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August 27, 2015

VIA ECF AND E-MAIL

Hon. Shira A. Scheindlin
United States District Judge
Daniel Patrick Moynihan Courthouse
500 Pearl Street
New York, New York 10007-1312

Re: *SEC v. Wyly*, No. 1:10-CV-5760 (SAS)

Dear Judge Scheindlin:

We write in response to the SEC's August 25, 2015 letter regarding a collateral estoppel opinion issued earlier this week by the United States Bankruptcy Court for the Northern District of Texas. (A copy of the relevant opinion was enclosed with the SEC's letter.) Through this letter, Defendants Sam Wyly and Donald R. Miller, Jr., in his capacity as executor of the Estate of Charles Wyly, respectfully request a pre-motion conference to discuss a potential Rule 60(b) motion for relief from the Final Judgment in this case.

As the Court is already aware, the SEC obtained a judgment in this case premised on a novel tax-based disgorgement theory. After this Court accepted that theory, the IRS—which has never been a party to this case—sought to use this Court's past tax-related rulings to preclude the Defendants from challenging their tax liability in separate litigation before the Bankruptcy Court. In an August 24 opinion granting the IRS partial summary judgment, the Bankruptcy Court has effectively treated this Court's disgorgement ruling as a final adjudication of the Wylys' tax liability, at least in relevant part.

The Bankruptcy Court's opinion contains a lengthy discussion regarding whether this Court actually "intended for the facts determined and issues decided in the Disgorgement Opinion to be given . . . preclusive effect by subsequent courts." Although the Bankruptcy Court ultimately concluded that this Court

intended the Disgorgement Opinion to have preclusive effect in litigation between the Wylys and the IRS with respect to certain itemized findings, the Bankruptcy Court also invited Defendants, in footnote 24 of the ruling, to "file a motion asking the District Court to elaborate on" its intentions.

In light of this development, Defendants seek to file a Rule 60(b) motion for relief from the judgment. As we understand this Court's rulings, it *did not* intend to conclusively resolve tax questions in a manner that would bind the Defendants in tax litigation. To the contrary, the Court disavowed any claim of jurisdiction to do so several times during the proceedings. Indeed, the Court's statement in footnote 205 of its September 24, 2014 Opinion anticipated that the disgorgement order could be voided "in the event there is a judicial determination . . . that the IOM Trusts are, in fact, tax-exempt non-grantor trusts." Any such contemplation would be rendered hollow if (as the Bankruptcy Court has now concluded) this Court's ruling nonetheless binds the Wylys in tax litigation against the IRS.[1] Even the SEC, in its letter of February 27, 2015 addressing the form of the Final Judgment, acknowledged that the judgment was to leave open the possibility of future tax litigation.

To avoid a perverse, unintended and unjust result, we respectfully request that the Court now vacate the judgment or otherwise clarify that it was not intended to have preclusive effect in litigation between the Wylys and the IRS.

Respectfully submitted,

Mark H. Hatch-Miller
Susman Godfrey, LLP

cc: All Counsel of Record via ECF

[1] The Court contemplated that such a determination could result if the IRS proceeded with an administrative or civil action against the Wylys, which is exactly what has happened.