No. _____

IN THE

Supreme Court of the United States

JOHN DOE,
Petitioner,
v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

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

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

JOHN DOE,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

No. 21-2537

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of November, two thousand twenty-two.

For Petitioner: EZRA SPILKE, Law Offices of Ezra Spilke, Brooklyn, NY.

For Respondent: EZEKIEL L. HILL, Attorney (Dan M. Berkovitz, General Counsel, Michael A. Conley, Solicitor, Stephen G. Yoder and Emily T. Parise, Senior Litigation Counsel, *on the brief*), Securities and Exchange Commission, Washington, DC.

On Petition for Review of an Order of the Securities and Exchange Commission.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the petition is DENIED.

PRESENT: Jon O. Newman, Guido Calabresi, Steven J. Menashi, Circuit Judges.

John Doe petitions for review of an order of the Securities and Exchange Commission ("SEC") denying him a whistleblower award. We assume the parties' familiarity with the underlying facts and procedural history.

In general, federal law directs the SEC to pay a monetary award to a whistleblower when that whistleblower "voluntarily provided original information to the Commission that led to the successful enforcement" of "any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000." 15 U.S.C. § 78u-6(a)(1), (b)(1). But the SEC may not make an award "to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award." 15 U.S.C. § 78u-6(c)(2)(B).

John Doe is a whistleblower. He provided information to the SEC that assisted in a successful agency enforcement action with respect to an international bribery scheme (the "Covered Action"). After the SEC posted a notice on its website about the Covered Action, Doe timely filed an application

for a whistleblower award pursuant to 15 U.S.C. § 78u-6(b)(1) in connection with both the Covered Action and a related action (the "Related Action"). By that point, however, Doe himself had pleaded guilty to bribery charges. A court had accepted Doe's guilty plea but had not yet sentenced him. Because of the accepted guilty plea, the SEC determined that Doe had been "convicted of a criminal violation related to" the bribery scheme that was at issue in the Covered Action and the Related Action. 15 U.S.C. § 78u-6(c)(2)(B). The SEC issued a preliminary determination recommending the denial of Doe's award application. Doe contested the preliminary determination, and a few months later the SEC issued its final order denying a whistleblower award to Doe.

The "determination ... whether ... to make [a whistleblower] award[ ]" is at "the discretion of the Commission." 15 U.S.C. § 78u-6(f). We review the determination of the SEC as to whether to make a whistleblower award for abuse of discretion and—to the extent the agency makes findings of fact—for substantial evidence. See id. (noting that a court "shall review the determination" of the SEC "in accordance" with 5 U.S.C. § 706); *see also Kilgour v. SEC*, 942 F.3d 113, 120 (2d Cir. 2019) ("We review the Commission's whistleblower award determinations in accordance with section 706 of the Administrative Procedure Act.") (internal quotation marks and alteration omitted).

Doe challenges the SEC's interpretation of two key terms in 15 U.S.C. § 78u-6(2)(B): "convicted" and "related to." He argues that he was not "convicted" and that his criminal conduct was not "related to" the bribery scheme at issue in the Covered and Related Actions. He additionally argues that the SEC did not adequately explain its reasoning in denying the whistleblower award. We disagree. Doe forfeited his challenge to the SEC's interpretation of "convicted," which in any event lacks merit, and the SEC properly interpreted and applied the "related to" provision of the statute. The agency adequately explained its reasoning and supported its findings with substantial evidence. We deny Doe's petition for review.

I

Doe argues that he was not "convicted" under 15 U.S.C. § 78u-6(c)(2)(B). In Doe's telling, the fact that he has not yet been *sentenced*—even though a court has accepted his guilty plea—means that he has not been "convicted." But Doe did not raise this issue before the agency and therefore we need not address Doe's argument about the meaning of "convicted." But even if we were to excuse the forfeiture, Doe's argument would fail.

A

SEC regulations provide that when a claimant contests the agency's preliminary determination about a whistleblower award, the claimant must "set[

] forth the grounds for [his] objection to either the denial of an award or the proposed amount of an award." 17 C.F.R. § 240.21F-10(e). When Doe contested the SEC's preliminary determination in this case, he did not argue that he was not "convicted" under the applicable statute. Doe's failure to comply with the administrative process for raising the argument before the agency prevents him from raising it for the first time on appeal. *Xiao Ji Chen v. USDOJ*, 471 F.3d 315, 320 n.1 (2d Cir. 2006).

Doe resists this conclusion. He notes that in a footnote in its final order, the SEC described its interpretation of the term "convicted" despite Doe's failure to challenge that interpretation when he contested the preliminary determination. Doe points to *Ye v. Department of Homeland Security*, in which we excused an alien's failure to raise a claim before the Board of Immigration Appeals ("BIA") because the BIA addressed the merits of the claim. 446 F.3d 289, 296-97 (2d Cir. 2006). Yet here, unlike in *Ye*, the agency did not address an argument the petitioner failed to raise. Instead, the SEC simply noted its longstanding interpretation of the term "convicted" as it addressed Doe's argument that his conviction was not "related to" the Covered and Related Actions. J. App'x 393 n.15 (quoting *In the Matter of Gregory Bartko*, Release No. 71666, 2014 WL 896758, at *8 (Mar. 7, 2014), aff'd in part, rev'd in part on other grounds, *Bartko v. SEC*, 845 F.3d 1217 (D.C. Cir. 2017)). Doe was on notice from the preliminary determination that the agency believed his accepted

guilty plea disqualified him from the whistleblower award. Having failed to contest before the agency its determination that one is "convicted" when he has pleaded guilty, Doe is not entitled to raise the issue for the first time on a petition for review. *Xiao Ji Chen*, 471 at 320 n.1.

B

Even if Doe had not forfeited his argument about the term "convicted," the argument would fail. The agency did not err in adhering to its view that "there is no reason for ascribing a different meaning to the word 'convicted' in the Exchange Act to the meaning given to that term in the Advisers Act." *Gregory Bartko*, 2014 WL 896758, at *8 (alteration omitted). Doe contends that a person may be considered "convicted" only after a sentence is imposed, but that is not correct. *See, e.g.*, *United States v. Adkins*, 743 F.3d 176, 188 (7th Cir. 2014) (describing defendants who are "convicted but not yet sentenced"); *United States v. White*, 620 F.3d 401, 414 (4th Cir. 2010) (noting that a defendant is "tried and convicted, and then sentenced"); *United States v. Montoya*, No. CR-89-409, 1990 WL 252179, at *1 (E.D.N.Y. Dec. 17, 1990) (noting that a defendant "was tried before this court, convicted, and then sentenced").

II

Doe also argues that the bribery charges to which he pleaded guilty were not "related to" the

Covered and Related Actions. He additionally argues that the agency did not support its finding of such a relationship with substantial evidence. We disagree.

A

A whistleblower is ineligible under 15 U.S.C. § 78u-6(c)(2)(B) for an award from the SEC if he was "convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award." Id. (emphasis added). The SEC and Doe understand the term "related to" differently. The SEC interprets the term to mean that "the conduct underlying the criminal conviction must be connected to or stand in some relation to the Covered Action." J. App'x 394. Doe suggests that the term requires the whistleblower to have been "a part of the conduct underlying the ... enforcement action" and to have known about the conduct during its occurrence. Petitioner's Br. 30.

We agree with the SEC. In *Morales v. Trans World Airlines, Inc.*, the Supreme Court said the ordinary meaning of the term "relating to" is "a broad one." 504 U.S. 374, 383 (1992). The Court explained that this meaning is "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." *Id.* (quoting Black's Law Dictionary 1158 (5th ed. 1979)); *see also Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08 (1995) (explaining that the term "related to" in a

jurisdiction-conferring statute "suggests a grant of some breadth"). Our court has also noted that "[t]he term 'related to' is typically defined more broadly" than a term such as "arising out of." *Coregis Ins. Co. v. Am. Health Found.*, 241 F.3d 123, 128 (2d Cir. 2001).

The ordinary meaning of "related to" encompasses the connection between Doe's bribery charges and the bribery scheme underlying the Covered and Related Actions. Doe pleaded guilty to facilitating bribery payments that came from the same principal briber, targeted government officials in the same country, and sought benefits in the same industry as the scheme charged in the Covered and Related Actions. The SEC did not abuse its discretion when it determined that Doe's criminal conduct was "related to" the Covered and Related Actions.

B

We will set aside an agency's action if its findings are "unsupported by substantial evidence." 5 U.S.C. § 706. In other words, "we require that they be supported by more than a scintilla of evidence, which may be less than a preponderance." *Kilgour*, 942 F.3d at 120 (internal quotation marks omitted). This "threshold for ... evidentiary sufficiency is not high." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019).

The SEC's findings are supported by substantial evidence. The criminal information and

Doe's guilty plea establish Doe's participation in a bribery scheme that involved the same central figure as the scheme underlying the Covered and Related Actions. A declaration from an SEC attorney that supported the SEC's denial of the award was based on information provided by a government attorney who had been involved in the Justice Department's investigation that resulted in the Related Action.

III

Finally, Doe insists that the SEC failed to articulate its reasoning in its final order, thereby denying meaningful appellate review. We again disagree.

Doe's inadequate-reasoning argument relies on his other arguments about the definitions of "convicted" and "related to," and he criticizes the declarations of SEC attorneys as "conclusory and unreasoned." Petitioner's Br. 38-40. We think the SEC adequately articulated its reasoning with respect to its statutory interpretation, and the agency lawyers' declarations—furnished to Doe on his request—reflected a considered analysis of Doe's conduct and its relationship to the Covered and Related Actions. The SEC's articulation of its reasoning did not prevent Doe from obtaining meaningful appellate review.

* * *

We have considered the petitioner's remaining arguments, which we conclude are without merit. For the foregoing reasons, we DENY the petition for review.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of December, two thousand twenty-two.

John Doe,

Petitioner,

v.

Securities and Exchange Commission,

Respondent.

ORDER

Docket No.: 21-2537

Petitioner John Doe, filed a petition for rehearing en banc. The active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

SECURITIES AND EXCHANGE COMMISSION (S.E.C.)

S.E.C. Release No. 92985

Securities Exchange Act of 1934

IN THE MATTER OF THE CLAIMS FOR AWARDS IN CONNECTION WITH [REDACTED] NOTICE OF COVERED ACTION [REDACTED]

Whistleblower Award Proceeding File No. 2021-91

September 15, 2021

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIMS

The Claims Review Staff ("CRS") issued Preliminary Determinations in connection with the above-referenced Covered Action ("Covered Action") and related [Redacted] actions, recommending that: (1) [Redacted] ("Claimant 1") receive a [Redacted] percent (***%) award in (a) the Covered Action, (b) [Redacted] ("Related Action 1"), and (c) [Redacted] ("Related Action 2"), for a payout of almost $110,000,000;[1] (2) the award claim for the Covered Action and Related Action 1 submitted by [Redacted] ("Claimant 2") be denied; and (3) [Redacted] ("Claimant 3") receive a *** percent (***%) award in the Covered Action, for a payout of approximately $4,000,000.

Claimant 1 and Claimant 3 provided written notice of their decisions not to contest the Preliminary Determinations.[2] Claimant 2 filed a timely response contesting the Preliminary

Determinations. For the reasons discussed below, the CRS's recommendations are adopted.

I. Background

A. The Covered Action

On [Redacted], the Commission instituted the Covered Action. The Commission charged [Redacted] ("Company 1") [Redacted] paid in full. [Redacted]

On [Redacted], the Office of the Whistleblower posted a Notice for the Covered Action on the Commission's public website inviting claimants to submit whistleblower award applications within 90 days.[3] Claimant 1, Claimant 2, and Claimant 3 each filed a timely whistleblower award claim.

B. Related Action 1

[Redacted] paid in full.

C. Related Action 2

[Redacted] *** ("Company 2") [Redacted] paid in full.

D. The Preliminary Determinations

The CRS issued Preliminary Determinations recommending that the Commission (1) grant Claimant 1 an award equal to [Redacted] percent (***%) of the monetary sanctions collected, or to be collected, in the Covered Action, Related Action 1, and Related Action 2; (2) grant Claimant 3 an award equal to percent (***%) of the monetary sanctions collected, or to be collected, in the Covered Action;

and (3) deny an award to Claimant 2 in the Covered Action and Related Action 1 [Redacted]

E. Claimants' Responses to the Preliminary Determinations

Claimant 1 and Claimant 3 provided written notice of their decisions not to contest the Preliminary Determinations.

Claimant 2 submitted a timely, written response contesting the Preliminary Determinations. Claimant 2 argues that the CRS incorrectly concluded that [Redacted].[5]

Claimant 2 alleges that [Redacted] In this way, Claimant 2 alleges, [Redacted] Claimant 2 asserts that [Redacted] Instead, Claimant 2 purportedly [Redacted] Claimant 2 alleges that [Redacted]

In support of these assertions, Claimant 2 points to the fact that [Redacted] Additionally, Claimant 2 argues that [Redacted]

Claimant 2 also argues that [Redacted] Further, Claimant 2 asserts that [Redacted] Additionally, Claimant 2 makes an equitable argument, asserting that [Redacted] According to Claimant 2, it would be unjust to [Redacted] Claimant 2 accordingly believes that Claimant 2 is entitled to a whistleblower award for [Redacted]

II. Analysis

A. Claimant 1

As to Claimant 1, the record demonstrates that Claimant 1 voluntarily provided original information[8] to the Commission and to the Other Agency, and Claimant 1's original information led to the successful enforcement of the Covered Action,[9] Related Action 1,[10] and Related Action 2.[11] Further, the record reflects that: (1) Claimant 1's information, which included a detailed suggested witness list and other charts reflecting [Redacted], was important in connection with the Commission's allegations [Redacted] involving Company 1 [Redacted]; (2) Claimant 1's information and supporting documents saved the Commission significant time and resources; (3) Claimant 1 provided substantial, ongoing assistance to staff in the Division of Enforcement (the "Staff"), which included multiple written submissions and communications, including in-person meetings; and (4) Claimant 1 suffered personal and professional hardships as a result of Claimant 1's whistleblower activities.

However, while Claimant 1's information was important, it was submitted after the Staff had already opened an investigation and after the Staff had already become aware of potential misconduct by Company 1 [Redacted]. Furthermore, Claimant 1's information assisted the Staff in connection with only some of the misconduct that the Staff was investigating and which the Commission ultimately charged in the Covered Action.

We further find that Related Action 1 and Related Action 2 are "related actions" under

Exchange Act Rule 21F-3(b)(1) [Redacted]. Claimant 1 satisfies the requirements of Exchange Act Rule 21F-3(b)(2) [Redacted] for related action awards because Related Action 1 and Related Action 2 were based in part on the same original information that Claimant 1 voluntarily provided to the Commission. Specifically, Claimant 1 voluntarily provided original information to the Commission as well as to the Other Agency, and Claimant 1's information led to the successful enforcement of Related Action 1 and Related Action 2.

In light of these considerations and the relevant factors specified in Exchange Act Rule 21F-6,[12] it is appropriate that Claimant 1 receive an award of [Redacted] (***%) of the monetary sanctions collected, or to be collected, in the Covered Action, Related Action 1 and Related Action 2.

B. Claimant 3

The record demonstrates that Claimant 3 voluntarily provided original information to the Commission, and Claimant 3's original information led to the successful enforcement of the Covered Action.[13] Further, the record reflects that: (1) Claimant 3's information was submitted [Redacted] after the Staff's investigation had been opened and the Staff had undertaken significant investigative steps; and (2) Claimant 3's information and assistance was much more limited as compared to the information and assistance provided by Claimant 1.

In light of these considerations and the relevant factors specified in Exchange Act Rule 21F-6, it is appropriate that Claimant 3 receive an award

of *** percent (***%) of the monetary sanctions collected, or to be collected, in the Covered Action.

C. Claimant 2

We deny an award to Claimant 2 in connection with the Covered Action. [Redacted]

In sum, we see no reason for the Commission to [Redacted]

There is no reason to disturb the CRS's preliminary determination that Claimant 2's award claim should be denied because [Redacted]

III. Conclusion

Accordingly, it is hereby ORDERED that: (1) Claimant 1 shall receive an award of [Redacted] percent (***%) of the monetary sanctions collected, or to be collected, in the Covered Action, Related Action 1, and Related Action 2; (2) Claimant 3 shall receive an award of *** percent (***%) of the monetary sanctions collected, or to be collected, in the Covered Action; and (3) Claimant 2 shall be denied an award in the Covered Action [Redacted]

By the Commission.

Vanessa A. Countryman

Secretary

Footnotes

[1] Related Action 1 and Related Action 2 were brought by [Redacted] (the "Other Agency").

[2] The CRS also preliminarily determined to recommend that Claimant 1's award claim [Redacted] and that Claimant 3's related action award claims be denied. Because Claimant 1 and Claimant 3 did not contest those portions of the Preliminary Determinations, the preliminary denials of those related action award claims are now deemed to be final through operation of law.

[3] See Exchange Act Rule 21F-10(a), 17 C.F.R. § 240.21F-10(a).

[5] Claimant 2 has only applied for an award in connection with the Covered Action and Related Action 1.

[8] Claimant 1's information was based on Claimant 1's "independent analysis," a constituent element of "original information." Specifically, Claimant 1 utilized publicly available information in a way that went beyond the information itself and afforded the Commission with important insights into the extent of Company 1's misconduct as well as other relevant conduct. Additionally, Claimant 1's information was derived from multiple sources that were not readily identified and accessed by members of the public without specialized knowledge, unusual effort, or substantial cost. Moreover, the sources that Claimant 1 cultivated collectively raised a strong inference of securities law violations that was not otherwise reasonably inferable from any of the sources individually. In all, Claimant 1's own examination, evaluation, and analysis contributed significant independent information that bridged the gap between certain publicly available information and the possible securities violations that the

Commission and the Other Agency were investigating.

[9] See Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1); Exchange Act Rule 21F-3(a), 17 C.F.R. §240.21F-3(a).

[10] Related Action 1 [Redacted] Here, Related Action 1 constitutes a ""related action" to the Covered Action within the meaning of Exchange Act Section 21F(a)(5), 15 U.S.C. § 78u-6(a)(5), and Exchange Act Rule 21F-3(b) promulgated the re under, 17 C. F. R. § 240. 21F-3 (b), as it is [Redacted] and it is based on the same original information that the whistleblower voluntarily provided to the Commission and which led the Commission to obtain monetary sanctions totaling more than $1,000,000.

[11] In determining the amount of the awards to Claimant 1, we considered the following factors set forth in Exchange Act Rule 21F-6 as they apply to the facts and circumstances of Claimant 1's application: (1) the significance of information; (2) the assistance provided; (3) the law enforcement interest in deterring violations by granting awards; (4) participation in internal compliance systems; (5) culpability; (6) unreasonable reporting delay; and (7) interference with internal compliance and reporting systems.

[12] See Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1); Exchange Act Rule 21F-3(a), 17 C.F.R. §240.21F-3(a).

[13] Because Claimant 2 is not eligible for an award in the Covered Action, Claimant 2 is not eligible for a related action award. A related action

award may be made only if, among other things, the claimant satisfies the eligibility criteria for an award for the applicable covered action in the first instance. See 15 U.S.C. § 78u-6(b); Exchange Act Rule 21F-3(b), (b)(l); Exchange Act Rule 21F-4(f) and (g); Exchange Act Rule 21F-11(a).

15 U.S.C. § 78u-6(b)(1)

In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to—

> (A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and
>
> (B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.