United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No: 09-1260

MARTIN A. ARMSTRONG,

Petitioner,

v.

SECURITITES AND EXCHANGE COMMISSION,

Respondent.

DECLARATION OF MARTIN A. ARMSTRONG

I, Martin A. Armstrong, age 61, currently reside under home confinement at 4 Arthur Court, Medford, New Jersey, declare as follows:

Princeton Economics International and the Princeton Notes

1. In or about 1987, I founded Princeton Economics International, Ltd. ("PEI"), a Turks & Caicos company and a holding company whose primary business was global economic and market forecasting. PEI became a franchise type operation with different offices and managing

partners of each entity located in London, England, Tokyo, Japan, Hong Kong, China and Sydney, Australia. I did not operate PEI's market forecasting business from the United States exclusively, nor did I manage and control all the PEI offices, which employed about 240 people, all whom worked outside the United States. Because I continually travelled around the world and gave financial seminars, the managing partner of each office ran each office as he saw fit I was not a director of any of those companies, and I did not have signature authority over any of their retail or bank accounts. I did not handle the financial matters of PEI and its affiliates. Nor was I a shareholder of PEI. There was no cross-ownership in these entities. Each stood on its own. PEI served merely at the holding company, retaining a 50 percent stake in each franchise.

2. Nor was I a director of the Princeton Economic Institute ("Institute"), a Texas corporation, located in Princeton, New Jersey, that published the global forecasting sold by the various PEI franchises around the world. PEI did not have a cross-ownership interest in the Institute. I was not an authorized signatory to any of the Institute's accounts.

3. In the late 1980s, a franchise office was opened in Tokyo by Jack King who funded all costs. By the early 1990s, that franchise began dealing in Japan with Cresvale International, Ltd, ("Cresvale"), a Cayman

Islands corporation, through the offices of Cresvale's Tokyo Branch (Cresvale-Tokyo"), a registered broker-dealer in Japan and subsidiary of Cresvale Far East, which was organized under the laws of Hong Kong as a securities broker-dealer. PEI began providing Cresvale-Tokyo with forecasting information, which Cresvale repackaged and translated into Japanese. PEI purchased Cresvale-Tokyo in 1995 from Banc Palias when it encountered financial difficulties in France in 1995. At the request of the Japanese Ministry of Finance ("JMOF"), PEI purchased Cresvale Far East in 1995 to prevent its collapse, since it was one of the top 25 broker-dealer/investment banker firms in Japan underwriting corporate bonds. Final approval was necessary from the Hong Kong regulators with jurisdiction over the Cresvale group. Because I was not registered in the United States with either the SEC or CFTC (not being a broker-dealer), I was approved by the regulatory authorities on the condition I remain a passive investor and leave the current management in place. [1] From 1995 to 1999, I was the chairman of Cresvale at the group level, but I again was not a director of the

[1] The Superseding Indictment ("SI") wrongly implies the I acquired Cresvale to cover up losses. [SI ¶ 70 l-m]. The internal audit records of Republic Securities Corporation of New York ("Republic Securities") state that the PGM note transactions were profitable until at least 1998. [Exhibit A; M Hershey Letter]

various branches including Cresvale-Tokyo, nor was I a signatory to any of the Cresvale accounts.

4. Jack King, the founder of the PEI Tokyo franchise, Princeton Economics International (Japan), Ltd. ("PEI-Japan"), died in or about 1994. The managing director of Cresvale-Tokyo, Mr. Akira Setogawa, assumed control of that franchise by purchasing Mr. King's equity from his widow who was Japanese. When Cresvale's parent company was in trouble, Mr. Setogawa also arranged to be a 50 percent partner in the Cresvale acquisition and his shares were held in trust with PEI as the nominee giving the appearance that PEI owned 100 percent. [2]

5. The note transactions at issue in this case began in or about 1992 in Tokyo exclusively, when the PEI-Japan franchise was approached by Mr. Setogawa, chairman of Cresvale-Tokyo. Yakult, a Japanese company that had previously obtained a note from Credit Suisse, requested Cresvale -Tokyo to provide a similar type of note. Mr. Setogawa requested PEI to issue such a note to Yakult. Over the course of the next several years, other Japanese companies made similar requests of Mr. Setogawa to

[2] Ms. Tina Mustra, who testified at the first contempt hearing on January 7th, 2000, knew Mr. Setogawa was a partner of PEI, but the Receiver, SEC, CFTC, and US Attorneys Office all objected to any questioning of Ms. Mustra beyond her affidavit, thus preventing my counsel from presenting any evidence about PEI and Setogawa.

help swap their stock portfolios -- which were being reported consistent with permissible accounting practices at book value on their financial statements rather than current market value (40-60% below cost) -- for an unsecured note with up to 10 years to repay. Since accounting principles in Japan did not require mark-to-the-market, these companies were permitted to carry the portfolios at cost (not market value). PEI and the Japanese companies swapped the stock portfolios or its notional (book) value for a note receivable, which could be carried as an asset on their balance sheets. All notes were marketed by Cresvale-Tokyo in Japan at private meetings by Setagowa. In almost all cases, I was not present. Cresvale-Tokyo was required to obtain the approval of the Japanese Ministry of Finance ("JMOF") to issue each note to any Japanese company.

6. PEI engaged in two types of note transactions: variable rate and fixed rate notes. The variable rate notes began being issued in 1992. The face value of the note was set at the book value of the portfolio and the two were then swapped. The transaction was completed in Japan. This "swap" was permitted under Japanese law. PEI then liquidated these Japanese stocks in Japan through Cresvale-Tokyo on the Japanese exchange, relieving the Japanese company of the need to report a loss. Upon the sale of the portfolio, PEI received Japanese yen. The variable rate notes were then

redeemable at maturity for their face value (*i.e.,* the book value of the stock portfolio). Since there was no set maturity date by which PEI had to repay the note, the interest rate was variable.

7. The Japanese yen received upon liquidation of the stocks was "wired" by Bank of Tokyo in Japan to its New York branch through internal book entry "transfers" within the bank. Bank of Tokyo then instructed its New York branch to transfer by wire US the Dollars to Republic Bank of New York ("Republic Bank") for further crediting to Republic Securities Corporation in Philadelphia ("Republic-Philadelphia"). Because of existing exchange controls, Cresvale-Tokyo was required to obtain the approval of JMOF for each transaction.

8. The fixed rate notes were first issued in 1995 when the Japanese yen reached its historical high against the US dollar. In 1995, PEI was approached by Maruzen, another Japanese company, which proposed to lend PEI $75 million worth of yen for 90 days, splitting the US interest rate of 8 percent and agreeing to accept only 10 percent of the foreign exchange currency gain. Japanese interest rates were 0.1 percent against US dollars interest rates of about 8 percent. PEI agreed. This is known in the industry as the "Yen Carry Trade," which is a swap of yen for US dollars to capitalize on the interest-differential in dollars over yen. The foreign

exchange rate risk falls on the borrower. The yen declined sharply, resulting in about a $14 million gain in 90 days. PEI agreed to split the interest rate, paying 4 percent in yen, which amounted to a 4000 percent increase in the local yen interest rate, and to pay to Maruzen 10 percent of the dollar-yen exchange rate gain.

9. The fixed rate notes were not issued in exchange for a stock portfolio, but were simple contract borrowings. The notes were yen denominated (except for a few when the Japanese company wanted to bear the exchange rate risk), and both principal and interest were payable in yen. The notes could be redeemed at maturity for their face value and paid a guaranteed 4 percent rate of interest, rather than the existing 0.1yen rate.

10. To earn the US interest rates of about 8 percent, PEI purchased Federal National Mortgage Association ("FNMAs") discount notes. PEI purchased FNMAs because these agency notes where not AAA, which meant that (1) they could not be posted as collateral for trading futures at any exchange, and (2) it prevented Republic Securities from selling the cash overnight in the repurchase ("REPO") market where settlement must occur in 24 hours and where, in the event of a meltdown, such funds would be lost. The REPO market can be highly dangerous, as proven by the later collapse of Lehman Brothers and Bear Stearns in 2009.

11. Since FNMAs were not an acceptable form of margin at exchanges, all of my hedging was proprietary, using credit lines provided by Republic Bank. [Exhibit ("Ex"). 1 (RNYSC 1995 Credit Memo); Ex. 7 (Rogers Ltr 3/17/99).] The audit by NY Mercantile Exchange confirmed that the accounts were proprietary and that cash was used to buy FNMAs. [Ex. 2 (NYMEX letter).] Republic's account statements also verified the purchase of FNMAs. [Ex. 3, p. 2 (Transcript of audio recording)].

12. The complexity of such international interest and exchange rate swap transactions for the interest-differential in dollars over yen, called the "Yen Carry Trade" and common in the industry, and the lack of familiarity with them by the government is demonstrated by the notes to the initial criminal complaint [Ex. 4 (Crm. Cmplnt, p. 5, note 1)] that PEI overpaid some note holders, paying them more than 20% when the note specified a 4% fixed rate. The government analyzed them in US dollars terms, thereby altering the currency of the contracts from yen to dollars. This error would be synonymous with a scenario where a bank recalculates your mortgage in Mexican pesos and then claims that you now owe more because of the fluctuation of the peso against the US dollar, even though the mortgage was expressed in US dollar terms.

13. Because I travelled extensively, sometimes I signed notes while in London. However, the bulk of the $1 billion in outstanding notes at issue in this case were signed by me during March 1999 while I was in Tokyo when I gave two seminars in Japan at that time. I had left the United States during October 1998 and worked in the PEI office in Tokyo, returning to the United States for about 10 days for Christmas. I returned to Asia for New Years. I came back to the United States for a few weeks during the first half of 1999, perhaps for 4 weeks, and then flew to Europe. I came back to the United States for the 4th of July. Thus, for the period from late 1998 until about the 4th of July 1999, I was in the United States for no more than six weeks at best and could not have committed the alleged acts from the United States.

14. Most fixed rate notes, which comprised almost 60 percent of all notes, were issued in the "street name" of Cresavle-Tokyo, as the nominee of the Japanese company [Ex. 5 (Princeton note); Ex. 4 (Crm Cmplnt, ¶¶ 5 a, c).], making them simple book entries at Cresvale-Tokyo. In addition, because the majority of the notes were book entries in Japan at Cresvale-Tokyo, these same notes were never actually issued in Japan to the note holders until the SEC Receiver directed John Gracy, who ran the Cresvale-Tokyo office, to issue the notes to the Japanese companies after the case

began. I saw email correspondence on this issue before I was put in prison for contempt. Thus, most of the notes would never have been issued were it not at the request of the SEC Receiver.

15. To effectuate each note transaction, PEI, through its pre-existing affiliate Princeton Global Management ("PGM"), also a Turks & Caicos company, set up a number of off-shore special purpose vehicles ("SPVs") affiliated with PGM, each of which issued the variable rate and fixed rate notes. The notes were issued under the name of PGM followed by an alpha-numeric denomination [x].

16. PGM was not set up specifically for these note transactions, as has been implied in these proceedings. PEI had managed money for other well known global financial institutions through PGM.

17. PEI traded in yen futures contracts primarily as a hedge against foreign exchange rate risk associated with converting the yen to dollars to earn higher interest rates, and again upon maturity when yen had to be repurchased to repay the loan. [Ex. 6 (Hershey Memo 3/4/98)] The yen borrowed from the Japanese companies was not used to trade commodities. [Ex. 6 (Hershey Memo 3/4/98), Ex. 7 (Rogers Ltr, 3/17/99] Instead, PEI had an unlimited line of credit from Republic Bank to use for hedging transactions. Since the money used to place the hedge came from

Republic's line of credit as well as previous profits, there never was any "trading" that was the property of any individual note holder or individual PGM accounts as the government has alleged. No profit or loss flowed to any note holder.

18. In hedging (as opposed to speculative futures trading), a futures position is purchased against the later nominal or notional cash value of the asset being hedged. A farmer who sells forward his wheat crop will take a loss on the futures position if the price of wheat rises; but, that loss is offset by the gain from the change in the cash market price of wheat. The net difference is not measured solely by the futures position, but by the total position (futures and cash market) at time of delivery. The government mischaracterized the Princeton note transactions by looking only at one side of the ledger (i.e., the futures position), by ignoring the cash market side of the transactions, and by converting everything from yen to US dollars. The government's allegations of losses in this case are faulty.

19. There were gains to PEI, not just from the interest differential in FNMAs, but from hedging as well. The gains from hedging occur when the yen to US dollar exchange rate moved in favor of the PEI. PEI made profits on its hedging, at least up through 1998. [Ex. 6 (Hershey Memo 3/4/98)].

20. From 1995 to 1998, the yen to dollar conversion rate moved in the direction of the US dollar by about 50 percent (*i.e.,* from 75 to 147 yen for $1 dollar). When it came time to repay the notes, PEI's cost to purchase yen had thus been reduced by 50 percent. By the end of 1998, approximately $2 billion in the notes had been redeemed at a substantial profit to PGM. As for the remaining $1 billion in notes, what originally approximated $1 billion in face value now only cost $606 million to repay. Thus, there never had been any loss on the notes at maturity.

21. Republic's internal due diligence audit confirmed that the proprietary (hedging) accounts were profitable up to late 1998 and an internal Republic memo states "Princeton's futures positions are not significantly out of line with the level of securities held in the portfolio. The figures above also show a fairly consistent positive track record by Princeton in establishing futures positions." [Ex. 6 (Hershey Memo 03/04/98)].

22. In late 1997, I began to notice consistent errors in many PGM accounts at Republic's Futures Division at Republic-Philadelphia. These errors seemed to have arisen from what I first assumed was sloppy accounting, but later appeared to arise from illegal trading through a practice known as "cherry picking," whereby losses were put in PGM accounts and winners were allocated to Republic-Philadelphia own accounts. To alleviate

and monitor such practices, I reduced the total accounts in which hedging or trading transactions could occur to eight accounts. Each of the eight accounts corresponded with a certain asset class --e.g., metals, currencies, bonds, and index futures. Nonetheless, the government's description of the use of these eight accounts [SI, ¶25] is in error. I had not been informed that employees at Republic- Philadelphia had been using the PGM accounts to trade for their own benefit. Indeed, transcripts of audio recordings recovered by the government – transcripts which, after being released from prison in March 2011, I have now been able to review for the first time -- show that these employees were engaged in fraudulent trading and kept that information from me. Maria Toczylowski of Republic who later pled guilty, stated in one such tape recording that I was not aware that employees of Republic and the Institute were stuffing losses in various accounts. "He doesn't know what you do in A though, right?" [Ex. 8 (Transcript Bates #247220).] [3] It is possible that such trading could also account for inaccurate NAV letters, all of which were in the files of Republic-Philadelphia from 1995 to 1999 and subject to examination by the bank's auditors.

[3] Although the transcripts bear a stamp "disclosure prohibited per order of Judge McKenna," that prohibition did not prohibit my use in court proceedings.

23. A Republic's internal audit memo for quarter end 1997 and as of February 20, 1998 stated that from funds on deposit for the PGM accounts at Republic- Philadelphia "outstanding securities positions average $547 million ($570 million as of 2/20/98). The average margin requirement (typically 4% of net outstanding futures positions) was 19.7 million ($13.3 million as of 2/20/98)." [Ex. 9 (Sweeney Memo 03/03/98, p. 3)] This memo clearly indicated that money used to support futures trading was a very small percentage – only 4%. "Also the average liquidating value of the futures positions shows a net gain of $13.3 million for these points in time, with a high point of $38.1 million gain, a low point of (-$2.7) million loss, and a net gain of $14.0 million as of 2/20/98." *Id.* This demonstrates that the government may have misunderstood or was even possibly misinformed at the outset about the degree of losses.

24. The government has alleged in this case that PEI misrepresented its track record of performance. [Ex. 10 (SEC Cmplnt ¶¶ 18-19).] However, the results from Republic and others financial institutions for which PGM managed money demonstrate a profitable track record. Indeed, PEI managed three public funds for trading profits. Two were managed for Deutsche Bank where independent auditors verified that all trading had been profitable each year. The Princeton Precious Metals Funds

administered by Deutsche Bank showed audited annual returns of 4.4% in 1995, 18.04% in 1996, 72.78% in 1997 and 32.41% in 1998 as of September 1998, which was again consistent with the internal audit conducted by Republic in 1998. *See* ¶ 21 above. [Ex.12 (Princeton Precious Metals & Capital Markets Fund)] . The third public fund was managed for MAGUM and that account was held by Cresvale-New York. Again, there were no problems with that account and the performance was profitable.

25. During the summer months of 1998, I pressed for internet access to the position statements (called an equity run) in the eight trading accounts, but received only "excuses" from Republic employees. [Ex. 13 (Email from M Toczylowski to M Hershey, 6/2/98).] Before I left the country in October 1998, I informed Rogers I wanted a full audit of all PGM accounts, including the eight trading accounts. I was planning to move everything from Republic to Cresvale. I was also wanted the audit to determine what was behind a so-called a "deficit" in the eight proprietary trading accounts. I disputed the so called "deficit" and demanded an audit because after discovering a loss in the tens of millions of dollars in bonds that I knew I did not trade, Rogers informed me it was an error and would be

"backed out." [4] I became concerned because PGM was the largest account they had and I began to suspect that Republic Bank might be parking losing trades in the PEI/PGM accounts. I was still unaware of Rodgers' and Ludwig's trading. It was not until after this case commenced that I learned that the back-office terminal accessing the accounts was under Rogers' control in Philadelphia and not located in New York City.

26. Upon my return from Japan for Christmas in 1998, I was informed by a staff member that Hal Ludwig, who was president of Princeton Economic Institute, had a personal account at Republic and was trading aggressively. Ludwig had not asked my permission to open such an account. In December 1998, I informed Ludwig that he could no longer engage in trading at Republic- Philadelphia and had to move all accounts to Cresvale. At that time, I was still unaware that Ludwig was involved with employees of Republic-Philadelphia trading illegally in PGM accounts. He knew I had restricted trading to the eight accounts to try to eliminate the problem I had with Republic's accounting. He had informed Republic that I was personally monitoring only the eight accounts and assumed that, while I was travelling, no trading was taking place in any other account. It appears

[4] A few years later, a forensic accountant who was appointed by the court to assist in my defense, informed me that perhaps as much as one-third of the trades were errors and later backed out by Republic.

that the illegal trading became more aggressive after Rogers and Ludwig were made aware by me that Cresvale was going public at the end of 1999 and that all accounts were going to be moved away from Republic to Cresvale It appears that they sought to make as much as money possible before the move occurred. Attached is the transcript of a phone call between Ludwig and Rogers, which shows that Rogers was upset because Republic would now lose the accounts it needed in which to park and cherry pick trades. I was unaware that Rogers and Ludwig had teamed up behind my back. [Ex. 14 (Transcript of Phone call 12/22/98)].

Inquiry by the Japanese Financial Supervisory Authority

27. I was in the London office of PEI- Europe when the Japanese Financial Supervisory Authority ("FSA") in perhaps June of 1999 began its investigation of Cresvale and foreign brokers.

28. In August 1999, the Japanese FSA sent a letter asking for confirmation that PEI/PGM had $10 billion on deposit with Republic-Philadelphia. [Ex. 15 (FSA Ltr 8/18/99)]. Republic Bank York did not inform me of the FSA's letter, but instead informed me that they were seizing whatever money was in the PGM accounts to settle what Republic called a "deficit" in the eight proprietary trading accounts. Initially, after I objected, Republic Bank informed me they wanted the deficit resolved

because of the Bank's upcoming sale to HSBC, which later occurred for $9.6 billion.

29. A short while later, which now appears to coincide with the FSA letter of August 18th, 1999, my conversations with Republic became more intense. Instead of inquiring into the validity of the trades and the accurate dollar amount, Republic informed me that it was taking whatever funds it desired. Republic also said that I should select certain accounts to be left intact or it would choose them for me. I objected in writing, but the money was taken by August 27th, 1999. Republic Bank appears to have panicked, especially given the coincidence in the dollar amount of the FSA letter and the sale of the Bank to HSBC, both of which approximated $10 billion On Monday, August 30th, 1999, I went to Mr. Richard Altman, a local lawyer who I had known for about 20 years, and explained what had taken place. Mr. Altman sent an email to Dov Schlein, the Vice Chairman and President of Republic National Bank in New York, informing him that the bank had one week to return the funds or we would file a lawsuit.

30. Someone must have contacted the FSA about verifying assets of $10 billion because the FSA wrote a second letter on August 31, 1999, correcting its earlier letter of August 18th, 1999 and now stating that total dollar amount of notes outstanding was $1 billion (not $10 billion) with a

total amount issued of $3 billion (not $30 billion). [Ex. 16 (FSA Ltr 8/31/99)]. However, it was too late since Republic had already taken the funds. Therefore, I believe that Republic Bank may have reached at state of panic and did not want to get involved in a conversation with the FSA, fearing that it could derail its sale to HSBC for $10 billion.

31. Apparently, everything had been set in motion by August 30th or August 31st, 1999.

Criminal Conduct at Republic Securities' Futures Division

32. Prior to purchasing Republic, HSBC conducted its own due diligence of what took place at Republic. I was told by a former Republic employee, Bobby Williamson, that HSBC found that there were numerous trades in Philadelphia at Republic's Futures Division that were not supported by telephone recordings during which I had given any transaction orders. After that audit, HSBC called off the purchase of Republic Bank, until, according to press accounts, Edmond Safra, who owned Republic Bank, had personally guaranteed any loss. I have sought that audit by HSBC, but have been unable to obtain it. I was also told by Bobby Williamson that James Sweeney, who was in charge of Republic-Philadelphia, had suspected that William Rogers had been illegally trading in the PEI/PGM accounts.

33. As this case unfolded, I later tried to explain to the Receiver that Republic's staff was illegally trading in the PGM accounts in the hope that he would investigate. His response was simply that he believed Republic and refused to take any actions. For this reason, I agreed to do several press interviews with the Japanese press in which I urged the Japanese companies to file suit in New York against Republic. They did so.

34. After Republic was sued by the Japanese companies, Republic changed its story, finally stating correctly that there had never been any promise of segregation of accounts from each other, but rather segregation of all customer accounts from Republic own accounts in the event of its bankruptcy so that, in accordance with CFTC regulations, customer accounts could not be seized to satisfy Republic's obligations. Thus, Republic now stated that the contracts with the Japanese companies did "not prohibit commingling of the sort that the complaints conclusorily allege." [Ex. 17 (Republic's Motion to Dismiss Complaint in Maruzen case, p. 8] That is consistent with documents I am now seeing for the first time. [Ex. 22 (Sweeney Memo, 7/7/99)]. In addition, although the SEC complaint alleges that there was a single master account created in 1998 [Ex. 10 (SEC Cmplnt ¶ 21)], that allegation is deficient because that single account was created only on the books of Republic-Philadelphia. No money was ever transferred

from the PGM accounts into that master account. Further, when the fixed rate notes underlying those PGM accounts matured, the money was redeemed by the note holder. To the extent the SEC might be referencing a possible cross margining agreement, that agreement was put in place by Republic-Philadelphia for operational and regulatory reasons, and it later expired when the fixed rates matured in March 1999.

35. Republic was later criminally charged separately on September 30th, 1999 with engaging in manipulative activities for conduct that occurred after I had been criminally charged on September 13th, 1999.

36. Curiously, when Republic pled guilty and agreed to make everyone whole to escape criminal liability for its bank officials, the government suddenly understood the currency differential and reduced the dollar amount owed by Republic. The government now recognized that the contract called for repayment in yen. On January 9th, 2002, AUSA Richard Owens told the court that the amount due in restitution had decreased because the yen declined in value. "As your Honor may have noted, due to the change in the exchange rate between the dollar and the yen, the total restitution amount has decreased in dollar terms, although not in yen terms, from approximately 700 million to approximately 650 million." [Ex. 18 (Transcript of Republic Plea).] These figures were later recalculated to

order restitution in the amount of $606 based on the dollar to yen exchange rate.

37. What had been $1 billion at the time of issuance of the notes had thus fallen to $606 million. The reduction in restitution to be paid by Republic may well have produced a profit of about $400 million, which HSBC, when it acquired Republic, may have pocketed. [Ex. 19 ("The Vanishing $400 Million").]

38. At the same time, when Republic Bank was sold to HSBC, Republic Bank's main shareholder, Edmond Safra, reduced the price of his personal shares by approximately $594 million, thus reducing the price HSBC paid for the bank and accordingly reducing the amount the bank had to pay to resolve this matter virtually to zero (*i.e.,* $400 million plus $594 million).

Seizure Warrant, FBI Raid and Receivership

39. I now know that Republic Bank contacted the CFTC and the SEC, which I believe then referred the matter to the US Attorney in the Southern District of New York who then issued the seizure warrant on September 2nd , 1999. By Friday September 3rd, 1999, the FBI raided the office of PEI in Princeton, New Jersey. Mr. Altman, my attorney, called AUSA Brian Coad to try to explain the facts and transactions to him. Mr.

Coad agreed to a meeting one week later on Friday September 10th, but then unexpectedly cancelled it. As Mr. Altman later informed the court, "we had an appointment and then it was cancelled on us. We weren't told that they intended to arrest [me] on Monday…" [Ex. 20 (Transcript of Trenton Arraignment, 9/13/99, p. 16, L18-20)].

40. I self surrendered on September 13, 1999 in Trenton, New Jersey. I was anxious to resolve the issue of the disputed trading and seizure of the funds by Republic in the PGM accounts. Mr. Altman pointed out in court on September 13, 1999 in Trenton that out of $3 billion in notes, $2 billion had already been redeemed and "[t]here are no defaults. There are no complaints" from any alleged note holder. [Ex. 20 (Transcript of Trenton Arraignment, 9/13/99, p.15, L17-18).]. At no time, however, would anyone listen to anything we had to say. The government had heard the facts initially from Republic Bank, a story that was inconsistent with mine.

41. After being granted $5 million bail by the Magistrate in Trenton, the AUSA in charge, Brian Coad, requested I waive my right to an indictment, which I declined to do and asserted my speedy trail right. I believed the government failed to understand the complex issues at stake and believed the allegations were simply wrong.

42. When Mr. Alan Cohen was appointed as the receiver in the SEC civil enforcement case, I again tried to tell him about Republic's illegal trading but he simply responded that he believed Republic's version of the events. My protestations and the arguments to the receiver thus fell on deaf ears. Once all of this hit the press, my case was dubbed a "high profile matter," the greatest financial debacle of the 20th Century, which engendered pandemonium and reactive behavior by everyone, rather than careful scrutiny.

Civil Contempt Proceedings

43. On December 16, 1999, the receiver filed a motion to hold me in contempt, this time for failing to turn over alleged corporate assets (i.e., a bust of Julius Caser, some antique coins and 102 gold bars) and other documents. After a hearing was held on January 14, 2000, I was held in contempt and incarcerated in the Metropolitan Correctional Center ("MCC"), which is adjacent to the federal court house in the Southern District of New York, where I remained for the next seven years and three months without a trial.

44. The receiver sought retroactive disgorgement of all funds paid to my lawyers, including funds paid prior to the seizure warrant and the asset freeze. Since the SEC, CFTC and the court viewed the proceedings as

"quasi criminal" [Ex. 21 (SDNY Tr; 1/14/00; p. 30, L18).], my counsel were placed in a highly untenable, and possible conflict, position. Once they were ordered to return the funds, they were obliged to withdraw in April 2000.

45. In or about April 2000, I met with AUSA Richard Owens, as well as counsel for the SEC and CFTC. I informed them that Republic was illegally trading in the accounts, and I believed they were parking trades in the eight trading accounts. I informed them I had requested an audit in 1998 and there was a dispute as to what Republic called a "deficit." I also informed AUSA Owens that Yakult owed PEI about $50 million for a hedge put on in the Nikkei index at their direction, but no one pressed any claims on behalf of the PEI. At a follow-up meeting, I was offered a §5K1 by AUSA Owens who informed me he knew I had not stolen any money. I declined to testify, because I told AUSA Owens that I did nor conspire with Republic officials. Nevertheless, AUSA Owens refused to drop the charges.

46. Sometime in the summer of 2001, a BOP employee (whose name I believe was Oliver Brown) came to my cell and apologized for any harsh words he might have said previously. He said that he or someone else at the MCC had participated in a conference call with the USAO to discuss what the MCC should do with me because, as a civil contemnor, I was not a

standard prisoner. Mr. Brown informed me that, during that conference call, an AUSA (I believe that was Brian Coad) informed the staff at the MCC that there was a possibility that I was innocent and that Republic's accounts were so bad they could never prove a case against me. If I remained incarcerated for civil contempt, perhaps I might break. Given the comments made during the conference call about the state of Republic's accounting, I knew he was being truthful since that was a fact I had known but had never been reported in the press.

Change in Judge Presiding Over Criminal Case

47. In June 2006, Mr. Cooper, my court appointed counsel, informed me that my case had unexpectedly and arbitrarily been reassigned to Judge Keenan. Judge Keenan had set it down for trial in two months. His trial scheduling order was "non-negotiable, non-adjournable, non-nothing." [Ex. 23 (NY Times 7/29/06).]. Judge McKenna, who had handled my case for over six years, had previously refused to recuse himself despite the government's motion that he do so on the grounds that his wife had done some legal work representing HSBC at a mortgage closing on a house and that there would likely be "numerous hotly contested issues concerning restitution which potentially could result in an order for Armstrong to pay restitution to HSBC of over $700 million." [Ex. 24 (AUSA Southwell Ltr to

Judge McKenna 5/27/05.] Mr. Cooper informed me that this reassignment away form Judge McKenna was strange because anytime a case was to be reassigned in the Southern District of New York, the defendant was always given an opportunity to object. But, I was given none. Mr. Cooper believed that the impetus for the sudden change came from the US Attorneys Office.

48. With Judge Keenan now presiding, he immediately denied all motions, including my counsel's motion for discovery and a motion I had submitted *pro se* for declaratory judgment to establish the true nature of the notes, a motion to which Judge McKenna had ordered the government to respond. Judge Keenan, however, dismissed this motion, saying *he* did not allow *pro se* motions, despite the fact everything was briefed and awaiting decision by Judge McKenna.

Solitary Confinement in the "Hole" and Guilty Plea

49. During the pendency of a petition for *certiorari* in the summer months of 2006 to the United States Supreme Court over the unconstitutional exercise of the contempt powers by the district court, I was offered a plea bargain of 15 years, which I refused. The next day the USAO returned, this time offering 10 years but with credit for time served for civil contempt. Again I refused and insisted on going to trial.

50. In August 2006, I was then thrown into the "hole" (Special Housing Unit), which is a special cell for solitary confinement. There were two such cells. I occupied one. The other was occupied by Vinnie "Gorgeous", former head of the New York Mafia under investigation for threating to kill a judge. When I asked the lieutenant, who came to my cell to take me to the hole, whether I could call my lawyer, the lieutenant responded by merely saying that the federal prosecutor Alexander Southwell would do that. When I asked him why I was going to the hole, the lieutenant told me I was under "investigation" because someone had opened a small vent about 6 x 4 inches in the common area. I told him I had been in the library all day. Nevertheless, I was singled out from among 96 men and taken to the hole. When I asked him how long I was going to be in the hole, he said the investigation would take 90 days and could be renewed for an additional 90 days making it 6 months total. The solitary confinement cell was high security and thus there was no outside recreation at all. I told him I needed to prepare for my upcoming criminal trial that was scheduled to start shortly, but he said that I would go to trial from the hole. The MCC also removed all my legal material about 30-40 boxes (except for two boxes) and denied me access to my defense preparation materials. When I asked the lieutenant whether he could call my lawyer, I was told, "Don't worry,

[AUSA] Southwell will inform your lawyer that you are going into the hole." The USAO was thus fully aware that I was being placed in the hole. Being in the hole also automatically cut off my phone privileges, which were now limited to one call for 15 minutes per month. Bloomberg news reported my being thrown into solitary confinement. [Ex. 25 (Bloomberg News: "Jailed N.J. financier moved to 'solitary'")]

51. Mr. Cooper, my court appointed criminal counsel, then came to see me in the hole. He told me the government admitted they did not want to go to trial. They now offered dropping all charges, except a single conspiracy count with Republic for a maximum sentence of 5 years. They offered a Form B plea agreement in which I would be allowed to now argue for time served based upon the six and one-half years of imprisonment for civil contempt. When I asked Mr. Cooper about going to Judge Keenan about why I was being thrown into the hole and taking my defense materials away, he simply replied that I had the wrong judge.

52. After seven days in the hole, I was brought before the AUSA David Seigal and told I had better accept the plea offer. Going to trial was now clearly impossible, stripped as I was of my defense preparation materials and informed I would be going to trial from the hole, with limited access to my counsel. I also feared further retaliation if I did not accept the

plea bargain offered, including up to 180 days in the hole, threat of continued contempt, which the district judge said he could continue for my lifetime as confirmed by the Second Circuit's ruling, and the threat from the government of 135 years in jail because the dollar mount of "loss" was off the guidelines chart. Denied counsel of choice and unable to explain complex international currency transactions to counsel, the courts, or the prosecution, it was painfully obvious I would not be given a fair opportunity for a trial.

53. In exchange for a guilty plea, AUSA David Seigal instructed the BOP to remove me from the hole and arranged for my family to at last visit on a weekend, which is something that had been denied for nearly seven years. Previously, my family could only visit me for one hour, which had to occur on work days, thereby reducing visitation with my family to about four times per year.

The Allocution

54. I was handed a written script that had been prepared by the USAO in the Southern District of New York. Although my SEC counsel, Thomas Sjoblom, attempted to edit the script, but the government would not accept his edits. I was told I had to read from the script as written in open court and before the press. I read the script. But it was clearly an attempt

to "dance through the raindrops," for example, by stating that the trading was for the "general" benefit of note holders when in fact the trading was proprietary and did not inure to the benefit of or belong to a note holder. Judge Keenan was informed and at the plea acknowledged I was to read only from a script.

55. At the allocution, Judge Keenan, obviously concerned about lack of venue, asked me whether there was "[s]ome in Manhattan." The only thing I could think of was that there an "exchange is in New York." [Ex. 26 (Transcript of Allocution 8/17/06) pp. 19-20.] I was referring to the Comex and the NYMEX, where there had in the past been some relatively insignificant metals or oil futures contracts traded by PEI and PGM that had no connection with the PGM notes.

56. Judge Keenan asked at the allocution whether my plea was voluntary. The plea bargain was the only alternative left to me:

- I had been deprived of my counsel of choice;
- I was being denied the discovery that had been requested for years, even by my forensic accountant, which might have included Brady materials and for which I had to waive my objection;

•I was being denied a decision by the court over a jurisdictional matter simply because the motion was *pro se* when it had already been accepted by another district judge;

•I had been thrown into solitary confinement after refusing two plea offers;

•I was told by my own lawyer that it would be pointless about going to the presiding over being thrown into the hole because I "had the wrong judge;"

•My trial preparation materials that approximated about 30 to 40 boxes had been taken away from me when I was put in the hole and I would not have access to them while in the hole;

•I was told by officers at the MCC that if I planned on going to trial, I would be doing so from the hole;

•I would remain in civil contempt just as long as Judge Owen believed it had any coercive effect, which he found it did for the past six and one-half years and his unlimited discretionary power over which had been upheld by the Second Circuit; and

•I was told that if I did not accept this plea bargain, I would face up to 135 years of imprisonment.

57. I would not have pled if my case remained with the Judge McKenna who presided over my case since 1999 for nearly seven years and who was familiar with the entire. I believed that my due process right to a fair and impartial judge had been eliminated.

58. The offer of a Form B plea agreement with a promise that I would be able to argue for time served in civil contempt was my only hope. Everything else had been stripped away. At the time of the allocution, Judge Keenan informed me he would make that decision.

Sentencing

59. At the allocution, Judge Keenan had stated that it would be up to him to decide whether I received any credit for time served in civil contempt. At my sentencing nine months later in May 2007, Judge Keenan reversed course, now stating the BOP would be the one to decide the question of credit for time served. The terms of the plea were thus abandoned and Judge Keenan transformed the plea back into a 15 year sentence with good time, terms which I had previously rejected. The promise underlying the Form B plea agreement pursuant to which the DOJ said I could argue for credit for time served was empty.

60. I was sentenced to an additional five years in prison. After sentencing, however, my prison term carried a huge caveat: it would not be

concurrent but consecutive. That meant it would not commence to run until the civil contempt was concluded. I was thus back where I started, facing life long civil contempt, with far fewer rights and privileges as a pretrial detainee than a convicted felon.

61. I appealed the sentence of the district court, but my court appointed lawyers failed to prosecute the appeal and it was dismissed.

62. For the next three years I asked the BOP to decide the issue of credit for time served. It never did.

SEC Administrative Proceedings

63. During the SEC administrative proceedings, I did not have access to administrative cases in prison and had to accept arguments and legal propositions of the SEC staff.

I declare under penalty of perjury that the foregoing is true and correct

Dated: August 19, 2011

/s/ Martin A. Armstrong
Martin A. Armstrong
#12518-050

United States Court of Appeals
for the District of Columbia Circuit

ARMSTRONG vs. SEC, No. 09-1260

CERTIFICATE OF SERVICE

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by THOMAS V. SJOBLOM, ESQ., Attorney for Petitioner to print this document. I am an employee of Counsel Press.

On **August 19, 2011**, Counsel for Petitioner has authorized me to electronically file the foregoing **DECLARATION OF PETITIONER MARTIN A. ARMSTRONG** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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A courtesy paper copy has also been mailed to the above address and 4 paper copies will be sent to the Court within 2 business days via Express Mail.

August 19, 2011

/s/ John C. Kruesi, Jr.
John C. Kruesi, Jr.
Counsel Press