IN THE SUPREME COURT OF THE UNITED STATES

No. ___

MARTIN A. ARMSTRONG,

Applicant,

v.

SECURITIES AND EXCHANGE COMMISSION,
UNITED STATES COMMODITY FUTURES TRADING COMMISSION,
ALAN M. COHEN*, in his capacity as receiver*, and
THE UNITED STATES OF AMERICA

Respondents.

APPLICATION TO THE HON. RUTH BADER GINSBURG FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Pursuant to Supreme Court Rule 13(5), Martin A. Armstrong hereby moves for an extension of time of 60 days, to and including September 20, 2019, for the filing of a petition for a writ of certiorari. Unless an extension is granted, the deadline for filing the petition for certiorari will be July 22, 2019.

In support of this request, Applicant states as follows:

1. The U.S. Court of Appeals for the Second Circuit rendered its decision on April 23, 2019 (Exhibit 1). This Court has jurisdiction under 28 U.S.C. §1254(1).

2. In September 1999, a federal grand jury indicted Armstrong for securities fraud and other related charges. *See* Sealed Indictment, *United States v. Armstrong*, No. 99-cr-997 (S.D.N.Y. Sept. 30, 1999), Dkt. 5. At the same time, the SEC and CFTC filed civil enforcement actions against Armstrong and two of his

companies, Princeton Economics International, Ltd. (PEIL), and Princeton Global Management (PGM). *See* Complaint, *SEC v. PEIL*, No. 99-cv-9667 (S.D.N.Y. Sept. 13, 1999), Dkt. 1; Complaint, *CFTC v. PGM*, No. 99-cv-9669 (S.D.N.Y. Sept. 13, 1999), Dkt. 1.

3. Upon initiating the civil enforcement actions, the SEC and CFTC obtained an *ex parte* temporary restraining order, later converted into a preliminary injunction, freezing Armstrong's companies' assets—save for "reasonable attorney's fees not to exceed $10,000"—and establishing a receiver to preserve corporate assets. *SEC v. PEIL*, 84 F. Supp. 2d 443, 444 (S.D.N.Y. 2000); *see SEC v. PEIL*, 2001 WL 237376, at *1 n.2 (S.D.N.Y. Mar. 9, 2001). The order "required Armstrong and his agents to provide the Receiver with 'all assets of the corporate defendants which they have in their current possession, custody, or control.'" *SEC v. PEIL*, 84 F. Supp. 2d 447, 448 (S.D.N.Y. 2000).

4. Pursuant to that order, the receiver demanded that Armstrong turn over all items in his possession that allegedly constituted corporate property. Armstrong turned over everything in his possession and insisted that he did not have any of the remaining demanded assets. He also asserted his Fifth Amendment privilege against self-incrimination in light of the pending criminal charges. The district court rejected Armstrong's arguments, adjudged him in contempt, and ordered him detained "until he agree[d] to deliver the missing items." *See SEC v. PEIL*, 7 F. App'x 65, 66 (2d Cir. 2001) (dismissing appeal from sanctions order for lack of appellate jurisdiction).

5. Notwithstanding the Recalcitrant Witness Statute, *see* 28 U.S.C. §1826(a)(2) ("in no event shall such confinement exceed eighteen months"), Armstrong remained confined in New York City's Metropolitan Correctional Center for civil contempt for the next seven-and-a-half years.

6. In the interim, the court-appointed receiver obtained a court order compelling the return of retainer payments Armstrong had made to law firms before the restraining order went into effect, which the receiver alleged had been made using corporate funds. 84 F. Supp. 2d at 446-47. The receiver also secured an order placing a beach house in the receiver's control, over Armstrong's objection that the house was personal property. 84 F. Supp. 2d at 448-51.[1] Still confined in the Metropolitan Correctional Center, Armstrong sought a hearing in his criminal case under *United States v. Monsanto*, 491 U.S. 600 (1989), and *United States v. Monsanto*, 924 F.2d 1186 (2d Cir. 1991) (en banc), which hold that "the fifth and sixth amendments … require an adversary post-restraint, pretrial hearing in order to continue a restraint ordered ex parte … of assets needed to retain counsel of choice," 924 F.2d at 1188, but the district court denied the motion. *See* Order, *United States v. Armstrong*, No. 99-cv-997 (S.D.N.Y. June 20, 2003), Dkt. 82.

7. Between 2006 and 2009, several relevant acts took place. First, after being placed in the Metropolitan Correctional Center's Special Housing Unit (the

[1] The receiver ultimately sold the beach house while Armstrong was serving his criminal sentence. *See* Order, *SEC v. PEIL*, No. 99-cv-9667 (S.D.N.Y. Apr. 27, 2012), Dkt. 473.

"hole"), Armstrong pled guilty to the single conspiracy count in the criminal case. *See* Minute Entries, *United States v. Armstrong*, No. 99-cr-997 (S.D.N.Y. Aug. 17, 2006). He was sentenced to the statutory maximum of 60 months in prison, to be "commence[d] as soon as the contempt case … is resolved," plus three years supervised release. Judgment, *United States v. Armstrong*, No. 99-cr-997 (S.D.N.Y. Apr. 10, 2007), Dkt. 150. He was separately ordered to pay $80,000,101.00 in restitution, which he paid in full upon his ultimate release from prison. Satisfaction of Judgment, *United States v. Armstrong*, No. 99-cr-997 (S.D.N.Y. Mar. 16, 2012), Dkt. 150. Second, without admitting or denying the allegations, Armstrong agreed in the civil enforcement actions to be permanently enjoined from further violations of the applicable securities and commodity trading laws. *CFTC v. PGM*, 2008 WL 6926640 (S.D.N.Y. June 24, 2008) (judgment and consent order against Armstrong); *see also CFTC v. PGM*, 2009 WL 3241527 (S.D.N.Y. July 31, 2009) (judgment and consent order against PGM and PEIL).

8. In addition, the receiver submitted a proposed plan in the consolidated enforcement actions in June 2008. The court then set a Bar Date, "*i.e.*, the deadline by which persons and entities were required to raise objections to the Plan and to assert claims to receivership property, or forever be barred from doing so." *See* Ex. 1 at 3. Armstrong, still in prison, timely "filed a proof of claim" via counsel that "asked the court 'to direct the Receiver to refrain from liquidating or abandoning any physical items' in the storage lockers until Armstrong had a chance to identify any personal property." *Id.* But the court never adjudicated Armstrong's claim. Instead,

the court approved the Plan of Final Distribution, which instructed the receiver to sell all remaining non-cash assets. *SEC v. PEIL*, 2008 WL 7826694 (S.D.N.Y. Sept. 30, 2008).

9. In January 2012, the receiver auctioned off several items of Armstrong's personal property, including personal property Armstrong had acquired prior to any allegedly unlawful conduct.

10. In August 2017, nearly a decade after filing the plan of final distribution, the receiver submitted a final report and motion asking the court to wind down the receivership, *i.e.*, to enjoin all remaining claims, discharge the receiver, and close the civil cases. *See SEC v. PEIL*, No. 99-cv-9667 (S.D.N.Y. Aug. 4, 2017), Dkts. 475-85. Armstrong opposed the motion. He argued that the receiver had not returned "personal property" under its control, and so the receivership could not be wound up until that occurred. Objections of Defendant Martin Armstrong 3, *SEC v. PEIL*, No. 99-cv-9667 (S.D.N.Y. Aug. 31, 2017), Dkt. 490 ("Objections"). He further argued that "[t]he Receiver is seeking to distribute proceeds from untainted assets that should have been available to Armstrong to retain counsel of choice" in the criminal case. *Id.* As Armstrong explained, in *Luis v. United States*, 136 S. Ct. 1083 (2016), this Court "held that it is a denial of the Sixth Amendment right to counsel of choice to deny a defendant access to untainted assets." Objections 3. The district court rejected all of Armstrong's arguments, ruling that Armstrong waived any right to oppose the wind-down of the receivership "by not objecting" to the Plan of Final Distribution "prior to its 2008 approval." *SEC v. PEIL*, 2017 WL 6729861, at *1 (S.D.N.Y. Oct. 6, 2017).

11. The Second Circuit affirmed. First, the court concluded that the district court was under no "obligation" to provide a hearing on the question of whether the receiver obtained and distributed property that properly belonged to Armstrong. Ex. 1 at 5. According to the Second Circuit, "Armstrong never affirmatively moved or otherwise requested that the District Court identify some receivership assets as his personal property, hold a hearing on this issue, or order the return of his personal property." *Id.* As to the property in the storage lockers, the court held that "the District Court reasonably found that the Receiver gave Armstrong an adequate opportunity to reclaim [his] personal possessions." *Id.* The court accordingly held that the District Court "did not exceed the bounds of [his] discretion in authorizing case closure over Armstrong's objection that some of his personal property had not been returned to him." *Id.* at 4. The court likewise affirmed the decision not to afford Armstrong a jury trial, concluding that "Armstrong explicitly waived the right to a jury trial in the Final Consent Judgment." *Id.* at 6.

12. The Second Circuit made no mention of Armstrong's argument that the court violated his constitutional rights by refusing to hold a hearing on the question of whether the assets and funds the government seized prior to trial—which left Armstrong unable to pay counsel of choice—were actually untainted personal property. That is because, prior to briefing on the merits, the Second Circuit dismissed Armstrong's consolidated appeals "to the extent [they sought] to challenge" either "his criminal conviction or sentence" or "the final distribution plan with respect to corporate assets." Motion Order, *CFTC v. PGM*, No. 17-3576 (2d Cir. Apr. 11,

2018), Dkt. 77. In support of that decision, the Second Circuit cited two district court orders, the first of which held that Armstrong "does not have standing to challenge the settlement distribution" (*id.* (quoting Order, No. 04-cv-3091 (2d Cir. July 21, 2004))), and the second of which held that "challenges to civil proceedings are 'precluded by the terms of the consent judgment, which includes an explicit waiver of the right to appeal" (*id.* (quoting Order, No. 08-cv-5902 (2d Cir. Apr. 10, 2009))).

13. Applicant's counsel, George W. Hicks, Jr., was not involved in the extensive proceedings below and was only recently retained. Applicant's counsel requires additional time to review the substantial record and prior proceedings in this case in order to prepare and file a petition for certiorari that best presents the arguments for this Court's review.

14. Applicant's counsel also has substantial briefing and argument obligations between now and July 22, including a brief for appellees in the consolidated cases of *In re Deepwater Horizon*, Nos. 18-31292 & 19-30001 (5th Cir.) (due June 28); a brief for petitioner in *Retirement Committee of IBM v. Jander*, No. 18-1165 (U.S.) (due July 18); and a brief for appellant in *United States v. North*, No. 19-1190 (3d Cir.) (due July 22).

WHEREFORE, for the foregoing reasons, Applicant requests that an extension of time to and including September 20, 2019, be granted within which Applicant may file a petition for a writ of certiorari.

Respectfully submitted,

/s/ George W. Hicks, Jr.

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