

IN THE SUPREME COURT OF THE UNITED STATES

No.

MICHAEL GRAMINS, APPLICANT

v.

UNITED STATES OF AMERICA

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI

To the Honorable Sonia Sotomayor, Circuit Justice for the United States Court of Appeals for the Second Circuit:

Pursuant to Rules 13.5 and 30.2 of this Court, Michael Gramins respectfully applies for a 30-day extension of time, to and including February 9, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case. The judgment of the court of appeals was entered on October 12, 2022. App., infra, 1a-11a. Unless extended, the time for filing a petition for a writ of certiorari will expire on January 10, 2023. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

1. This case presents the question whether misstatements during negotiations for the sale of a bond can be material as a matter of law even if they do not relate to the bond's nature or value. Materiality is an objective standard, "involving the significance of an omitted or misrepresented fact to a reasonable

investor." TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 445 (1976); see also Basic Inc. v. Levinson, 485 U.S. 224, 231-232 (1988). A misstatement is material if there is a "substantial likelihood" that a reasonable investor "would consider it important" in making an investment decision. Ibid.; see Kungys v. United States, 485 U.S. 759, 770 (1988). This Court's understanding of materiality accords with the longstanding common-law principle that, in order to be material, a misrepresentation must "affect[] and go[] to [the transaction's] very essence and substance." 1 William Williamson Kerr, A Treatise on the Law of Fraud and Mistake 34 (2d ed. 1883).

The two federal fraud statutes at issue in this case prohibit only material misstatements. First, Section 1343 of Title 18 of the United States Code, which criminalizes wire fraud, was enacted against the backdrop of the "well-settled meaning at common law" of "actionable fraud," requiring "materiality of falsehood." Neder v. United States, 527 U.S. 1, 22, 25 (1999). Second, Section 10(b) of the Securities Exchange Act of 1934 prohibits fraud in connection with the purchase or sale of a security in violation of rules promulgated by the Securities and Exchange Commission. 15 U.S.C. 78j(b). Materiality is also an element of securities fraud. See Basic, 485 U.S. at 232.

2. The government prosecuted applicant Michael Gramins and two other bond traders for statements made during negotiations with professional investment managers for the purchase or sale of residential mortgage-backed securities (RMBS) bonds. In the RMBS

market, which is dominated by sophisticated institutional investors, bonds are not publicly traded and there is no centralized listing of the price at which each bond is trading. See United States v. Gramins, 939 F.3d 429, 435 (2d Cir. 2019). Traders earn a profit based on the difference between the amounts the buyer and seller agree to pay. See id. at 436.

In some of the transactions at issue, applicant concededly misstated the amount a purchaser had offered or the amount of profit his employer would make. But the government never alleged that applicant made misstatements concerning the nature or quality of the bonds themselves. Each buyer received the agreed-upon bond at the agreed-upon price.

3. The government tried applicant, together with two other traders, in a trial that lasted four weeks. See Gramins, 939 F.3d at 440-442. After deliberating for a week, the jury found applicant guilty of conspiracy to commit wire or securities fraud. Id. at 442. The jury either failed to reach a verdict or acquitted applicant on each of the remaining counts of the indictment, and the jury did not find the other defendants guilty on any counts. Ibid.

Applicant moved for a judgment of acquittal or for a new trial. App., infra, 1a. The district court denied the motion for judgment of acquittal and granted the motion for a new trial. Ibid. The government appealed, and the court of appeals reversed and remanded. Ibid. (citing Gramins, 939 F.3d at 434). On remand, the district court entered a judgment of conviction and sentenced

applicant to two years of probation, with the first six months to be spent on home confinement. Ibid.

4. The court of appeals affirmed. App., infra, 1a-11a. As is relevant here, it rejected the argument that, “to satisfy the materiality requirement, the government was required to prove that absent [applicant’s] misrepresentation the counterparties would have declined to transact, not simply that they might have negotiated a better price.” Id. at 5a (alterations, internal quotation marks, and citation omitted). Relying on its decisions in United States v. Litvak, 808 F.3d 160 (2015) (Litvak I) and United States v. Litvak, 889 F.3d 56 (2018) (Litvak II), the court reasoned that, although “[t]he value of the security may be the most important factor governing the decision to buy, * * * the price must be considered in determining whether the purchase is deemed profitable.” App., infra, 5a (quoting Litvak II, 889 F.3d at 67, and citing Litvak I, 808 F.3d at 175-178). Accordingly, it concluded that misrepresentations about a broker-dealer’s “profit for its role in procuring and selling a security desired by a buyer,” where “the profit becomes part of the price paid by the buyer,” are material as a matter of law. Ibid. (quoting Litvak II, 889 F.3d at 67).

5. Counsel for applicant respectfully requests a 30-day extension of time, to and including February 9, 2023, within which to file a petition for a writ of certiorari. The undersigned counsel is currently preparing the brief for petitioner in Samia v. United States (due Jan. 27, 2023), and a petition for a writ of certiorari in Exxon Mobil Corporation v. Environmental Defense

Center (due Jan. 25, 2023). In addition, the undersigned counsel will be presenting oral argument in the Fifth Circuit in United States v. Greenlaw, No. 22-10511 (Feb. 6, 2023). Additional time is therefore needed to prepare and print the petition in this case.

Respectfully submitted.

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