial Watch, Inc.*, 371 F.3d 824, 830-831 (D.C. Cir. 2004); *Sugarloaf Funding, LLC* v. *U.S. Dep't of the Treasury*, 584 F.3d 340, 350-351 (1st Cir. 2009); *United States* v. *Tiffany Fine Arts, Inc.*, 718 F.2d 7, 14 (2d Cir. 1983), aff'd, 469 U.S. 310 (1985); *United States* v. *Garden State Nat'l Bank*, 607 F.2d 61, 71 (3d Cir. 1979); *Hintze* v. *I.R.S.*, 879 F.2d 121, 126-127 (4th Cir. 1989), overruled on other

grounds by *Church of Scientology* v. *United States*, 506 U.S. 9 (1992); *Zugerese Trading LLC* v. *IRS*, 336 Fed. Appx. 416, 419 (5th Cir. 2009); *Phillips* v. *United States*, No. 98-3128, 1999 WL 228585, at *4 (6th Cir. Mar. 10, 1999); *Kis*, 658 F.2d at 539-540 (7th Cir.); *United States* v. *National Bank*, 622 F.2d 365, 367 (8th Cir. 1980); *Fortney* v. *United States,* 59 F.3d 117, 121 (9th Cir. 1995); *United States* v. *Balanced Fin. Mgmt., Inc.,* 769 F.2d 1440, 1444-1445 (10th Cir. 1985). That lopsided and intractable circuit conflict is a sufficient reason to grant the petition for a writ of certiorari.

As the Seventh Circuit has explained, Congress's "concern that summons enforcement proceedings be concluded rapidly, while at the same time the taxpayer is protected from summonses that may be an abuse of process," is best implemented by requiring a summons objector to "develop facts from which a court might *infer* a *possibility* of some wrongful conduct by the Government" before the objector is entitled to an evidentiary hearing. *Kis*, 658 F.2d at 540. To be sure, a taxpayer need not develop evidence sufficient to *prove* that the IRS has issued a summons for an improper purpose. But if a taxpayer cannot develop sufficient evidence from which at least an inference of possible wrongdoing might arise, "then an evidentiary hearing would be a waste of judicial time and resources," and a district court should have discretion not to indulge such a waste. *Ibid.*

Courts of appeals have differed in their articulations of the standard that a summons objector must satisfy to be entitled to an evidentiary hearing to explore the IRS's purpose for issuing a summons. For example, the Eighth Circuit requires a summons op-

ponent to show "substantial deficiencies in the summons proceedings," *National Bank*, 622 F.2d at 367; the Fourth Circuit requires an objector to produce "some substantive evidence corroborating the claim of abuse," *Hintze*, 879 F.2d at 127; and the Second Circuit requires a taxpayer to make a "substantial preliminary showing of an alleged abuse," *Tiffany*, 718 F.2d at 14 (quoting *United States* v. *Morgan Guar. Trust Co.*, 572 F.2d 36, 42-43 n.9 (2d Cir.), cert. denied, 439 U.S. 822 (1978)). But every court of appeals except the Eleventh Circuit agrees that a district court has discretion not to hold an evidentiary hearing based only on a bare allegation of improper purpose.

2. The division between the Eleventh Circuit and every other court of appeals is unlikely to be resolved without this Court's intervention. On June 10, 2009, a panel of the Eleventh Circuit issued its decision in *Nero Trading, LLC* v. *U.S. Dep't of Treasury*, 570 F.3d 1244. The panel in *Nero Trading* held that a summons opponent "is entitled to a limited adversarial hearing in order to ascertain whether the Service issued a given summons for an improper purpose," *id.* at 1249, and that "an allegation of improper purpose is sufficient to trigger a limited adversary hearing where the taxpayer may question IRS officials concerning the Service's reasons for issuing the summons," *ibid.* (quoting *United States* v. *Southeast First Nat'l Bank*, 655 F.2d 661 (5th Cir. 1981)). The panel in *Nero* recognized that its "precedent in this area is not in accord with that of a number of our sister circuits." *Ibid.* The panel was "convinced," however, "that *Southeast First National Bank*'s considered review of our earlier line of cases in this area strikes the appropriate balance between honoring the intended summary

nature of the summons proceeding and protecting the interests of the taxpayer." *Id.* at 1250.[3]

On June 18, 2009, eight days after the panel decision in *Nero Trading*, the Fifth Circuit held that a district court *does* have discretion to deny a request for an evidentiary hearing when a taxpayer alleges that the IRS issued a summons for an improper purpose. *Zugerese Trading LLC*, 336 Fed. Appx. at 419; see *Mazurek* v. *United States*, 271 F.3d 226, 234 (5th Cir. 2001) (noting that the "availability of a hearing on a motion to quash a summons is left to the sound discretion of the district court"). The government filed a petition for rehearing en banc in *Nero Trading*, which brought to the Eleventh Circuit's attention the intervening decision in *Zugerese*. See Gov't Pet. for Reh'g, *Nero Trading*, at 7. Despite that development and the acknowledged conflict with decisions of other courts of appeals, the Eleventh Circuit in *Nero Trading* denied rehearing en banc without recorded dissent. See Order, No. 08-12053, (11th Cir. Oct. 5, 2009). In the present case, the court of appeals relied on both *Nero*

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[3] The Fifth Circuit's 1981 decision in *Southeast First National Bank* is binding precedent in the Eleventh Circuit. See *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). *Southeast First National Bank* was decided before the enactment of TEFRA, at a time when the propriety of an IRS summons depended in part on whether the Service had made an "institutional commitment" to refer the taxpayer to the Justice Department for possible criminal prosecution. See pp. 12-13, *supra*. The taxpayer in *Southeast First National Bank* alleged "that the sole objective of the IRS' investigation was to gather evidence for a criminal prosecution." 655 F.2d at 665. TEFRA has since replaced the prior "institutional commitment" inquiry with an objective standard that turns on whether an actual referral has been made. See pp. 12-13, *supra*.

Trading and *Southeast First National Bank* in holding that, "[u]nder our precedents, [petitioners] were entitled to a hearing to explore their allegation of an improper purpose." App., *infra*, 5a. In light of that sequence of events, there is no reasonable prospect that the present circuit conflict will be resolved without this Court's intervention.

C. The Question Presented Is Recurring And Important

If left uncorrected, the Eleventh Circuit's decision is likely to have a recurring detrimental effect on the IRS's efficient enforcement of federal tax laws. In order to fulfill its duty to inquire into, determine, and assess tax liabilities throughout the country, the IRS issues thousands of summonses every year, including hundreds in the Eleventh Circuit. Although district courts are not called upon to enforce every summons the IRS issues, they adjudicate a significant number of requests to enforce (or to quash) IRS summonses every year. Under the Eleventh Circuit's rule, a taxpayer is virtually guaranteed the ability to delay the resolution of such proceedings merely by alleging that the summons was issued for an improper purpose. Such delays could be particularly problematic in international investigations where the Eleventh Circuit's rule could make it difficult for the IRS to respond in a timely manner to requests that it issue summonses to obtain information for United States tax-treaty partners.

In *Nero Trading*, the Eleventh Circuit expressed the view that its approach "strikes the appropriate balance between honoring the intended summary nature of the summons proceeding and protecting the interests of the taxpayer." 570 F.3d at 1250. This Court has "recognize[d] that the authority vested in

tax collectors may be abused, as all power is subject to abuse." *Bisceglia*, 420 U.S. at 146. The Court has explained, however, that "the solution is not to restrict that authority so as to undermine the efficacy of the federal tax system, which seeks to assure that taxpayers pay what Congress has mandated and to prevent dishonest persons from escaping taxation thus shifting heavier burdens to honest taxpayers." *Ibid.* District courts already protect taxpayers against abusive summons practices by requiring the IRS to establish (by demonstrating the *Powell* factors) that it is pursuing a summons in good faith. And if there is reason to believe, notwithstanding the IRS's representation that it has satisfied the *Powell* factors, that a summons was issued for an improper purpose, a district court has discretion to hold an evidentiary hearing. Going further and requiring a hearing any time the recipient of a summons merely alleges bad faith, by contrast, subverts the presumption of regularity of government action and thereby distorts the balance that Congress sought to strike.

The efficient collection of internal revenue taxes authorized by statute is vital to the Nation's well-being. Congress has required taxpayers "to disclose honestly all information relevant to tax liability." *Bisceglia*, 420 U.S. at 145. Although most taxpayers discharge that duty with "good faith and integrity * * * , it would be naive to ignore the reality that some persons attempt to outwit the system, and tax evaders are not readily identifiable." *Ibid.* Congress has charged the IRS with endeavoring to identify delinquent taxpayers and has endowed the Service

with broad investigatory powers to that end. *Id.* at 145-146; see *Arthur Young & Co.*, 465 U.S. at 815-816.[4]

This Court has been appropriately loath to complicate summons-enforcement proceedings in a way that would "stultify the Service's every investigatory move" or "thwart and defeat the appropriate investigatory powers that the Congress has placed in 'the Secretary or his delegate.'" *Donaldson*, 400 U.S. at 531, 533. The aberrant rule applied by the Eleventh Circuit in this case disserves the intent of Congress and should not be allowed to stand.

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[4] This Court has recognized that the IRS's broad investigatory authority is not *sui generis* in our federal system but is similar to other investigatory powers such as those of the Federal Trade Commission and the Department of Labor. *Bisceglia*, 420 U.S. at 147-148; see *Church of Scientology*, 506 U.S. at 16 n.10. The Court has also noted that "the language of § 7602 suggests an intention to codify a broad testimonial obligation" that has its source in the common law. *Euge*, 444 U.S. at 714.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2013

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

12-13190

9:11-mc-80456-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF BEEKMAN VISTA, INC., DYNAMO HOLDINGS LIMITED PARTNERSHIP, DEFENDANTS-APPELLANTS

9:11-mc-80457-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DYNAMO HOLDINGS LIMITED PARTNERSHIP, INTERVENOR PLAINTIFF-APPELLANT

MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF DYNAMO GP, INC., AS GENERAL PARTNER OF DYNAMO HOLDINGS LIMITED PARTNERSHIP, DEFENDANT-APPELLANT

9:11-mc-80459-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DYNAMO HOLDINGS LIMITED PARTNERSHIP, INTERVENOR PLAINTIFF-APPELLANT

RITA HOLLOWAY, AS TRUSTEE FOR THE 2005 CHRISTINE MOOG FAMILY DELAWARE DYNASTY TRUST, DEFENDANT

9:11-mc-80460-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MARC JULIEN, AS TRUSTEE FOR THE 2005 ROBERT JULIEN DELAWARE DYNASTY TRUST, DEFENDANT

DYNAMO HOLDINGS LIMITED PARTNERSHIP, INTERVENOR DEFENDANT-APPELLANT

9:11-mc-80461-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ROBERT JULIEN, DEFENDANT-APPELLANT

DYNAMO HOLDINGS LIMITED PARTNERSHIP, INTERVENOR DEFENDANT-APPELLANT

Filed: Apr. 18, 2013

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

Before: MARCUS, BLACK and SILER,[*] Circuit Judges.

PER CURIAM:

[*] Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

This case involves the Internal Revenue Service's (IRS) issuance of five administrative summonses, pursuant to 26 U.S.C. § 7602, during an investigation into the tax liabilities of Dynamo Holdings Limited Partnership (Dynamo). Specifically, (1) Michael Clarke, in his capacity as the chief financial officer of Beekman Vista, Inc., and Dynamo GP, Inc.; (2) Robert Julien; and (3) Dynamo (collectively Appellants) appeal the district court's orders granting the IRS's petitions to enforce the summonses. After careful review of the record, and having had the benefit of oral argument, we vacate the district court's order enforcing the summonses and remand for the district court to hold a hearing.

To obtain enforcement of a summons, the IRS must make a four-part prima facie showing that (1) "the investigation will be conducted pursuant to a legitimate purpose," (2) "the inquiry may be relevant to the purpose," (3) "the information sought is not already within the Commissioner's possession," and (4) "the administrative steps required by the Code have been followed." *United States v. Powell,* 379 U.S. 48, 57-58, 85 S. Ct. 248, 13 L. Ed. 2d 112 (1964); *see also Nero Trading, LLC v. U.S. Dep't of Treasury, IRS,* 570 F.3d 1244, 1248 (11th Cir. 2009). Once the IRS makes its prima facie showing, the burden shifts to the party opposing the summons to either (1) disprove one of the four elements of the IRS's prima facie case, or (2) "convince the court that enforcement of the summons would constitute an abuse of the court's process." *Nero,* 570 F.3d at 1249 (internal quotation omitted). The Supreme Court has stated that because the dis-

trict court's process is used to enforce a summons, the court should not permit its process to be abused by enforcing a summons that was issued for an improper purpose. *See Powell,* 379 U.S. at 58, 85 S. Ct. 248. According to the *Powell* Court, an improper purpose may include any purpose "reflecting on the good faith of the particular investigation." *Id.*

In *Powell,* the Supreme Court also explained that a party opposing a summons is entitled to an adversary hearing before enforcement is ordered, and that, at the hearing, the opponent "may challenge the summons on any appropriate ground." *Id.* (internal quotation omitted). Subsequently, in *United States v. Southeast First National Bank of Miami Springs,* we held that "an allegation of improper purpose is sufficient to trigger a limited adversary hearing where the taxpayer may question IRS officials concerning the Service's reasons for issuing the summons." 655 F.2d 661, 667 (5th Cir. 1981) (footnote omitted).[1] More recently, we have reaffirmed *Southeast First National Bank,* calling it "the legitimate offspring of the Supreme Court's seminal decision in *Powell*." *Nero,* 570 F.3d at 1249.

Appellants contend they were entitled to discovery and an evidentiary hearing before the district court granted the IRS's petitions to enforce the summonses because they alleged the IRS may have issued and sought to enforce the summonses for at least four

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

improper purposes.[2] 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 Powell*, 379 U.S. at 58, 85 S. Ct. 248.

Under our precedents, Appellants were entitled to a hearing to explore their allegation of an improper purpose.[3] As we have explained, in situations such as this, requiring the taxpayer to provide factual support for an allegation of an improper purpose, without giving the taxpayer a meaningful opportunity to obtain such facts, saddles the taxpayer with an unreasonable circular burden, creating an impermissible "Catch 22." *See Nero*, 570 F.3d at 1250; *S.E. First Nat'l Bank*, 655 F.2d at 667. While "the scope of any adversarial

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[2] We will not reverse a district court's order enforcing an IRS summons unless it is clearly erroneous. *Nero*, 570 F.3d at 1248. In addition, we review the denial of discovery and an evidentiary hearing for abuse of discretion. *Id.*

[3] Appellants, however, are not entitled to discovery. We have held that the full "panoply of expensive and time-consuming pretrial discovery devices may not be resorted to as a matter of course and on a mere allegation of improper purpose." *Nero*, 570 F.3d at 1249 (internal quotation and emphasis omitted).

hearing in this area is left to the discretion of the district court," binding Circuit authority requires that Appellants be given an opportunity "to ascertain whether the Service issued a given summons for an improper purpose." *Nero,* 570 F.3d at 1249. As required by *Southeast First National Bank,* on remand Appellants should be permitted to "question IRS officials concerning the Service's reasons for issuing the summons[es]." 655 F.2d at 667 (footnote omitted).

VACATED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 12-13190

District Court Docket No. 9:11-mc-80456-KLR

9:11-mc-80456-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF BEEKMAN VISTA, INC., DYNAMO HOLDINGS LIMITED PARTNERSHIP, DEFENDANTS-APPELLANTS

9:11-mc-80457-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DYNAMO HOLDINGS LIMITED PARTNERSHIP, INTERVENOR PLAINTIFF-APPELLANT

MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF DYNAMO GP, INC., AS GENERAL PARTNER OF DYNAMO HOLDINGS LIMITED PARTNERSHIP, DEFENDANT-APPELLANT

9:11-mc-80459-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DYNAMO HOLDINGS LIMITED PARTNERSHIP, INTERVENOR PLAINTIFF-APPELLANT

RITA HOLLOWAY, AS TRUSTEE FOR THE 2005 CHRISTINE MOOG FAMILY DELAWARE DYNASTY TRUST, DEFENDANT

9:11-mc-80460-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MARC JULIEN, AS TRUSTEE FOR THE 2005 ROBERT JULIEN DELAWARE DYNASTY TRUST, DEFENDANT

DYNAMO HOLDINGS LIMITED PARTNERSHIP, INTERVENOR DEFENDANT-APPELLANT

9:11-mc-80461-KLR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ROBERT JULIEN, DEFENDANT-APPELLANT

DYNAMO HOLDINGS LIMITED PARTNERSHIP, INTERVENOR DEFENDANT-APPELLANT

Entered: Apr. 18, 2013

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

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of the Court.

For the Court: John Ley, Clerk of Court
By: Djuanna Clark

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 11-80456-MC

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF BEEKMAN VISTA, INC., RESPONDENT

Filed: Apr. 17, 2012

ORDER GRANTING PETITION TO ENFORCE INTERNAL REVENUE SUMMONS AND DENYING MOTION FOR SUMMARY DISMISSAL

KENNETH L. RYSKAMP, District Judge.

THIS CAUSE comes before the Court pursuant to the petition to enforce Internal Revenue Summons, filed April 28, 2011 **[DE 1]**. The Court issued an order requiring a response to the summons on June 14, 2011 **[DE 4]**. Respondent answered the summons on July 18, 2011 **[DE 7]**, and the government replied on July 29, 2011 **[DE 9]**. The Court granted Dynamo Holdings Limited Partnership's ("DHLP") motion to intervene on August 30, 2011 **[DE 15]**, and DHLP filed its answer, which adopted Respondent's response, on

September 6, 2011 **[DE 16]**. On October 19, 2011 **[DE 20]**, Respondent and DHLP moved for summary dismissal or for scheduling of a pretrial conference. The government responded on November 7, 2011 **[DE 21]**, and Respondent and DHLP replied on November 17, 2011 **[DE 22]**. This matter is ripe for adjudication.

According to the petition, Internal Revenue Agent Mary Fierfelder and the Internal Revenue Service have examined the tax returns of DHLP for the years ending December 31, 2005, December 31, 2006, and December 31, 2007. During the exam, issues arose with respect to debt that DHLP reported on its returns, including DHLP's questionable interest expenses in the amount of $17,000,000 in both 2006 and 2007. The summons seeks testimony and records that Mr. Clarke may have regarding the tax reporting obligations of DHLP and deductions it has claimed.

As part of her investigation, on September 24, 2010, Agent Fierfelder issued an administrative summons (Form 2039) directing Mr. Clarke to appear before her on October 25, 2010, to give testimony and to produce for examination certain books, records, papers or other data, as described in the summons. Agent Fierfelder served the summons on Mr. Clarke in accordance with 26 U.S.C. § 7603 by handing a copy of the summons to him on September 28, 2010. On September 28, 2010, Agent Fierfelder served notice required by 26 U.S.C. § 7609(a) on the persons entitled to notice according to Exhibit B of the summons, by sending it by certified mail, as evidenced in the certificate of service on the reverse side of the summons. On October 25, 2010,

Mr. Clarke did not appear, and to date, Mr. Clarke has not produced any material or provided any testimony as sought in the summons.

As a result of the examination, the IRS issued a "Notice of Final Partnership Administrative Adjustment," ("FPAA") on December 28, 2010. On February 1, 2011, DHLP filed in the United States Tax Court a "Petition for Readjustment of Partnership Items Under Code Section 6226," assigned Docket number 2685-11, (the "Tax Court Petition"), challenging the determinations made by the Government in the FPAA. Thereafter, this proceeding was commenced to enforce the Summons in issue.

The government asserts that the information sought is in the possession, custody, or control of Mr. Clarke and is not already in the possession of the Internal Revenue Service. The government asserts that the information sought may be relevant to the determination of the correctness of the federal tax reporting by DHLP for the tax years ending December 31, 2005, December 31, 2006, and December 31, 2007. The government also asserts that there is no Department of Justice referral, as defined in 26 U.S.C. § 7602(d)(2), in effect with respect to DHLP for the tax years covered by the summons. Further, the government asserts that all administrative steps for the issuance of the summonses have been followed and the summons has not been issued for any improper purpose.

To obtain enforcement of a summons, the government must establish that the summons is issued for a

legitimate purpose, seeks information relevant to that purpose, seeks information that is not already in the IRS's possession, and that the summons satisfies all administrative steps required by the Internal Revenue Code. *United States v. Powell,* 379 U.S. 48, 57-58, 85 S. Ct. 248, 13 L. Ed. 2d 112 (1964).

Accordingly, on June 14, 2011, the Court required Mr. Clarke to file a written response stating why he should not comply with the summons.

The Response fails to rebut the government's prima facie case. The Response discusses the Tax Court proceedings referenced above. But the fact that DHLP is challenging the FPAA in Tax Court is irrelevant since the subsequent initiation of a Tax Court proceeding has no effect on the summons enforcement process.

The Response contends that the government has possession of certain unspecified documents and information requested by the summons. That Response also alleges that the government has all the information it needs analyze the tax reporting obligations of DHLP. Yet Respondent does not deny that he has not provided all the documents and provided the testimony requested by the summons, and she has offered no facts or evidence to contradict Revenue Agent Fierfelder's Declaration that the government does not possess the documents sought.

The Response contends that the government may not establish a prima facie case through a declaration by a revenue agent. That position is baseless. *See United States v. Morse,* 532 F.3d 1130, 1132 (11th Cir.

2008) (stating that a sworn affidavit of the agent who issued the summons is sufficient to demonstrate a prima facie case). The response also asserts that the Declaration of the Revenue Agent is unsworn, but the Declaration states it was made pursuant to 28 U.S.C. § 1746, which treats such declaration as having the same force and effect as a sworn declaration. Moreover, the Declaration was made pursuant to penalties of perjury.

The Respondent's affirmative defenses also fail. The Response first alleges that the government is engaged in an improper second examination of another taxpayer, Beekman Vista, Inc., and that information obtained through the summons might be used in the Beekman examination. The government has established a prima facie case that it has a legitimate need for the information sought by the summons to investigate DHLP. That there might be an additional use of the information does not render an otherwise enforceable summons unenforceable. *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 324, 105 S. Ct. 725, 83 L. Ed. 2d 678 (1985).

The second ground offered for not enforcing the summons is that the government is displeased that DHLP declined to extend its statute of limitations period. This is mere conjecture unsupported by evidence. Establishing an improper purpose requires more than a naked assertion. *United States v. Millman*, 765 F.2d 27, 29 (2d Cir. 1985) (holding that a taxpayer must make "a substantial preliminary showing" that the IRS has abused its summons power)

(quoting *Tiffany Fine Arts, Inc.*, 718 F.2d 7, 14 (2d Cir. 1983), *aff'd* 469 U.S. 310, 105 S. Ct. 725, 83 L. Ed. 2d 678 (1985)). Even if the IRS were displeased, such has no bearing on whether the issuance of a summons for information that is clearly relevant to the issues being examined was improper.

The Response's third grounds against enforcement of the summons is that the government's power to enforce a summons terminates when a taxpayer petitions the Tax Court because this might allow the government to obtain more information than it could by the Tax Court's discovery tools alone. The Response is incorrect as a matter of law. The government's power to enforce a summons does not terminate merely because a statutory notice of deficiency or FPAA has been issued and a Tax Court proceeding has begun. *PAA Mgmt., Ltd. v. United States,* 962 F.2d 212, 219 (2nd Cir. 1992). The validity of a summons is tested as of the date of issuance. Events occurring after the date of issuance, but before enforcement, should not affect enforceability. *See United States v. Centennial Builders, Inc.,* 747 F.2d 678, 681, n.1 (11th Cir. 1984).

The Response's fourth ground for non-enforcement of the summons is comity. The respondent posits that comity requires the Tax Court, which currently has DHLP's partnership proceeding, take over the instant summons enforcement proceeding because the two proceedings are the same. Contrary to the Response's assertion, the District Court and the Tax Court are not presented with the same lawsuit. The instant case involves the enforcement of a summons under section

7604 of the Internal Revenue Code ("IRC"). The Tax Court proceeding involves a challenge to the adjustments to DHLP's partnership items under IRC § 6226. The Tax Court does not have jurisdiction to consider summons enforcement proceedings, IRC § 7604(a); *Ash v. Comm'r,* 96 T.C. 459, 462, 1991 WL 30196 (1991), and the district court, in a summons enforcement proceeding, does not have jurisdiction to consider the FPAA adjustments to DHLP's tax reporting. *Morse,* 532 F.3d at 1132 (holding a court in a summons enforcement proceeding does not have authority over the validity of a tax assessment).

Respondent also maintains that DHLP's statute of limitations period for the years covered by the FPAA has expired, and that this would prevent the Summons from being enforceable. The Response offers no authority for its position. The factual premise regarding DHLP's statute of limitations period is incorrect. The statute of limitations period for the DHLP tax years covered by the FPAA remains open. As noted in the Second Affirmative Defense, the IRS issued the FPAA prior to the close of the statute of limitations period. The period for making an assessment is extended under IRC § 6229(d) for one year after the conclusion of the Tax Court proceeding, which is ongoing.

Respondent also argues that the Summons should not be enforced because "the Government" told an attorney for DHLP that the government would not enforce the Summons if a petition was filed with the Tax Court. This allegation is nothing more than a

bald assertion unsupported by any credible evidence. Unsupported allegations are insufficient to rebut the government's prima facie case.

Arguing that he has raised "in a substantial way the existence of substantial deficiencies in the summons proceedings," Respondent demands discovery and a hearing. In support of this request, he cites *United States v. Southeast First National Bank of Miami Springs,* 655 F.2d 661 (5th Cir. 1981). This case was relied upon in *Nero Trading LLC v. United States,* 570 F.3d 1244, 1249 (11th Cir. 2009), which allowed a limited adversarial hearing to provide the taxpayer with a meaningful opportunity "to challenge the summons on any appropriate grounds," but may be limited as long as the court does not deny the taxpayer "his sole means of demonstrating the truth (or falsity) of his allegations." *Nero,* 570 F.3d at 1249 & n.3. Providing an adversarial hearing does not require an evidentiary hearing. *See Tiffany Fine Arts,* 469 U.S. at 324, n.7 (holding that district court did not abuse its discretion in determining "that an evidentiary hearing on the question of enforcement was unnecessary"). Significantly, the Eleventh Circuit faulted the district court in Nero for inadequately explaining its decision not to hold an evidentiary hearing, not for failing to hold one. *Nero,* 570 F.3d at 1250. *Nero* should not be read to require an evidentiary hearing upon a mere allegation of improper purpose. In *Tiffany Fine Arts,* the Supreme Court upheld the denial of an evidentiary hearing in a summons enforcement proceeding under similar circumstances and emphasized that "the burden of showing an abuse of the court's process is on the tax-

payer." 469 U.S. at 324 n.7 ("We also find that it was well within the District Court's discretion to conclude, after reviewing the submissions of the parties and holding oral argument, that an evidentiary hearing on the question of enforcement was unnecessary."). Here, the respondent has made no meaningful allegations of improper purpose which warrant the Court allowing discovery into and a hearing on the allegations raised in the Response. The Court will deny Respondent access to discovery and will not hold an evidentiary hearing.

Respondent also moves for summary dismissal or for scheduling of a pretrial conference. Respondent's motion in this regard largely reiterates the arguments set forth in response to the summons. Respondent makes two new arguments, however. First, he suggests that the issuance of the summons may have violated the intent of the Internal Revenue Manual (IRM). Second, he suggests that this Court should adopt a rule that enforcement of a summons issued pursuant to 26 U.S.C. § 7602 before Tax Court litigation is commenced should be limited in the same manner as discovery under Bankruptcy Rule 2004 is limited once litigation between the parties has commenced.

Respondent does not actually allege that the IRM guidelines on issuing summonses were violated, since he acknowledges that the summons was issued *before* the FPAA was issued or the Tax Court proceedings begun, as the IRM permits. Nevertheless, Respondent deems suspicious the timing of the enforcement

proceedings relative to the issuance of the FPAA and the initiation of the Tax Court case. Respondent offers no evidence to support his suspicions that this enforcement proceeding violates the IRM's proscription on issuance of a post-FPAA summons. Even if he could offer evidence to that effect, the IRM itself confers no rights on Clarke here. *Matthews v. Commissioner,* T.C. Memo. 2008-126, 2008 WL 1946817, at *11 (U.S. Tax Ct. 2008) ("Initially, we note the well-settled principle that the Internal Revenue Manual does not have the force of law, is not binding on the IRS, and confers no rights on taxpayers.").

Respondent also asks the Court to create a new rule that bars summons enforcement once a Tax Court case or other litigation is commenced that concerns the subject of the summons. As noted, the government's power to enforce a summons does not terminate merely because a statutory notice of deficiency or final partnership administrative adjustment has been issued and a Tax Court proceeding has begun. It is hereby

ORDERED AND ADJUDGED that the petition to enforce Internal Revenue Summons, filed April 28, 2011 **[DE 1]**, is GRANTED. It is further

ORDERED AND ADJUDGED that the motion for summary dismissal and for a pretrial conference, filed October 19, 2011 **[DE 20]**, is DENIED. The Clerk of Court shall CLOSE this case and DENY any pending motions as MOOT.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 16th day of April, 2012.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 11-80457-MC-RYSKAMP/VITUNAC

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF DYNAMO GP, INC., AS GENERAL PARTNER OF DYNAMO HOLDINGS LIMITED PARTNERSHIP, RESPONDENT

[Filed: Apr. 16, 2012]

ORDER GRANTING PETITION TO ENFORCE INTERNAL REVENUE SUMMONS AND DENYING MOTION FOR SUMMARY DISMISSAL

THIS CAUSE comes before the Court pursuant to the petition to enforce Internal Revenue Summons, filed April 28, 2011 **[DE 1]**. The Court issued an order requiring a response to the summons on June 14, 2011 **[DE 4]**. Respondent answered the summons on July 18, 2011 **[DE 7]**, and the government replied on July 29, 2011 **[DE 9]**. The Court granted Dynamo Holdings Limited Partnership's ("DHLP") motion to intervene on August 30, 2011 **[DE 15]**, and DHLP filed its answer, which adopted Respondent's response, on September 6, 2011 **[DE 16]**. On October 19, 2011 **[DE**

20], Respondent and DHLP moved for summary dismissal or for scheduling of a pretrial conference. The government responded on November 7, 2011 [**DE 21**], and Respondent and DHLP replied on November 17, 2011 [**DE 22**]. This matter is ripe for adjudication.

According to the petition, Internal Revenue Agent Mary Fierfelder and the Internal Revenue Service have examined the tax returns of DHLP for the years ending December 31, 2005, December 31, 2006, and December 31, 2007. During the exam, issues arose with respect to debt that DHLP reported on its returns, including DHLP's questionable interest expenses in the amount of $17,000,000 in both 2006 and 2007. The summons seeks testimony and records that Mr. Clarke may have regarding the tax reporting obligations of DHLP and deductions it has claimed.

As part of her investigation, on September 24, 2010, Agent Fierfelder issued an administrative summons (Form 2039) directing Mr. Clarke to appear before her on October 25, 2010, to give testimony and to produce for examination certain books, records, papers or other data, as described in the summons. Agent Fierfelder served the summons on Mr. Clarke in accordance with 26 U.S.C. § 7603 by handing a copy of the summons to him on September 28, 2010. On September 28, 2010, Agent Fierfelder served notice required by 26 U.S.C. § 7609(a) on the persons entitled to notice according to Exhibit B of the summons, by sending it by certified mail, as evidenced in the certificate of service on the reverse side of the summons. On October 25, 2010, Mr. Clarke did not appear, and to date, Mr. Clarke has

not produced any material or provided any testimony as sought in the summons.

As a result of the examination, the IRS issued a "Notice of Final Partnership Administrative Adjustment," ("FPAA") on December 28, 2010. On February 1, 2011, DHLP filed in the United States Tax Court a "Petition for Readjustment of Partnership Items Under Code Section 6226," assigned Docket number 2685-11, (the "Tax Court Petition"), challenging the determinations made by the Government in the FPAA. Thereafter, this proceeding was commenced to enforce the Summons in issue. The government asserts that the information sought is in the possession, custody, or control of Mr. Clarke and is not already in the possession of the Internal Revenue Service.

The government asserts that the information sought may be relevant to the determination of the correctness of the federal tax reporting by DHLP for the tax years ending December 31, 2005, December 31, 2006, and December 31, 2007. The government also asserts that there is no Department of Justice referral, as defined in 26 U.S.C. § 7602(d)(2), in effect with respect to DHLP for the tax years covered by the summons. Further, the government asserts that all administrative steps for the issuance of the summonses have been followed and the summons has not been issued for any improper purpose.

To obtain enforcement of a summons, the government must establish that the summons is issued for a legitimate purpose, seeks information relevant to that

purpose, seeks information that is not already in the IRS's possession, and that the summons satisfies all administrative steps required by the Internal Revenue Code. *United States v. Powell*, 379 U.S. 48, 57-58, 85 S. Ct. 248, 13 L. Ed. 2d 112 (1964).

Accordingly, on June 14, 2011, the Court required Mr. Clarke to file a written response stating why he should not comply with the summons.

The Response fails to rebut the government's prima facie case. The Response discusses the Tax Court proceedings referenced above. But the fact that DHLP is challenging the FPAA in Tax Court is irrelevant since the subsequent initiation of a Tax Court proceeding has no effect on the summons enforcement process.

The Response contends that the government has possession of certain unspecified documents and information requested by the summons. That Response also alleges that the government has all the information it needs analyze the tax reporting obligations of DHLP. Yet Respondent does not deny that he has not provided all the documents and provided the testimony requested by the summons, and she has offered no facts or evidence to contradict Revenue Agent Fierfelder's Declaration that the government does not possess the documents sought.

The Response contends that the government may not establish a prima facie case through a declaration by a revenue agent. That position is baseless. *See United States v. Morse,* 532 F.3d 1130, 1132 (11th Cir. 2008) (stating that a sworn affidavit of the agent who

issued the summons is sufficient to demonstrate a prima facie case). The response also asserts that the Declaration of the Revenue Agent is unsworn, but the Declaration states it was made pursuant to 28 U.S.C. § 1746, which treats such declaration as having the same force and effect as a sworn declaration. Moreover, the Declaration was made pursuant to penalties of perjury.

The Respondent's affirmative defenses also fail. The Response first alleges that the government is engaged in an improper second examination of another taxpayer, Beekman Vista, Inc. and that information obtained through the summons might be used in the Beekman examination. The government has established a prima facie case that it has a legitimate need for the information sought by the summons to investigate DHLP. That there might be an additional use of the information does not render an otherwise enforceable summons unenforceable. *Tiffany Fine Arts, Inc. v. United States,* 469 U.S. 310, 324, 105 S. Ct. 725, 83 L. Ed. 2d 678 (1985).

The second ground offered for not enforcing the summons is that the government is displeased that DHLP declined to extend its statute of limitations period. This is mere conjecture unsupported by evidence. Establishing an improper purpose requires more than a naked assertion. *United States v. Millman,* 765 F.2d 27, 29 (2d Cir.1985) (holding that a taxpayer must make "a substantial preliminary showing" that the IRS has abused its summons power) (quoting *Tiffany Fine Arts, Inc.* 718 F.2d 7, 14 (2d Cir. 1983),

aff'd 469 U.S. 310, 105 S. Ct. 725, 83 L. Ed. 2d 678 (1985)). Even if the IRS were displeased, such has no bearing on whether the issuance of a summons for information that is clearly relevant to the issues being examined was improper.

The Response's third grounds against enforcement of the summons is that the government's power to enforce a summons terminates when a taxpayer petitions the Tax Court because this might allow the government to obtain more information than it could by the Tax Court's discovery tools alone. The Response is incorrect as a matter of law. The government's power to enforce a summons does not terminate merely because a statutory notice of deficiency or FPAA has been issued and a Tax Court proceeding has begun. *PAA Mgmt. Ltd. v. United States,* 962 F.2d 212, 219 (2nd Cir. 1992). The validity of a summons is tested as of the date of issuance. Events occurring after the date of issuance, but before enforcement, should not affect enforceability. *See United States v. Centennial Builders, Inc.* 747 F.2d 678, 681, n.1 (11th Cir. 1984).

The Response's fourth ground for non-enforcement of the summons is comity. The respondent posits that comity requires the Tax Court, which currently has DHLP's partnership proceeding, take over the instant summons enforcement proceeding because the two proceedings are the same. Contrary to the Response's assertion, the District Court and the Tax Court are not presented with the same lawsuit. The instant case involves the enforcement of a summons

under section 7604 of the Internal Revenue Code ("IRC"). The Tax Court proceeding involves a challenge to the adjustments to DHLP's partnership items under IRC § 6226. The Tax Court does not have jurisdiction to consider summons enforcement proceedings, IRC § 7604(a); *Ash v. Comm'r,* 96 T.C. 459, 462, 1991 WL 30196 (1991), and the district court, in a summons enforcement proceeding, does not have jurisdiction to consider the FPAA adjustments to DHLP's tax reporting. *Morse,* 532 F.3d at 1132 (holding a court in a summons enforcement proceeding does not have authority over the validity of a tax assessment).

Respondent also maintains that DHLP's statute of limitations period for the years covered by the FPAA has expired, and that this would prevent the Summons from being enforceable. The Response offers no authority for its position. The factual premise regarding DHLP's statute of limitations period is incorrect. The statute of limitations period for the DHLP tax years covered by the FPAA remains open. As noted in the Second Affirmative Defense, the IRS issued the FPAA prior to the close of the statute of limitations period. The period for making an assessment is extended under IRC § 6229(d) for one year after the conclusion of the Tax Court proceeding, which is ongoing.

Respondent also argues that the Summons should not be enforced because "the Government" told an attorney for DHLP that the government would not enforce the Summons if a petition was filed with the

Tax Court. This allegation is nothing more than a bald assertion unsupported by any credible evidence. Unsupported allegations are insufficient to rebut the government's prima facie case.

Arguing that he has raised "in a substantial way the existence of substantial deficiencies in the summons proceedings," Respondent demands discovery and a hearing. In support of this request, he cites *United States v. Southeast First National Bank of Miami Springs,* 655 F.2d 661 (5th Cir. 1981). This case was relied upon in *Nero Trading LLC v. United States,* 570 F.3d 1244, 1249 (11th Cir. 2009), which allowed a limited adversarial hearing to provide the taxpayer with a meaningful opportunity "to challenge the summons on any appropriate grounds," but may be limited as long as the court does not deny the taxpayer "his sole means of demonstrating the truth (or falsity) of his allegations. *Nero,* 570 F.3d at 1249 & n.3. Providing an adversarial hearing does not require an evidentiary hearing. *See Tiffany Fine Arts,* 469 U.S. at 324, n.7 (holding that district court did not abuse its discretion in determining "that an evidentiary hearing on the question of enforcement was unnecessary"). Significantly, the Eleventh Circuit faulted the district court in Nero for inadequately explaining its decision not to hold an evidentiary hearing, not for failing to hold one. *Nero,* 570 F.3d at 1250. *Nero* should not be read to require an evidentiary hearing upon a mere allegation of improper purpose. In *Tiffany Fine Arts,* the Supreme Court upheld the denial of an evidentiary hearing in a summons enforcement proceeding under similar circumstances and emphasized that "the burden of

showing an abuse of the court's process is on the taxpayer . 469 U.S. at 324 n.7 ("We also find that it was well within the District Court's discretion to conclude, after reviewing the submissions of the parties and holding oral argument, that an evidentiary hearing on the question of enforcement was unnecessary.). Here, the respondent has made no meaningful allegations of improper purpose which warrant the Court allowing discovery into and a hearing on the allegations raised in the Response. The Court will deny Respondent access to discovery and will not hold an evidentiary hearing.

Respondent also moves for summary dismissal or for scheduling of a pretrial conference. Respondent's motion in this regard largely reiterates the arguments set forth in response to the summons. Respondent makes two new arguments, however. First, he suggests that the issuance of the summons may have violated the intent of the Internal Revenue Manual (IRM). Second, he suggests that this Court should adopt a rule that enforcement of a summons issued pursuant to 26 U.S.C. § 7602 before Tax Court litigation is commenced should be limited in the same manner as discovery under Bankruptcy Rule 2004 is limited once litigation between the parties has commenced.

Respondent does not actually allege that the IRM guidelines on issuing summonses were violated, since he acknowledges that the summons was issued *before* the FPAA was issued or the Tax Court proceedings begun, as the IRM permits. Nevertheless, Respond-

ent deems suspicious the timing of the enforcement proceedings relative to the issuance of the FPAA and the initiation of the Tax Court case. Respondent offers no evidence to support his suspicions that this enforcement proceeding violates the IRM's proscription on issuance of a post-FPAA summons. Even if he could offer evidence to that effect, the IRM itself confers no rights on Clarke here. *Matthews v. Commissioner*, T.C. Memo. 2008-126, 2008 WL 1946817, at *11 (U.S. Tax Ct. 2008) ("Initially, we note the well-settled principle that the Internal Revenue Manual does not have the force of law, is not binding on the IRS, and confers no rights on taxpayers.).

Respondent also asks the Court to create a new rule that bars summons enforcement once a Tax Court case or other litigation is commenced that concerns the subject of the summons. As noted, the government's power to enforce a summons does not terminate merely because a statutory notice of deficiency or final partnership administrative adjustment has been issued and a Tax Court proceeding has begun. It is hereby

ORDERED AND ADJUDGED that the petition to enforce Internal Revenue Summons, filed April 28, 2011 **[DE 1]**, is GRANTED. It is further

ORDERED AND ADJUDGED that the motion for summary dismissal and for a pretrial conference, filed October 19, 2011 **[DE 20]**, is DENIED. The Clerk of Court shall CLOSE this case and DENY any pending motions as MOOT.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 16th day of April, 2012.

/s/ KENNETH L. RYSKAMP
KENNETH L. RYSKAMP
UNITED STATES DISTRICT
JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

11-80459-MC-RYSKAMP/VITUNAC

UNITED STATES OF AMERICA, PETITIONER

v.

RITA HOLLOWAY, AS TRUSTEE FOR THE 2005 CHRISTINE MOOG FAMILY DELAWARE DYNASTY TRUST, RESPONDENT

Filed: Apr. 16, 2012

ORDER GRANTING PETITION TO ENFORCE INTERNAL REVENUE SUMMONS AND DENYING MOTION FOR SUMMARY DISMISSAL

THIS CAUSE comes before the Court pursuant to the petition to enforce Internal Revenue Summons, filed April 28, 2011 **[DE 1]**. The Court issued an order requiring a response to the summons on May 3, 2011 **[DE 3]**. Respondent answered the summons on August 18, 2011 **[DE 10]**, and the government replied on August 31, 2011 **[DE 12]**. The Court granted Dynamo Holdings Limited Partnership's ("DHLP") motion to intervene on August 30, 2011 **[DE 11]**, and DHLP filed its answer, which adopted Respondent's response, on September 6, 2011 **[DE 13]**. On October 19, 2011 **[DE**

16], Respondent and DHLP moved for summary dismissal or for scheduling of a pretrial conference. The government responded on November 7, 2011 **[DE 17]**, and Respondent and DHLP replied on November 17, 2011 **[DE 18]**. This matter is ripe for adjudication.

According to the petition, Internal Revenue Agent Mary Fierfelder and the Internal Revenue Service have examined the tax returns of DHLP for the years ending December 31, 2005, December 31, 2006, and December 31, 2007. During the exam, issues arose with respect to debt that DHLP reported on its returns, including DHLP's questionable interest expenses in the amount of $17,000,000 in both 2006 and 2007. The summons seeks testimony and records that Ms. Holloway may have regarding the tax reporting obligations of DHLP and deductions it has claimed.

As part of her investigation, on September 27, 2010, Agent Fierfelder issued an administrative summons (Form 2039) directing Ms. Holloway to appear before her on October 25, 2010, to give testimony and to produce for examination certain books, records, papers or other data, as described in the summons. Agent Fierfelder served the summons on Ms. Holloway in accordance with 26 U.S.C. § 7603 by handing a copy of the summons to him on September 30, 2010. On October 1, 2010, Agent Fierfelder served notice required by 26 U.S.C. § 7609(a) on the persons entitled to notice according to Exhibit B of the summons, by sending it by certified mail, as evidenced in the certificate of service on the reverse side of the summons. On October 25, 2010, Ms. Holloway did not appear, and to

date, Ms. Holloway has not produced any material or provided any testimony as sought in the summons.

As a result of the examination, the IRS issued a "Notice of Final Partnership Administrative Adjustment," ("FPAA") on December 28, 2010. On February 1, 2011, DHLP filed in the United States Tax Court a "Petition for Readjustment of Partnership Items Under Code Section 6226," assigned Docket number 2685-11, (the "Tax Court Petition"), challenging the determinations made by the Government in the FPAA. Thereafter, this proceeding was commenced to enforce the Summons in issue.

The government asserts that the information sought is in the possession, custody, or control of Ms. Holloway and is not already in the possession of the Internal Revenue Service. The government asserts that the information sought may be relevant to the determination of the correctness of the federal tax reporting by DHLP for the tax years ending December 31, 2005, December 31, 2006, and December 31, 2007. The government also asserts that there is no Department of Justice referral, as defined in 26 U.S.C. § 7602(d)(2), in effect with respect to DHLP for the tax years covered by the summons. Further, the government asserts that all administrative steps for the issuance of the summonses have been followed and the summons has not been issued for any improper purpose.

To obtain enforcement of a summons, the government must establish that the summons is issued for a legitimate purpose, seeks information relevant to that

purpose, seeks information that is not already in the IRS's possession, and that the summons satisfies all administrative steps required by the Internal Revenue Code. *United States v. Powell*, 379 U.S. 48, 57-58 (1964).

Accordingly, on May 3, 2011, the Court required Ms. Holloway to file a written response stating why she should not comply with the summons.

The response fails to rebut the government's prima facie case. The Response discusses the Tax Court proceedings referenced above. But the fact that DHLP is challenging the FPAA in Tax Court is irrelevant since the subsequent initiation of a Tax Court proceeding has no effect on the summons enforcement process.

The Response contends that the government has possession of certain unspecified documents and information requested by the summons. That Response also alleges that the government has all the information it needs analyze the tax reporting obligations of DHLP. Yet Respondent does not deny that he has not provided all the documents and provided the testimony requested by the summons, and she has offered no facts or evidence to contradict Revenue Agent Fierfelder's Declaration that the government does not possess the documents sought.

The Response contends that the government may not establish a prima facie case through a declaration by a revenue agent. That position is baseless. *See United States v. Morse*, 532 F.3d 1130, 1132 (11th Cir. 2008) (stating that a sworn affidavit of the agent who

issued the summons is sufficient to demonstrate a prima facie case). The response also asserts that the Declaration of the Revenue Agent is unsworn, but the Declaration states it was made pursuant to 28 U.S.C. § 1746, which treats such declaration as having the same force and effect as a sworn declaration. Moreover, the Declaration was made pursuant to penalties of perjury.

The Respondent's affirmative defenses also fail. The Response first alleges that the government is engaged in an improper second examination of another taxpayer, Beekman Vista, Inc., and that information obtained through the summons might be used in the Beekman examination. The government has established a prima facie case that it has a legitimate need for the information sought by the summons to investigate DHLP. That there might be an additional use of the information does not render an otherwise enforceable summons unenforceable. *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 324 (1985).

The second ground offered for not enforcing the summons is that the government is displeased that DHLP declined to extend its statute of limitations period. This is mere conjecture unsupported by evidence. Establishing an improper purpose requires more than a naked assertion. *United States v. Millman*, 765 F.2d 27, 29 (2d Cir. 1985) (holding that a taxpayer must make "a substantial preliminary showing" that the IRS has abused its summons power) (quoting *Tiffany Fine Arts, Inc.*, 718 F.2d 7, 14 (2d Cir. 1983), *aff'd* 469 U.S. 310 (1985)). Even if the IRS

were displeased, such has no bearing on whether the issuance of a summons for information that is clearly relevant to the issues being examined was improper.

The Response's third grounds against enforcement of the summons is that the government's power to enforce a summons terminates when a taxpayer petitions the Tax Court because this might allow the government to obtain more information than it could by the Tax Court's discovery tools alone. The Response is incorrect as a matter of law. The government's power to enforce a summons does not terminate merely because a statutory notice of deficiency or FPAA has been issued and a Tax Court proceeding has begun. *PAA Mgmt., Ltd. v. United States*, 962 F.2d 212, 219 (2nd Cir. 1992). The validity of a summons is tested as of the date of issuance. Events occurring after the date of issuance, but before enforcement, should not affect enforceability. *See United States v. Centennial Builders, Inc.*, 747 F.2d 678, 681, n.1 (11th Cir. 1984).

The Response's fourth ground for non-enforcement of the summons is comity. The respondent posits that comity requires the Tax Court, which currently has DHLP's partnership proceeding, take over the instant summons enforcement proceeding because the two proceedings are the same. Contrary to the Response's assertion, the District Court and the Tax Court are not presented with the same lawsuit. The instant case involves the enforcement of a summons under section 7604 of the Internal Revenue Code ("IRC"). The Tax Court proceeding involves a chal-

lenge to the adjustments to DHLP's partnership items under IRC § 6226. The Tax Court does not have jurisdiction to consider summons enforcement proceedings, IRC § 7604(a); *Ash v. Comm'r*, 96 T.C. 459, 462 (1991), and the district court, in a summons enforcement proceeding, does not have jurisdiction to consider the FPAA adjustments to DHLP's tax reporting. *Morse*, 532 F.3d at 1132 (holding a court in a summons enforcement proceeding does not have authority over the validity of a tax assessment).

Respondent also maintains that DHLP's statute of limitations period for the years covered by the FPAA has expired, and that this would prevent the Summons from being enforceable. The Response offers no authority for its position. The factual premise regarding DHLP's statute of limitations period is incorrect. The statute of limitations period for the DHLP tax years covered by the FPAA remains open. As noted in the Second Affirmative Defense, the IRS issued the FPAA prior to the close of the statute of limitations period. The period for making an assessment is extended under IRC § 6229(d) for one year after the conclusion of the Tax Court proceeding, which is ongoing.

Respondent also argues that the Summons should not be enforced because "the Government" told an attorney for DHLP that the government would not enforce the Summons if a petition was filed with the Tax Court. This allegation is nothing more than a bald assertion unsupported by any credible evidence.

Unsupported allegations are insufficient to rebut the government's prima facie case.

Arguing that she has raised "in a substantial way the existence of substantial deficiencies in the summons proceedings," Respondent demands discovery and a hearing. In support of this request, she cites *United States v. Southeast First National Bank of Miami Springs*, 655 F.2d 661 (5th Cir. 1981). This case was relied upon in *Nero Trading LLC v. United States*, 570 F.3d 1244, 1249 (11th Cir. 2009), which allowed a limited adversarial hearing to provide the taxpayer with a meaningful opportunity "to challenge the summons on any appropriate grounds," but may be limited as long as the court does not deny the taxpayer "his sole means of demonstrating the truth (or falsity) of his allegations." *Nero*, 570 F.3d at 1249 & n.3. Providing an adversarial hearing does not require an evidentiary hearing. *See Tiffany Fine Arts*, 469 U.S. at 324, n.7 (holding that district court did not abuse its discretion in determining "that an evidentiary hearing on the question of enforcement was unnecessary"). Significantly, the Eleventh Circuit faulted the district court in Nero for inadequately explaining its decision not to hold an evidentiary hearing, not for failing to hold one. *Nero*, 570 F.3d at 1250. *Nero* should not be read to require an evidentiary hearing upon a mere allegation of improper purpose. In *Tiffany Fine Arts*, the Supreme Court upheld the denial of an evidentiary hearing in a summons enforcement proceeding under similar circumstances and emphasized that "the burden of showing an abuse of the court's process is on the taxpayer." 469 U.S. at 324 n.7 ("We also find

that it was well within the District Court's discretion to conclude, after reviewing the submissions of the parties and holding oral argument, that an evidentiary hearing on the question of enforcement was unnecessary."). Here, the respondent has made no meaningful allegations of improper purpose which warrant the Court allowing discovery into and a hearing on the allegations raised in the Response. The Court will deny Respondent access to discovery and will not hold an evidentiary hearing.

Respondent also moves for summary dismissal or for scheduling of a pretrial conference. Respondent's motion in this regard largely reiterates the arguments set forth in response to the summons. Respondent makes two new arguments, however. First, she suggests that the issuance of the summons may have violated the intent of the Internal Revenue Manual (IRM). Second, she suggests that this Court should adopt a rule that enforcement of a summons issued pursuant to 26 U.S.C. § 7602 before Tax Court litigation is commenced should be limited in the same manner as discovery under Bankruptcy Rule 2004 is limited once litigation between the parties has commenced.

Respondent does not actually allege that the IRM guidelines on issuing summonses were violated, since she acknowledges that the summons was issued *before* the FPAA was issued or the Tax Court proceedings begun, as the IRM permits. Nevertheless, Respondent deems suspicious the timing of the enforcement proceedings relative to the issuance of the FPAA and

the initiation of the Tax Court case. Respondent offers no evidence to support her suspicions that this enforcement proceeding violates the IRM's proscription on issuance of a post-FPAA summons. Even if she could offer evidence to that effect, the IRM itself confers no rights on Holloway here. *Matthews v. Commissioner*, T.C. Memo. 2008-126, 2008 WL 1946817, at *11 (U.S. Tax Ct. 2008) ("Initially, we note the well-settled principle that the Internal Revenue Manual does not have the force of law, is not binding on the IRS, and confers no rights on taxpayers.").

Respondent also asks the Court to create a new rule that bars summons enforcement once a Tax Court case or other litigation is commenced that concerns the subject of the summons. As noted, the government's power to enforce a summons does not terminate merely because a statutory notice of deficiency or final partnership administrative adjustment has been issued and a Tax Court proceeding has begun. It is hereby

ORDERED AND ADJUDGED that the petition to enforce Internal Revenue Summons, filed April 28, 2011 **[DE 1]**, is GRANTED. It is further

ORDERED AND ADJUDGED that the motion for summary dismissal and for a pretrial conference, filed October 19, 2011 **[DE 16]**, is DENIED. The Clerk of Court shall CLOSE this case and DENY any pending motions as MOOT.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 16th day of April, 2012.

/s/ KENNETH L. RYSKAMP
KENNETH L. RYSKAMP
UNITED STATES DISTRICT
JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

11-80460-MC-RYSKAMP/VITUNAC

UNITED STATES OF AMERICA, PETITIONER

v.

MARC JULIEN, AS TRUSTEE FOR THE 2005 ROBERT JULIEN DELAWARE DYNASTY TRUST,
RESPONDENT

Filed: Apr. 16, 2012

ORDER GRANTING PETITION TO ENFORCE INTERNAL REVENUE SUMMONS AND DENYING MOTION FOR SUMMARY DISMISSAL

THIS CAUSE comes before the Court pursuant to the petition to enforce Internal Revenue Summons, filed April 28, 2011 **[DE 1]**. The Court issued an order requiring a response to the summons on June 14, 2011 **[DE 6]**. Respondent answered the summons on August 18, 2011 **[DE 12]**, and the government replied on August 31, 2011 **[DE 14]**. The Court granted Dynamo Holdings Limited Partnership's ("DHLP") motion to intervene on August 30, 2011 **[DE 13]**, and DHLP filed its answer, which adopted Respondent's response, on September 6, 2011 **[DE 15]**. On October 19, 2011 **[DE**

18], Respondent and DHLP moved for summary dismissal or for scheduling of a pretrial conference. The government responded on November 7, 2011 [**DE 19**], and Respondent and DHLP replied on November 17, 2011 [**DE 20**]. This matter is ripe for adjudication.

According to the petition, Internal Revenue Agent Mary Fierfelder and the Internal Revenue Service have examined the tax returns of DHLP for the years ending December 31, 2005, December 31, 2006, and December 31, 2007. During the exam, issues arose with respect to debt that DHLP reported on its returns, including DHLP's questionable interest expenses in the amount of $17,000,000 in both 2006 and 2007. The summons seeks testimony and records that Mr. Julien may have regarding the tax reporting obligations of DHLP and deductions it has claimed.

As part of her investigation, on September 27, 2010, Agent Fierfelder issued an administrative summons (Form 2039) directing Mr. Julien to appear before her on October 25, 2010, to give testimony and to produce for examination certain books, records, papers or other data, as described in the summons. Agent Fierfelder served the summons on Mr. Julien in accordance with 26 U.S.C. § 7603 by handing a copy of the summons to him on September 28, 2010. On September 28, 2010, Agent Fierfelder served notice required by 26 U.S.C. § 7609(a) on the persons entitled to notice according to Exhibit B of the summons, by sending it by certified mail, as evidenced in the certificate of service on the reverse side of the summons. On October 25, 2010, Mr. Julien did not appear, and to date, Mr. Julien has

not produced any material or provided any testimony as sought in the summons.

As a result of the examination, the IRS issued a "Notice of Final Partnership Administrative Adjustment," ("FPAA") on December 28, 2010. On February 1, 2011, DHLP filed in the United States Tax Court a "Petition for Readjustment of Partnership Items Under Code Section 6226," assigned Docket number 2685-11, (the "Tax Court Petition"), challenging the determinations made by the Government in the FPAA. Thereafter, this proceeding was commenced to enforce the Summons in issue.

The government asserts that the information sought is in the possession, custody, or control of Mr. Julien and is not already in the possession of the Internal Revenue Service. The government asserts that the information sought may be relevant to the determination of the correctness of the federal tax reporting by DHLP for the tax years ending December 31, 2005, December 31, 2006, and December 31, 2007. The government also asserts that there is no Department of Justice referral, as defined in 26 U.S.C. § 7602(d)(2), in effect with respect to DHLP for the tax years covered by the summons. Further, the government asserts that all administrative steps for the issuance of the summonses have been followed and the summons has not been issued for any improper purpose.

To obtain enforcement of a summons, the government must establish that the summons is issued for a legitimate purpose, seeks information relevant to that

purpose, seeks information that is not already in the IRS's possession, and that the summons satisfies all administrative steps required by the Internal Revenue Code. *United States v. Powell*, 379 U.S. 48, 57-58 (1964).

Accordingly, on June 14, 2011, the Court required Mr. Julien to file a written response stating why he should not comply with the summons.

The Response fails to rebut the government's prima facie case. The Response discusses the Tax Court proceedings referenced above. But the fact that DHLP is challenging the FPAA in Tax Court is irrelevant since the subsequent initiation of a Tax Court proceeding has no effect on the summons enforcement process.

The Response contends that the government has possession of certain unspecified documents and information requested by the summons. That Response also alleges that the government has all the information it needs analyze the tax reporting obligations of DHLP. Yet Respondent does not deny that he has not provided all the documents and provided the testimony requested by the summons, and she has offered no facts or evidence to contradict Revenue Agent Fierfelder's Declaration that the government does not possess the documents sought.

The Response contends that the government may not establish a prima facie case through a declaration by a revenue agent. That position is baseless. *See United States v. Morse*, 532 F.3d 1130, 1132 (11th Cir. 2008) (stating that a sworn affidavit of the agent who

issued the summons is sufficient to demonstrate a prima facie case). The response also asserts that the Declaration of the Revenue Agent is unsworn, but the Declaration states it was made pursuant to 28 U.S.C. § 1746, which treats such declaration as having the same force and effect as a sworn declaration. Moreover, the Declaration was made pursuant to penalties of perjury.

The Respondent's affirmative defenses also fail. The Response first alleges that the government is engaged in an improper second examination of another taxpayer, Beekman Vista, Inc., and that information obtained through the summons might be used in the Beekman examination. The government has established a prima facie case that it has a legitimate need for the information sought by the summons to investigate DHLP. That there might be an additional use of the information does not render an otherwise enforceable summons unenforceable. *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 324 (1985).

The second ground offered for not enforcing the summons is that the government is displeased that DHLP declined to extend its statute of limitations period. This is mere conjecture unsupported by evidence. Establishing an improper purpose requires more than a naked assertion. *United States v. Millman*, 765 F.2d 27, 29 (2d Cir. 1985) (holding that a taxpayer must make "a substantial preliminary showing" that the IRS has abused its summons power) (quoting *Tiffany Fine Arts, Inc.*, 718 F.2d 7, 14 (2d Cir. 1983), *aff'd* 469 U.S. 310 (1985)). Even if the IRS were

displeased, such has no bearing on whether the issuance of a summons for information that is clearly relevant to the issues being examined was improper.

The Response's third grounds against enforcement of the summons is that the government's power to enforce a summons terminates when a taxpayer petitions the Tax Court because this might allow the government to obtain more information than it could by the Tax Court's discovery tools alone. The Response is incorrect as a matter of law. The government's power to enforce a summons does not terminate merely because a statutory notice of deficiency or FPAA has been issued and a Tax Court proceeding has begun. *PAA Mgmt., Ltd. v. United States*, 962 F.2d 212, 219 (2nd Cir. 1992). The validity of a summons is tested as of the date of issuance. Events occurring after the date of issuance, but before enforcement, should not affect enforceability. *See United States v. Centennial Builders, Inc.*, 747 F.2d 678, 681, n.1 (11th Cir. 1984).

The Response's fourth ground for non-enforcement of the summons is comity. The respondent posits that comity requires the Tax Court, which currently has DHLP's partnership proceeding, take over the instant summons enforcement proceeding because the two proceedings are the same. Contrary to the Response's assertion, the District Court and the Tax Court are not presented with the same lawsuit. The instant case involves the enforcement of a summons under section 7604 of the Internal Revenue Code ("IRC"). The Tax Court proceeding involves a chal-

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Respondent also maintains that DHLP's statute of limitations period for the years covered by the FPAA has expired, and that this would prevent the Summons from being enforceable.

The Response offers no authority for its position. The factual premise regarding DHLP's statute of limitations period is incorrect. The statute of limitations period for the DHLP tax years covered by the FPAA remains open. As noted in the Second Affirmative Defense, the IRS issued the FPAA prior to the close of the statute of limitations period. The period for making an assessment is extended under IRC § 6229(d) for one year after the conclusion of the Tax Court proceeding, which is ongoing.

Respondent also argues that the Summons should not be enforced because "the Government" told an attorney for DHLP that the government would not enforce the Summons if a petition was filed with the Tax Court. This allegation is nothing more than a bald assertion unsupported by any credible evidence.

Unsupported allegations are insufficient to rebut the government's prima facie case.

Arguing that he has raised "in a substantial way the existence of substantial deficiencies in the summons proceedings," Respondent demands discovery and a hearing. In support of this request, he cites *United States v. Southeast First National Bank of Miami Springs*, 655 F.2d 661 (5th Cir. 1981). This case was relied upon in *Nero Trading LLC v. United States*, 570 F.3d 1244, 1249 (11th Cir. 2009), which allowed a limited adversarial hearing to provide the taxpayer with a meaningful opportunity "to challenge the summons on any appropriate grounds," but may be limited as long as the court does not deny the taxpayer "his sole means of demonstrating the truth (or falsity) of his allegations." *Nero*, 570 F.3d at 1249 & n.3. Providing an adversarial hearing does not require an evidentiary hearing. *See Tiffany Fine Arts*, 469 U.S. at 324, n.7 (holding that district court did not abuse its discretion in determining "that an evidentiary hearing on the question of enforcement was unnecessary"). Significantly, the Eleventh Circuit faulted the district court in Nero for inadequately explaining its decision not to hold an evidentiary hearing, not for failing to hold one. *Nero*, 570 F.3d at 1250. *Nero* should not be read to require an evidentiary hearing upon a mere allegation of improper purpose. In *Tiffany Fine Arts*, the Supreme Court upheld the denial of an evidentiary hearing in a summons enforcement proceeding under similar circumstances and emphasized that "the burden of showing an abuse of the court's process is on the taxpayer." 469 U.S. at 324 n.7 ("We also find that it was

well within the District Court's discretion to conclude, after reviewing the submissions of the parties and holding oral argument, that an evidentiary hearing on the question of enforcement was unnecessary."). Here, the respondent has made no meaningful allegations of improper purpose which warrant the Court allowing discovery into and a hearing on the allegations raised in the Response. The Court will deny Respondent access to discovery and will not hold an evidentiary hearing.

Respondent also moves for summary dismissal or for scheduling of a pretrial conference. Respondent's motion in this regard largely reiterates the arguments set forth in response to the summons. Respondent makes two new arguments, however. First, he suggests that the issuance of the summons may have violated the intent of the Internal Revenue Manual (IRM). Second, he suggests that this Court should adopt a rule that enforcement of a summons issued pursuant to 26 U.S.C. § 7602 before Tax Court litigation is commenced should be limited in the same manner as discovery under Bankruptcy Rule 2004 is limited once litigation between the parties has commenced.

Respondent does not actually allege that the IRM guidelines on issuing summonses were violated, since he acknowledges that the summons was issued *before* the FPAA was issued or the Tax Court proceedings begun, as the IRM permits. Nevertheless, Respondent deems suspicious the timing of the enforcement proceedings relative to the issuance of the FPAA and

the initiation of the Tax Court case. Respondent offers no evidence to support his suspicions that this enforcement proceeding violates the IRM's proscription on issuance of a post-FPAA summons. Even if he could offer evidence to that effect, the IRM itself confers no rights on Julien here. *Matthews v. Commissioner*, T.C. Memo. 2008-126, 2008 WL 1946817, at *11 (U.S. Tax Ct. 2008) ("Initially, we note the well-settled principle that the Internal Revenue Manual does not have the force of law, is not binding on the IRS, and confers no rights on taxpayers.").

Respondent also asks the Court to create a new rule that bars summons enforcement once a Tax Court case or other litigation is commenced that concerns the subject of the summons. As noted, the government's power to enforce a summons does not terminate merely because a statutory notice of deficiency or final partnership administrative adjustment has been issued and a Tax Court proceeding has begun. It is hereby

ORDERED AND ADJUDGED that the petition to enforce Internal Revenue Summons, filed April 28, 2011 **[DE 1]**, is GRANTED. It is further

ORDERED AND ADJUDGED that the motion for summary dismissal and for a pretrial conference, filed October 19, 2011 **[DE 18]**, is DENIED. The Clerk of Court shall CLOSE this case and DENY any pending motions as MOOT.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 16th day of April, 2012.

/s/ KENNETH L. RYSKAMP
KENNETH L. RYSKAMP
UNITED STATES DISTRICT
JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

11-80461-MC-RYSKAMP/VITUNAC

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT JULIEN, RESPONDENT

Filed: Apr. 17, 2012

ORDER GRANTING PETITION TO ENFORCE INTERNAL REVENUE SUMMONS AND DENYING MOTION FOR SUMMARY DISMISSAL

THIS CAUSE comes before the Court pursuant to the petition to enforce Internal Revenue Summons, filed April 28, 2011 **[DE 1]**. The Court issued an order requiring a response to the summons on June 14, 2011 **[DE 3]**. Respondent answered the summons on August 18, 2011 **[DE 7]**, and the government replied on August 31, 2011 **[DE 9]**. The Court granted Dynamo Holdings Limited Partnership's ("DHLP") motion to intervene on August 30, 2011 **[DE 15]**, and DHLP filed its answer, which adopted Respondent's response, on September 6, 2011 **[DE 16]**. On October 19, 2011 **[DE 19]**, Respondent and DHLP moved for summary dis-

missal or for scheduling of a pretrial conference. The government responded on November 7, 2011 **[DE 21]**, and Respondent and DHLP replied on November 17, 2011 **[DE 22]**. This matter is ripe for adjudication.

According to the petition, Internal Revenue Agent Mary Fierfelder and the Internal Revenue Service have examined the tax returns of DHLP for the years ending December 31, 2005, December 31, 2006, and December 31, 2007. During the exam, issues arose with respect to debt that DHLP reported on its returns, including DHLP's questionable interest expenses in the amount of $17,000,000 in both 2006 and 2007. The summons seeks testimony and records that Mr. Julien may have regarding the tax reporting obligations of DHLP and deductions it has claimed.

As part of her investigation, on October 25, 2010, Agent Fierfelder issued an administrative summons (Form 2039) directing Mr. Julien to appear before her on December 3, 2010, to give testimony and to produce for examination certain books, records, papers or other data, as described in the summons. Agent Fierfelder served the summons on Mr. Julien in accordance with 26 U.S.C. § 7603 by handing a copy of the summons to him on October 28, 2010. On October 28, 2010, Agent Fierfelder served notice required by 26 U.S.C. § 7609(a) on the persons entitled to notice according to Exhibit B of the summons, by sending it by certified mail, as evidenced in the certificate of service on the reverse side of the summons. On December 3, 2010, Mr. Julien did not appear, and to date, Mr. Julien has

not produced any material or provided any testimony as sought in the summons.

As a result of the examination, the IRS issued a "Notice of Final Partnership Administrative Adjustment," ("FPAA") on December 28, 2010. On February 1, 2011, DHLP filed in the United States Tax Court a "Petition for Readjustment of Partnership Items Under Code Section 6226," assigned Docket number 2685-11, (the "Tax Court Petition"), challenging the determinations made by the Government in the FPAA. Thereafter, this proceeding was commenced to enforce the Summons in issue.

The government asserts that the information sought is in the possession, custody, or control of Mr. Julien and is not already in the possession of the Internal Revenue Service. The government asserts that the information sought may be relevant to the determination of the correctness of the federal tax reporting by DHLP for the tax years ending December 31, 2005, December 31, 2006, and December 31, 2007. The government also asserts that there is no Department of Justice referral, as defined in 26 U.S.C. § 7602(d)(2), in effect with respect to DHLP for the tax years covered by the summons. Further, the government asserts that all administrative steps for the issuance of the summonses have been followed and the summons has not been issued for any improper purpose.

To obtain enforcement of a summons, the government must establish that the summons is issued for a legitimate purpose, seeks information relevant to that

purpose, seeks information that is not already in the IRS's possession, and that the summons satisfies all administrative steps required by the Internal Revenue Code. *United States v. Powell*, 379 U.S. 48, 57-58 (1964).

Accordingly, on May 3, 2011, the Court required Mr. Julien to file a written response stating why he should not comply with the summons.

The Response fails to rebut the government's prima facie case. The Response discusses the Tax Court proceedings referenced above. But the fact that DHLP is challenging the FPAA in Tax Court is irrelevant since the subsequent initiation of a Tax Court proceeding has no effect on the summons enforcement process.

The Response contends that the government has possession of certain unspecified documents and information requested by the summons. That Response also alleges that the government has all the information it needs analyze the tax reporting obligations of DHLP. Yet Respondent does not deny that he has not provided all the documents and provided the testimony requested by the summons, and she has offered no facts or evidence to contradict Revenue Agent Fierfelder's Declaration that the government does not possess the documents sought.

The Response contends that the government may not establish a prima facie case through a declaration by a revenue agent. That position is baseless. *See United States v. Morse*, 532 F.3d 1130, 1132 (11th Cir. 2008) (stating that a sworn affidavit of the agent who

issued the summons is sufficient to demonstrate a prima facie case). The response also asserts that the Declaration of the Revenue Agent is unsworn, but the Declaration states it was made pursuant to 28 U.S.C. § 1746, which treats such declaration as having the same force and effect as a sworn declaration. Moreover, the Declaration was made pursuant to penalties of perjury.

The Respondent's affirmative defenses also fail. The Response first alleges that the government is engaged in an improper second examination of another taxpayer, Beekman Vista, Inc., and that information obtained through the summons might be used in the Beekman examination. The government has established a prima facie case that it has a legitimate need for the information sought by the summons to investigate DHLP. That there might be an additional use of the information does not render an otherwise enforceable summons unenforceable. *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 324 (1985).

The second ground offered for not enforcing the summons is that the government is displeased that DHLP declined to extend its statute of limitations period. This is mere conjecture unsupported by evidence. Establishing an improper purpose requires more than a naked assertion. *United States v. Millman*, 765 F.2d 27, 29 (2d Cir. 1985) (holding that a taxpayer must make "a substantial preliminary showing" that the IRS has abused its summons power) (quoting *Tiffany Fine Arts, Inc.*, 718 F.2d 7, 14 (2d Cir. 1983), *aff'd* 469 U.S. 310 (1985)). Even if the IRS were

displeased, such has no bearing on whether the issuance of a summons for information that is clearly relevant to the issues being examined was improper.

The Response's third grounds against enforcement of the summons is that the government's power to enforce a summons terminates when a taxpayer petitions the Tax Court because this might allow the government to obtain more information than it could by the Tax Court's discovery tools alone. The Response is incorrect as a matter of law. The government's power to enforce a summons does not terminate merely because a statutory notice of deficiency or FPAA has been issued and a Tax Court proceeding has begun. *PAA Mgmt., Ltd. v. United States*, 962 F.2d 212, 219 (2nd Cir. 1992). The validity of a summons is tested as of the date of issuance. Events occurring after the date of issuance, but before enforcement, should not affect enforceability. *See United States v. Centennial Builders, Inc.*, 747 F.2d 678, 681, n.1 (11th Cir. 1984).

The Response's fourth ground for non-enforcement of the summons is comity. The respondent posits that comity requires the Tax Court, which currently has DHLP's partnership proceeding, take over the instant summons enforcement proceeding because the two proceedings are the same. Contrary to the Response's assertion, the District Court and the Tax Court are not presented with the same lawsuit. The instant case involves the enforcement of a summons under section 7604 of the Internal Revenue Code ("IRC"). The Tax Court proceeding involves a challenge to the adjustments to DHLP's partnership items

under IRC § 6226. The Tax Court does not have jurisdiction to consider summons enforcement proceedings, IRC § 7604(a); *Ash v. Comm'r*, 96 T.C. 459, 462 (1991), and the district court, in a summons enforcement proceeding, does not have jurisdiction to consider the FPAA adjustments to DHLP's tax reporting. *Morse*, 532 F.3d at 1132 (holding a court in a summons enforcement proceeding does not have authority over the validity of a tax assessment).

Respondent also maintains that DHLP's statute of limitations period for the years covered by the FPAA has expired, and that this would prevent the Summons from being enforceable. The Response offers no authority for its position. The factual premise regarding DHLP's statute of limitations period is incorrect. The statute of limitations period for the DHLP tax years covered by the FPAA remains open. As noted in the Second Affirmative Defense, the IRS issued the FPAA prior to the close of the statute of limitations period. The period for making an assessment is extended under IRC § 6229(d) for one year after the conclusion of the Tax Court proceeding, which is ongoing.

Respondent also argues that the Summons should not be enforced because "the Government" told an attorney for DHLP that the government would not enforce the Summons if a petition was filed with the Tax Court. This allegation is nothing more than a bald assertion unsupported by any credible evidence. Unsupported allegations are insufficient to rebut the government's prima facie case.

Arguing that he has raised "in a substantial way the existence of substantial deficiencies in the summons proceedings," Respondent demands discovery and a hearing. In support of this request, he cites *United States v. Southeast First National Bank of Miami Springs*, 655 F.2d 661 (5th Cir. 1981). This case was relied upon in *Nero Trading LLC v. United States*, 570 F.3d 1244, 1249 (11th Cir. 2009), which allowed a limited adversarial hearing to provide the taxpayer with a meaningful opportunity "to challenge the summons on any appropriate grounds," but may be limited as long as the court does not deny the taxpayer "his sole means of demonstrating the truth (or falsity) of his allegations." *Nero*, 570 F.3d at 1249 & n.3. Providing an adversarial hearing does not require an evidentiary hearing. *See Tiffany Fine Arts*, 469 U.S. at 324, n.7 (holding that district court did not abuse its discretion in determining "that an evidentiary hearing on the question of enforcement was unnecessary"). Significantly, the Eleventh Circuit faulted the district court in Nero for inadequately explaining its decision not to hold an evidentiary hearing, not for failing to hold one. *Nero*, 570 F.3d at 1250. *Nero* should not be read to require an evidentiary hearing upon a mere allegation of improper purpose. In *Tiffany Fine Arts*, the Supreme Court upheld the denial of an evidentiary hearing in a summons enforcement proceeding under similar circumstances and emphasized that "the burden of showing an abuse of the court's process is on the taxpayer." 469 U.S. at 324 n.7 ("We also find that it was well within the District Court's discretion to conclude, after reviewing the submissions of the parties and

holding oral argument, that an evidentiary hearing on the question of enforcement was unnecessary."). Here, the respondent has made no meaningful allegations of improper purpose which warrant the Court allowing discovery into and a hearing on the allegations raised in the Response. The Court will deny Respondent access to discovery and will not hold an evidentiary hearing.

Respondent also moves for summary dismissal or for scheduling of a pretrial conference. Respondent's motion in this regard largely reiterates the arguments set forth in response to the summons. Respondent makes two new arguments, however. First, he suggests that the issuance of the summons may have violated the intent of the Internal Revenue Manual (IRM). Second, he suggests that this Court should adopt a rule that enforcement of a summons issued pursuant to 26 U.S.C. § 7602 before Tax Court litigation is commenced should be limited in the same manner as discovery under Bankruptcy Rule 2004 is limited once litigation between the parties has commenced.

Respondent does not actually allege that the IRM guidelines on issuing summonses were violated, since he acknowledges that the summons was issued *before* the FPAA was issued or the Tax Court proceedings begun, as the IRM permits. Nevertheless, Respondent deems suspicious the timing of the enforcement proceedings relative to the issuance of the FPAA and the initiation of the Tax Court case. Respondent offers no evidence to support his suspicions that this

enforcement proceeding violates the IRM's proscription on issuance of a post-FPAA summons. Even if he could offer evidence to that effect, the IRM itself confers no rights on Julien here. *Matthews v. Commissioner*, T.C. Memo. 2008-126, 2008 WL 1946817, at *11 (U.S. Tax Ct. 2008) ("Initially, we note the well-settled principle that the Internal Revenue Manual does not have the force of law, is not binding on the IRS, and confers no rights on taxpayers.").

Respondent also asks the Court to create a new rule that bars summons enforcement once a Tax Court case or other litigation is commenced that concerns the subject of the summons. As noted, the government's power to enforce a summons does not terminate merely because a statutory notice of deficiency or final partnership administrative adjustment has been issued and a Tax Court proceeding has begun. It is hereby

ORDERED AND ADJUDGED that the petition to enforce Internal Revenue Summons, filed April 28, 2011 **[DE 1]**, is GRANTED. It is further

ORDERED AND ADJUDGED that the motion for summary dismissal and for a pretrial conference, filed October 19, 2011 **[DE 19]**, is DENIED. The Clerk of Court shall CLOSE this case and DENY any pending motions as MOOT.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 16th day of April, 2012.

/s/ KENNETH L. RYSKAMP
KENNETH L. RYSKAMP
UNITED STATES DISTRICT
JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 11-mc-80456-RYSKAMP/VITUNAC

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL CLARKE AS CHIEF FINANCIAL OFFICER OF BEEKMAN VISTA, INC., ET AL., RESPONDENTS

AND

DYNAMO HOLDINGS LIMITED PARTNERSHIP, INTERVENOR

Filed: Oct. 19, 2011

MOTION FOR SUMMARY DISMISSAL OR SCHEDULING OF PRETRIAL CONFERENCE

Respondents, MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF BEEKMAN VISTA, INC., MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF DYNAMO HOLDINGS, INC., and ROBERT JULIEN, together with Intervenor, DYNAMO HOLDINGS LIMITED PARTNERSHIP (hereinafter "DHLP") (collectively "Movants") by and through their undersigned attorney, move the Court, for alternative relief as follows: (1) pursuant to its

inherent authority to control its own proceedings, to dismiss summarily the petitions to enforce IRS Summonses at issue in these consolidated cases for the government's failure to cooperate in providing evidence necessary to the proper determination of the issues; or, (2) pursuant to Fed. R. Civ. P. Rule 16, to schedule a pretrial conference for the purpose of formulating and simplifying the issues in the case, obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and to control and schedule discovery. In support, Movants say:

SUPPORTING MEMORANDUM
FACTUAL BACKGROUND

This action involves an attempt by the government to enforce five Internal Revenue Service administrative summonses purportedly served in respect of the examination of the tax returns of DHLP for the calendar years ending December 31, 2005, 2006 and 2007. Each summons states on its front page on a line marked "In the matter of" the name "Dynamo Holdings Limited Partnership." 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." As alleged in the petitions, none of the persons summoned appeared to be examined on the dates indicated on the summonses. The government did not commence enforcement proceedings in respect of these summonses within three days after the failure of the witnesses to appear. Instead, it proceeded to prepare and issue a Final Partnership Administrative Adjustment (hereinafter

"FPAA") for DHLP. A copy of the FPAA is attached to the responses of each Respondent in this action. *See, e.g.*, DE#7-2 in this case. 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. *White and Case v. U.S.*, 22 Ct. Cl. 734, 736 (Ct. Cl. 1991). IRS Agent Mary Fierfelder (hereinafter "Fierfelder"), in her declaration supporting the petitions here says, in the past tense, that the IRS "has examined" the subject returns, DE#1-2, ¶2, not that it is "in the process" of such an examination.

After the FPAA was issued, DHLP commenced an action in the Tax Court seeking readjustment of partnership items adjusted in the FPAA pursuant to Code Section 6226. DE#7-1 in this action. The government, through Special Trial Counsel David Flassing (hereinafter "Flassing"), has answered the petition in the Tax Court. Discovery is available to both parties in those proceedings under the Tax Court Discovery Rules, of which this Court has taken judicial notice. *See* DE#12-1 in this case. Indeed, Flassing has commenced discovery in the Tax Court case. *See, e.g.*, Exhibit "A" attached. Upon information and belief, 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. This is shown by the fact that the enforcement actions 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 month after Flassing answered the Tax Court petition.

In an examination pursuant to a Tax Court 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. This procedure is available only to the government. Taxpayers or other targets of IRS investigations have no right to such resources. 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 any kind are the exception rather than the norm. *See*, *e.g.*, Tax Court Rule 70(a)(1). However, the discovery methods that are available are equally available to the parties.

While the petitions for enforcement here suggest that enforcement is being sought independently of the Tax Court case by attorneys in the Department of Justice at the behest of a local IRS agent, Mary Fierfelder (hereinafter "Fierfelder") for "proper purposes", the truth is otherwise. Christine Moog, the subject of the sixth summons, appeared and was examined in New York. *See*, Exhibit "B" attached. 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 IRS attorney, Lisa Goldberg. *Id*. Moreover, in the Tax Court case, Flassing: (1) 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, *see* Exhibit "C" attached; (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, Exhibit "D" attached; and, (3) through Goldberg,[1] 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* Exhibit "E" attached.

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"). A copy of the portion of the Manual referred to as the Handbook is attached as Exhibit "F." 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. Handbook, ¶25.5.4.4.8 (3). 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

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

IRS summonses. *Cunningham v. C.I.R.*, 165 B.R. 599, 607 (N.D. Texas 1993).

In order to support their position that the enforcement proceedings here, like the issuance of a summons after the issuance of a statutory notice of deficiency, is abusive, respondents requested from the government several documents and dates for the depositions of witnesses who would have knowledge of relevant facts. Exhibit "G." The government refused to provide the documents or dates for the depositions. Exhibit "H."

ARGUMENT AND AUTHORITIES

IRS summonses are administrative devices that are typically enforced by United States District Courts unless the witness summoned or the target of the investigation establishes that the summons was not properly issued or that enforcement would constitute an abuse of process. *U.S. v. Powell*, 379 U.S. 48, 57-58 (1964). While such proceedings are often handled via summary procedure, the person subjected to the summons is entitled to a hearing. *Id.*, n.18. Where, as here, the target has presented a colorable claim that the enforcement of the summons would be abusive, both discovery and an evidentiary hearing are in order. *U.S. v. Southeast First National Bank of Miami Springs*, 655 F. 2d 661 (5th Cir. Unit B, 1981).[2] Here the government has failed to cooperate in providing

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[2] Cases decided by the Fifth Circuit Unit B before midnight September 30, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard, Alabama*, 661 F. 2d 1206 (11th Cir. 1981). The cited case was decided September 15, 1981.

the Court with the information necessary to resolve the issue before it, or even to acknowledge any responsibility to do so where there is clearly a colorable claim that the conduct of the IRS in seeking enforcement of these summonses is abusive.

As noted above, the Handbook provides guidance for the issuance and enforcement of IRS summonses. It authorizes Internal Revenue Agents, such as Fierfelder, to issue summonses to third party witnesses, such as the Respondents, only when the agent's manager or supervisory official has given prior approval. Handbook, ¶25.5.1.3.3 (1). Even though all of the summonses at issue were directed to third parties as opposed to DHLP itself, the government has refused to provide Movants with a copy of any request for such approval. 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." Handbook ¶25.5.10.3 (2). Even though Movants have challenged the regularity of the procedure followed in enforcing the summonses, the government has refused to provide Respondents with a copy of any such report. The Handbook provides that the IRS employee who issued the summons is responsible for the preparation of all requests for civil enforcement using "either the memorandum report format or Form 4443, Summons Referral." Handbook ¶25.5.10.4 (4). Again, despite the issues raised by Movants, the government has refused to provide Respondents with a copy of any such requests. In terms of referral for enforcement, the Handbook calls for the

preparation of a "summons referral" and the sending of that form to the "Technical Services function" (or "TSf") within three business days after the witness fails or refuses to comply, and, if a summons is not referred within that time, the file must be documented to explain why. Handbook, ¶25.5.10.4.1.1 (1)-(3). Despite Movants' challenge of the suspicious timing of the enforcement proceedings relative to the issuance of the FPAA and the initiation of the Tax Court case, the government has refused to provide Movants with a copy of any such documentation.

The failure of the government to follow its own guidelines for the issuance and enforcement of summonses in the ordinary course is itself evidence that these enforcement proceedings are not brought for the purposes for which IRS summonses are authorized, and that, instead, these enforcement proceedings are an abusive attempt to use this Court's processes to evade the strictures of the Tax Court Discovery Rules. The purposes for which IRS summonses are authorized, to the extent applicable here, is examining tax returns preparatory to issuance of a FPAA. Where the summonses are to be used for collection proceedings or criminal enforcement, they are required to disclose those purposes, and these do not. Instead, these summonses identify three tax returns to be examined that, according to Fierfelder, the IRS has already examined and issued a final adjustment. She makes no caveat that the IRS had started the examination or that it was not completed. Indeed, she cannot truthfully say as much since on December 28, 2010, the government issued its FPAA, DE#7-2, p. 1, which

had been signed by her, *id.*, p. 5, on August 11, 2010. From its name, *i.e*, "Final Partnership Administrative Adjustment," and its reference to the three years under examination identified in the summonses, it is apparent 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* Fierfelder signed the FPAA on August 11, 2010.[3] While the FPAA may not formally have been issued until December, it is not logical that Fierfelder, having signed the FPAA already on August 11, 2010, would need to issue the summonses in question in order to complete the "final" report that she had already completed. There must have been some ulterior motive, whether that be retribution for DHLP's refusal to grant a further extension of the applicable statute of limitations, a subterfuge to gather information related to Beekman Vista, Inc., in order to justify reopening the examination of its returns for the same periods or part of a larger scheme on the part of the government to send out such summonses in hopes of being able to use them to subvert the Tax Court Discovery Rules once a Tax Court case was commenced.

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[3] The summonses were issued, respectively, on: September 24, 2010 (Michael Clarke as CFO of Beekman Vista, Inc. and Michael Clarke as CFO of Dynamo GP, Inc.); September 27, 2010 (Rita Holloway as Trustee of the 2005 Christine Moog Family Delaware Dynasty Trust and Marc Julien as Trustee of the 2005 Robert Julien Family Delaware Dynasty Trust); and October 25, 2010 (Robert Julien). The date of issuance of each summons is set forth in paragraph 5 of the petition seeking to enforce it.

It is undisputed that DHLP declined an additional one year extension of the statute of limitations on its tax year ended December 31, 2005 shortly before this flurry of summonses at issue here was issued. The issuance of the summonses shortly after the refusal to extend the statute of limitations gives rise to the inference that the summonses were issued as retribution for the refusal to grant the extension. DHLP has the right to explore this issue through discovery.

A more sinister reason for the government to try to enforce these summonses is its attempt to re-open its examination of Beekman Vista's tax returns for the relevant time period. The examination of those returns was previously completed and resolved by Beekman paying the government over $28 million. Now, however, the government has given signs suggesting that it continues to seek information about Beekman Vista in order to justify a second examination. Seeking information about Beekman Vista via summonses stating on their faces that they relate to the examination of DHLP is dishonest. DHLP has the right to explore this issue through discovery.

The requests for information made in the summonses relate to the issues before the Tax Court in respect of DHLP's petition for readjustment of the adjustments demanded by the government in the FPAA. While the government's petition and supporting papers, following a form set forth in the Handbook, make broad statements concerning the purpose of the summonses, they do not identify any issue to which that information might relate other than the

issues before the Tax Court.[4] All of those issues, if relevant and necessary to that case, should be available under the Tax Court Discovery Rules. This combined with the facts that the summonses were issued after the FPAA was signed, and that they were not enforced until after the Tax Court had been filed and answered, gives rise to the inference that the government, anticipating that there would be litigation in the Tax Court, and that its discovery in the Tax Court would be limited, as a matter of course issued the summonses at issue here even though not needed to complete the FPAA solely for the purpose of evading the Tax Court Discovery Rules. DHLP has the right to explore this issue through discovery.

In order to get at the explanation, if any, for this otherwise inexplicable behavior, a deposition of Fierfelder and her supervisor is necessary. The government has refused to cooperate in the scheduling of those depositions, frustrating Movants' ability to defend these proceedings.

All of the requested documentation is relevant to whether the summonses at issue here were properly issued and whether their enforcement would be abu-

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[4] The information in requested in the summonses might also be relevant to the tax returns of Beekman Vista for the listed tax years, but, as noted above, it would be improper for the IRS to seek that information in these summonses. Unfortunately, in order fully to analyze the relevance of the information requested to anything the government could do legitimately, the Court would need to analyze all of the issues raised by the FPAA and challenged in the petition in the Tax Court.

sive. The documentation is exclusively in the possession of the government, yet it refuses to provide that information for consideration by the Court. For the government's refusal to cooperate, the Court should exercise its inherent authority to control the proceedings before it to dismiss summarily the petitions for enforcement here. Clearly, the government ONLY wants these summonses enforced in order to get discovery for the Tax Court case or for use in the second Beekman Vista examination. While whatever discovery the government needs in the Tax Court case can be obtained there, the government is not content to follow the rules of that court and instead seeks to enlist this Court to relieve it of those rules. Not only is that an abuse of this Court's processes, it is an attempt to draw this Court into a violation of the rules of comity. The rules of comity teach that this Court should defer to the Tax Court which had jurisdiction of the controversy between DHLP and the government well before these enforcement proceedings were commenced. *Merrill Lynch Pierce Fenner & Smith, Inc., v. Haydu*, 675 F. 2d 1169, 1174 (11th Cir. 1982).

There is no case that holds that the government has carte blanche to issue and serve IRS summonses on the eve of issuance of a FPAA knowing that enforcement of the summonses would be of no use in *examining* the tax returns of a target, but, rather, would be useful only in evading the strictures of the discovery rules of the Tax Court. While there are multiple cases that suggest that wide latitude must be given to the government in enforcing such summonses, all contain the caveat that this is not so when issuance of the

summonses was not done in accordance with law, when enforcement would constitute an abuse of the enforcing court's process, or when the government is behaving abusively or in bad faith. Besides the apparent bad faith attempt to obtain information about Beekman Vista under the guise of seeking information about DHLP, in this case the government is abusively attempting to use this Court's process to subvert the discovery rules of the Tax Court to the disadvantage of DHLP. This behavior should be evaluated just as attempts to use Bankruptcy Rule 2004 examinations to evade discovery rules in pending litigation are evaluated, which would mean finding them inherently abusive and impermissible.

There is no good reason that enforcement of a summons issued pursuant to 26 U.S.C. § 7602 before Tax Court litigation is commenced should not be limited just as discovery under Bankruptcy Rule 2004 is limited once litigation between the parties has commenced. Rule 2004 was enacted by Congress to permit those involved in the administration of the bankruptcy laws, such as bankruptcy trustees and other parties in interest, to conduct wide-ranging discovery to ensure the proper liquidation or reorganization of bankruptcy estates. *In re: Bennett Funding Group, Inc.*, 203 B.R. 24, 27-28 (Bkrptcy. NDNY 1996). Discovery under this rule can even be in the nature of a "fishing expedition" so long as it is arguably related to the property of the bankruptcy estate or the financial affairs of the debtor. *Id.*; *In re Szadkowski*, 198 B.R. 140, 141 (Bkrptcy. D. Md. 1996) ("A Rule 2004 examination allows a broad "fishing expedition" into an

entity's affairs for the purpose of obtaining information relevant to the administration of the bankruptcy estate.'). However, once actual litigation commences between the party seeking Rule 2004 discovery and the party from or about whom discovery is sought, further discovery related to the subject matter of the litigation pursuant to Rule 2004 is prohibited. *In re: 2435 Plainfield Avenue, Inc. (2435 Plainfield Avenue, Inc. v. Township of Scotch Plains)*, 223 B.R. 440, 455-56 (Bkrptcy. D.N.J. 1998) (compiling cases) *aff'd* 213 F.3d 629 (3rd Cir. 2000); *Szadkowski, supra*, 142; *Bennett, supra*, 29-30.

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[5] (5th Cir. 1995) (no Rule 2004 discovery on subject matter of state court litigation between parties). The decisions limiting the use of Rule 2004 discovery in the face of litigation concerning the same subject matter assume that the discovery

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[5] Although the opinion affirming the trial court decision was not chosen for publication by the Fifth Circuit Court of Appeals, under the rules of that court, unpublished decisions issued before January 1, 1996, are binding precedent. Fifth Circuit Court of Appeals Rule 47.5.3.

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.

Like Rule 2004, §7602 was enacted by Congress to permit those involved in the administration of the tax laws to conduct wide-ranging discovery to ensure the proper reporting of income, assessment of and calculating of taxes. This is obvious from the face of the statute itself which states, *inter alia*: "For the purpose of ascertaining the correctness of any return . . . the Secretary or his delegate is authorized—. . . (2) To summon . . . any person having possession, custody or care of books of account containing entries relating to the business of the person liable for tax . . . to appear before the Secretary or his delegate" to produce documents and give testimony.. So long as it "may" relate to the intended purpose, discovery under § 7602 can even be in the nature of what appears to be a "fishing expedition" so long as arguably related to the stated purpose of the statute. *U.S. v. Giordano*, 419 F. 2d 564, 568 (8th Cir. 1969) ("Taxpayer in his brief characterized the Government's efforts as a 'fishing expedition.' If so, the Secretary or his delegate has been specifically licensed to fish by 7602."). Just as is the case with bankruptcy related litigation, such broad discovery is not available in the litigation that might arise between the government and the target of an investigation.

The types of litigation that might ensue are limited to litigation between the government and the taxpayer. That litigation will necessarily be in either the Tax

Court; the Court of Federal Claims; a United States District Court, including the affiliated bankruptcy courts; or state court. All of those forums have rules governing discovery that are far more restrictive and provide far more procedural safeguards for the litigants than those applicable under a §7602 summons. Here the parties are already litigating all issues relating to the tax returns identified in the summonses in the Tax Court. As in *Bennett, supra*, at 29-30 "it is difficult at this point, if not impossible, to determine whether and to what extent information gleaned from . . . [the requested examination] will not be related to the parties and subject matter covered by the [pleading in the pending litigation]."

As has been accepted with respect to Rule 2004 discovery for many years, it is obvious that permitting the use of §7602 discovery that has no other apparent legitimate purpose, but is clearly relevant to litigation pending between the government and a target of an examination, is inherently wrong. It fails to give due deference to the rules and procedures of the court in which the litigation is pending. It permits the government to obtain discovery that the rules of the court in which the litigation is pending 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. That should be the rule for examinations under §7602 as well.

Once a Tax Court case has been commenced, the Tax Court Discovery Rules, of which this Court has

taken notice, are similar to the Federal Rules of Civil Procedure, with the caveat that the Tax Court "expects the parties to attempt to attain the objectives of discovery through informal consultation or communication . . . " and depositions are exceptions, not the norm. Tax Ct. Rule 70(a). As the government admits in §25.5 . . . . of the Handbook, summonses under §7602 are not to be issued *after* the issuance of a Statutory Notice of Deficiency ("SND") (the functional equivalent of the FPAA here) or once Tax Court litigation commences, *as this would be deemed abusive*. In the instant case the FPAA was issued in December, 2010, in the same form as was signed on August 11, 2010, and Dynamo Holdings Limited Partnership ("DHLP") commenced Tax Court litigation by filing its Petition for Readjustment of Partnership Items Under Code Section 6226, assigned Docket number 2685-11 (the "Petition") on February 1, 2011. Although the summonses at issue here were issued before the FPAA, the government's attempt to enforce these summonses now, after no attempts when it could have done any good in the preparation of the FPAA, is obviously part of a design to evade the applicable Tax Court Discovery Rules. In this regard, there is no practical difference between summonses issued after an FPAA or SND which the IRS Manual prohibits, and summonses issued before the FPAA or SND but never sought to be enforced in time to use the information to prepare the FPAA or SND for the proper purpose of examining tax returns as we have here.

If the petitions are not dismissed summarily for the government's failure to cooperate in providing the Court with necessary evidence, at the very least, the Court should schedule a pretrial conference under Rule 16 for the purpose of formulating and simplifying the issues in this case, obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and to control and schedule discovery.

WHEREFORE, Movants, MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF BEEKMAN VISTA, INC., MICHAEL CLARKE, AS CHIEF FINANCIAL OFFICER OF DYNAMO HOLDINGS, INC., ROBERT JULIEN, and DYNAMO HOLDINGS LIMITED PARTNERSHIP respectfully move the Court, for alternative relief as follows: (1) pursuant to its inherent authority to control its own proceedings, to dismiss summarily the petitions to enforce IRS Summonses at issue in these consolidated cases for the government's failure to cooperate in providing evidence necessary to the proper determination of the issues; or, (2) pursuant to Fed. R. Civ. P. Rule 16, to schedule a pretrial conference for the purpose of formulating and simplifying the issues in the case, obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and to control and schedule discovery and award such other and further relief as may be appropriate under the circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 19, 2011, I electronically filed the foregoing document and Exhibits "A" through "H" with the Clerk of the Court using CM/ECF. 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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APPENDIX I

1. 26 U.S.C. 6201(a) (Supp. V 2011) provides in pertinent part:

Assessment authority

(a) Authority of Secretary

The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law.

* * * * *

2. 26 U.S.C. 7601(a) provides:

Canvass of districts for taxable persons and objects

(a) General rule

The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

3. 26 U.S.C. 7602 provides:

Examination of books and witnesses

(a) Authority to summon, etc.

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 Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(b) Purpose may include inquiry into offense

The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

(c) Notice of contact of third parties

(1) General notice

An officer or employee of the Internal Revenue Service may not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer without providing reasonable notice in advance to the taxpayer that contacts with persons other than the taxpayer may be made.

(2) Notice of specific contacts

The Secretary shall periodically provide to a taxpayer a record of persons contacted during such period by the Secretary with respect to the determination or collection of the tax liability of such taxpayer. Such record shall also be provided upon request of the taxpayer.

(3) Exceptions

This subsection shall not apply—

(A) to any contact which the taxpayer has authorized;

(B) if the Secretary determines for good cause shown that such notice would jeopardize

collection of any tax or such notice may involve reprisal against any person; or

(C) with respect to any pending criminal investigation.

(d) No administrative summons when there is Justice Department referral

(1) Limitation of authority

No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

(2) Justice Department referral in effect

For purposes of this subsection—

(A) In general

A Justice Department referral is in effect with respect to any person if—

(i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws, or

(ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.

(B) Termination

A Justice Department referral shall cease to be in effect with respect to a person when—

(i) the Attorney General notifies the Secretary, in writing, that—

(I) he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws,

(II) he will not authorize a grand jury investigation of such person with respect to such an offense, or

(III) he will discontinue such a grand jury investigation,

(ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or

(iii) the Attorney General notifies the Secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in subparagraph (A)(ii).

(3) Taxable years, etc., treated separately

For purposes of this subsection, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately.

(e) Limitation on examination on unreported income

The Secretary shall not use financial status or economic reality examination techniques to determine the existence of unreported income of any taxpayer unless the Secretary has a reasonable indication that there is a likelihood of such unreported income.