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**ORDER DENYING PETITION FOR REVIEW, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (AUGUST 30, 2024)**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN M. BARR; JOHN MCPHERSON,

*Petitioners,*

v.

SECURITIES AND EXCHANGE COMMISSION,

*Respondent.*

No. 23-60216

Petition of Review of an Order from the Securities and Exchange Commission Agency No. 2023-42

Before: SMITH, ENGELHARDT, and RAMIREZ, Circuit Judges.

IRMA CARRILLO RAMIREZ, *Circuit Judge*:

Two whistleblowers challenge the Securities and Exchange Commission's calculation of award amounts under the Dodd–Frank Wall Street Reform and Consumer Protection Act. The petitions for review are DENIED.

# I

## A

This case concerns the extensive securities fraud perpetrated from 1999 to 2013 by Life Partners Holdings, Inc. (Life Partners). *See SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 773 (5th Cir. 2017). Because this Court has previously considered the details of the fraudulent scheme, *see, e.g.*, *id.* at 772-74; *Jacobs v. Cowley (In re Life Partners Holdings, Inc.)*, 926 F.3d 103, 112-14 (5th Cir. 2019), only immediately relevant facts are recounted here.

In 2012, the Securities and Exchange Commission (the SEC) "filed a civil action in federal district court charging [Life Partners] and three of its officers with violations of the anti-fraud provisions of the federal securities laws." In late 2014, following a jury trial, the district court entered final judgment against Life Partners, in which it was ordered to pay $38.7 million in disgorgement and civil penalties. *See SEC v. Life Partners Holdings, Inc.*, 71 F. Supp. 3d 615, 626 (W.D. Tex. 2014).

Before the district court entered final judgment on January 16, 2015, the SEC filed an emergency motion to appoint a receiver "to maintain the status quo, prevent further dissipation of assets from [Life Partners], and protect [Life Partners's] investors and creditors." Four days after entry of final judgment, Life Partners filed a voluntary petition for Chapter 11 bankruptcy. The district court had not yet ruled on the SEC's motion to appoint a receiver when Life Partners filed for bankruptcy, and Life Partners openly admitted that it filed for bankruptcy "to 'avoid the appointment'" of a receiver. On February 5, 2015, the district court

denied without prejudice the motion to appoint a receiver, finding, "[b]ased on [its] review of the motions and pleadings filed in [the bankruptcy] court," that "the SEC will be able to effectively seek from the [b]ankruptcy [c]ourt the relief sought . . . in the receivership motion."

In its capacity as an unsecured judgment creditor, the SEC filed a motion requesting that the bankruptcy court appoint a Chapter 11 trustee. The U.S. Trustee filed a similar motion. The bankruptcy court granted the SEC's motion, finding that Life Partners's gross mismanagement constituted cause for appointment of a trustee and the appointment would be in the best interests of Life Partners's creditors and investors.

In June 2016, the Chapter 11 trustee proposed a plan that was ultimately confirmed. Among other things, the plan proposed the creation of a "'Creditors' Trust,' whose beneficiaries generally comprised unsecured creditors." The plan listed the SEC's claim for the enforcement-action judgment as "its own creditor class," "allocated a Creditor's Trust interest" to the SEC for the judgment's full amount, and "estimated the corresponding recovery as 'Unknown.'" As part of the plan, the SEC "agreed to reallocate any distributions with respect to its Creditors' Trust interest to . . . the life-settlement investors . . . in return for [Life Partners's] agreement to voluntarily dismiss its appeal then pending" before this Court. *See* Order, *SEC v. Life Partners Holdings, Inc.*, No. 14-51353 (5th Cir. Dec. 22, 2016). The bankruptcy court confirmed the plan in November 2016. Notably, "[u]ndisputed evidence in the administrative record reflects that, as of November 2020, there had been no collections or distributions with respect to the [SEC]'s Creditors' Trust interest."

**B**

On April 1, 2015, the SEC posted a Notice of Covered Action, inviting individuals to apply for whistleblower awards in connection with the Life Partners enforcement action. John Barr and John McPherson (Petitioners) timely submitted their respective applications.

On September 28, 2020, the SEC's Claims Review Staff (CRS) issued Preliminary Determinations, advising Petitioners of the intent to recommend that Barr be denied an award and that McPherson be granted an award of "23% of the monetary sanctions collected, or to be collected." The Preliminary Determination sent to McPherson[1] explained that: (1) the SEC "shall pay an award to a whistleblower who provides original information that leads to the successful enforcement of the covered judicial or administrative action, or related action," (2) "[a] bankruptcy proceeding is neither brought by the [SEC] nor does it arise under the securities laws," (3) "a bankruptcy proceeding is not a related action, which must be 'brought by' a qualifying entity 'based on' the same original information that led to the successful enforcement of the covered action," and (4) the bankruptcy case "was not brought by a qualifying entity but rather was initiated by a voluntary petition under Chapter 11 filed by Life Partners."

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[1] When the SEC transmits a document to a putative whistleblower, the SEC redacts information related to other whistleblowers. Here, this meant that CRS's explanation to McPherson was not provided to Barr.

C

Petitioners timely filed their respective written responses to the Preliminary Determinations. Barr primarily argued that CRS's determination to deny him an award was "based on inaccurate and incomplete information." After pointing out alleged factual inaccuracies in a declaration CRS relied on and listing out his contributions to the SEC's work relating to Life Partners, Barr urged reconsideration and for the SEC to grant him an award. McPherson advanced two main arguments: (1) the whistleblower-award calculation should be based on what the SEC is "able to collect," and (2) his whistleblower efforts warranted exercise of the SEC's statutorily delegated discretion to pay him a larger award.

On March 27, 2023, the SEC issued the final order regarding the whistleblower awards. It revised the ultimate recommendations in the Preliminary Determinations and granted Barr 5% and McPherson 20% of "the amounts collected or to be collected in connection with" the SEC's enforcement action. The SEC disagreed with McPherson's objections. Among other legal conclusions, the SEC stated: (1) it did not "walk away from a collection of $38.7 million" by voluntarily subordinating its interest in the Creditors' Trust "because it would only have been able to collect a *de minimis* amount, and any such collections would have been dependent upon the [SEC] winning on appeal"; (2) the whistleblower-award calculation cannot be based on what the SEC "may have been able to but did not collect" because "the statutory maximum whistleblower award is based on the amount actually collected"; and (3) calculating the award "based on what the [SEC] hypothetically 'was able to collect,' but

did not, would introduce uncertainty, inconsistency, and could delay the processing of award claims."

Barr petitioned this Court for review of the SEC's final order on April 24, 2023, and McPherson petitioned the United States Court of Appeals for the D.C. Circuit for review on April 25, 2023. The D.C. Circuit subsequently transferred McPherson's petition to this Court under 28 U.S.C. § 2112(a)(5), where it was consolidated with Barr's petition.

## II

Congress commits whistleblower-award determinations to the SEC's discretion. 15 U.S.C. § 78u-6(f). These determinations are reviewed "in accordance with section 706 of Title 5," *id.*, so they may be set aside if "found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,'" *Healthy Gulf v. U.S. Army Corps of Eng'rs*, 81 F.4th 510, 520 (5th Cir. 2023) (quoting 5 U.S.C. § 706(2)(A)).

An agency order is "arbitrary and capricious 'if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 933 (5th Cir. 1998) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). But this review is "neither sweeping nor intrusive. Instead, we 'ask whether the agency considered the relevant facts and articulated a satisfactory explanation for its decision; we cannot substitute our judgment for the agency's.'" *Fort Bend*

*County v. U.S. Army Corps of Eng'rs*, 59 F.4th 180, 194 (5th Cir. 2023) (quoting *Amin v. Mayorkas*, 24 F.4th 383, 393 (5th Cir. 2022)). Pure questions of law are reviewed *de novo*. *Tex. Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 775 (5th Cir. 2010) (quoting *Alwan v. Ashcroft*, 388 F.3d 507, 510 (5th Cir. 2004)); *see Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). Agency decisions are "presumptively valid; the [petitioner] bears the burden of showing otherwise." *Tex. Tech Physicians Assocs. v. U.S. Dep't of Health & Hum. Servs.*, 917 F.3d 837, 844 (5th Cir. 2019).

## III

### A

In the Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), Congress "established 'a new, robust whistleblower program designed to motivate people who know of securities law violations to tell the SEC.'" *Digit. Realty Tr., Inc. v. Somers*, 583 U.S. 149, 155 (2018) (quoting S. Rep. No. 111-176, at 38 (2010)). The program's statutory framework is located in 15 U.S.C. § 78u-6.

The statute outlines the circumstances in which the SEC must pay out whistleblower awards:

> In any covered judicial or administrative action, or related action, the [SEC], under regulations prescribed by the [SEC] and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the [SEC] that led to the successful enforce-

> ment 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.

*Id.* § 78u-6(b)(1)(A)-(B).

The SEC is required to pay a whistleblower award in a "covered judicial or administrative action, or related action." *See id.* § 78u-6(b)(1). "[C]overed judicial or administrative action" and "related action" are defined terms. A covered judicial or administrative action refers to "any judicial or administrative action brought by the [SEC] under the securities laws that results in monetary sanctions exceeding $1,000,000." *Id.* § 78u-6(a)(1). A related action, "when used with respect to any judicial or administrative action brought by the [SEC] under the securities laws," refers to "any judicial or administrative action brought by [the Attorney General of the United States, an appropriate regulatory authority, a self-regulatory organization, or a State attorney general in connection with any criminal investigation] that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the [SEC] action." *Id.* § 78u-6(a)(5); *see id.* § 78u-6(h)(2)(D)(i)(I)-(IV) (identifying the entities that may bring a related action). Whistleblowers are only entitled to awards under § 78u-6(b)(1) resulting from these qualifying actions.

**B**

The SEC contends Petitioners forfeited their argument that the SEC's actions in the bankruptcy case initiated a new "covered" action. Petitioners disagree.

Arguments are forfeited if raised "for the first time on appeal." *Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021). An exception to this rule is that "an issue might be addressed for the first time on appeal if 'it is a purely legal matter and failure to consider the issue will result in a miscarriage of justice.'" *Shambaugh & Son, L.P. v. Steadfast Ins. Co.*, 91 F.4th 364, 372 (5th Cir. 2024) (quoting *Rollins*, 8 F.4th at 398). While there is "no certain answer" as to when this exception should apply, *Essinger v. Liberty Mut. Fire Ins. Co.*, 534 F.3d 450, 453 (5th Cir. 2008), we must identify a "principled basis" to invoke it, *Rollins*, 8 F.4th at 398.

As noted above, when the SEC transmitted its Preliminary Determination to Barr, the document was redacted in great part, revealing information relevant only to Barr's award application. The SEC's explanation as to why it would recommend denying Barr an award rested on a single basis—that the information Barr provided "did not lead to the successful enforcement" of the SEC's enforcement action. Unlike with the Preliminary Determination McPherson received, the materials the SEC sent to Barr provided no indication of the SEC's interpretation of law now at issue before us.

The argument the SEC claims is forfeited is a purely legal one, and Barr had no notice or opportunity to contest the SEC's argument in the agency proceedings. *See Bunker v. Dow Chem. Co.*, ___ F.4th ___,

No. 24-20046, 2024 WL 3680804, at *4 n.3 (5th Cir. Aug. 7, 2024) ("Our decision not to address Bunker's newly raised arguments does not result in a miscarriage of justice. Bunker had every opportunity to present these arguments below."). We find that a miscarriage of justice would result if we did not consider this purely legal argument since Barr was unaware of the SEC's legal position and had no opportunity to challenge it in the agency proceedings.[2]

**C**

Petitioners contend the bankruptcy case is a "covered judicial or administrative action" because, among other things, it is an action the SEC brought. They also contend the bankruptcy case is a "related action" because, among other things, it is an action the SEC or the Attorney General[3] brought. The SEC disagrees.

**1**

The statutory provisions defining qualifying actions are not identical, but they do share a phrase—"action brought." *See* 15 U.S.C. § 78u-6(a)(1), (5). The parties dispute its meaning.

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[2] Given our ultimate conclusion, we assume without deciding that McPherson did not forfeit this argument either.

[3] Sections 78u-6(a)(5) and 78u-6(h)(2)(D)(i)(I) establish that the Attorney General may bring a related action. "The Attorney General is the head of the Department of Justice." 28 U.S.C. § 503. The U.S. Trustees fall within the Department of Justice and operate under the Attorney General. *See id.* §§ 581, 586. Petitioners contend that under this structure, the U.S. Trustee qualifies as the Attorney General for purposes of 15 U.S.C. § 78u-6(a)(5).

When interpreting acts of Congress, courts seek the ordinary meaning of the enacted language. *Nat'l Ass'n of Priv. Fund Managers v. SEC*, 103 F.4th 1097, 1110 (5th Cir. 2024). The statutory text is invariably the first and primary consideration, *see Parada v. Garland*, 48 F.4th 374, 377 (5th Cir. 2022) (per curiam), and "the words of a statute" are normally given "their 'ordinary, contemporary, common meaning,' absent an indication Congress intended them to bear some different import," *Williams v. Taylor*, 529 U.S. 420, 431 (2000) (quoting *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997)). If a statute's text is clear and unambiguous, the interpretive inquiry ends. *Christiana Tr. v. Riddle*, 911 F.3d 799, 806 (5th Cir. 2018) (quoting *BMC Software, Inc. v. Comm'r*, 780 F.3d 669, 674 (5th Cir. 2015)).

Section 78u-6 does not define the word "action" or the phrase "action brought," so they take their "ordinary meaning." *See HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n*, 594 U.S. 382, 388 (2021) (quoting *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)); *see also Belt v. EmCare, Inc.*, 444 F.3d 403, 412 (5th Cir. 2006) ("[W]e routinely consult dictionaries as a principal source of ordinary meaning. . . . "). An "action" is a "civil or criminal judicial proceeding." *Action*, Black's Law Dictionary (12th ed. 2024). Precedent confirms this understanding of "action." *See Brown v. Megg*, 857 F.3d 287, 290 (5th Cir. 2017) ("The ordinary meaning of 'action' is the entire lawsuit."); *Tejero v. Portfolio Recovery Assocs., L.L.C.*, 993 F.3d 393, 396 (5th Cir. 2021) (synonymizing an "action" with "a 'lawsuit'"); *see also Brownback v. King*, 592 U.S. 209, 220 (2021) (Sotomayor, J., concurring) ("An 'action' refers to the whole of the lawsuit."); *Corley v. Long-Lewis, Inc.*, 965

F.3d 1222, 1236 (11th Cir. 2020) (Pryor, C.J., concurring) ("'[A]n action[]' . . . refers to 'the whole case.'" (citation omitted)).

As for "action brought," "[t]he dictionary defines to 'bring an action' as to 'sue' or 'institute legal proceedings.'" *Serna v. L. Off. of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 451 (5th Cir. 2013) (Smith, J., dissenting) (quoting *Bring an Action*, Black's Law Dictionary 219 (9th ed. 2009)); *see Dynamic CRM Recruiting Sols., L.L.C. v. UMA Educ., Inc.*, 31 F.4th 914, 919-23 (5th Cir. 2022) (conducting similar analysis of "brought before"); *see also Action*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/action (last visited August 30, 2024) ("the initiating of a proceeding in a court of justice by which one demands or enforces one's right"). And because "[t]o 'sue' is 'to institute a lawsuit against (another party),' and to 'institute' is, in turn 'to begin or start; commence,'" *Serna*, 732 F.3d at 451 (Smith, J., dissenting) (original alterations and citations omitted); *see id.* ("[M]any federal statutes use 'file' and 'bring' interchangeably. . . . "), bringing an action refers to the act of filing a lawsuit or beginning legal proceedings. *See Goldenberg v. Murphy*, 108 U.S. 162, 163 (1883) ("A suit is brought when in law it is commenced, and we see no significance in the fact that in the legislation of congress on the subject of limitations the word 'commenced' is sometimes used, and at other times the word 'brought.' In this connection the two words evidently mean the same thing, and are used interchangeably."). Federal courts agree on this understanding. *See, e.g.*, *Hong v. SEC*, 41 F.4th 83, 95 (2d Cir. 2022) ("[C]ourts commonly refer to a party as having 'brought an action,' meaning that the party

filed a lawsuit or formally initiated an administrative proceeding."); *United States ex rel. Chovanec v. Apria Healthcare Grp. Inc.*, 606 F.3d 361, 362 (7th Cir. 2010) ("One 'brings' an action by commencing suit."); *Chandler v. D.C. Dep't of Corr.*, 145 F.3d 1355, 1359 (D.C. Cir. 1998) ("[T]he phrase 'bring a civil action' means to initiate a suit.").

**2**

Petitioners contend the SEC's motion to appoint a Chapter 11 trustee constituted bringing a qualifying action under § 78u-6(a).[4] They maintain that once the bankruptcy court granted the SEC's motion, the U.S. Trustee appointed a Chapter 11 trustee, "who then initiated the full bankruptcy proceedings."

Key aspects of filing a motion to appoint a Chapter 11 trustee are incongruent with the plain meaning of bringing an action. First, bankruptcy cases are "commenced by the filing with the bankruptcy court of a petition," not the filing of a motion to appoint a trustee. 11 U.S.C. § 301(a); *see* Fed. R. Bankr. P. 1002. Second, a motion to appoint a Chapter 11 trustee may not be brought until a bankruptcy case has already commenced. *See* 11 U.S.C. § 1104(a). Third, and more generally, a motion "is—and long has been—commonly understood to denote a request filed within the context

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[4] The question addressed here is narrow: is a motion to appoint a Chapter 11 trustee an "action brought" under § 78u-6(a)(1) or § 78u-6(a)(5)? Because the motion to appoint a Chapter 11 trustee is the only act Petitioners point to that may constitute bringing an action under § 78u-6(a), the answer to this question must be yes for Petitioners to prevail. Accordingly, we do not address whether other filings or procedures in the bankruptcy context qualify as an "action brought" in this statutory context.

of a preexisting judicial proceeding." *In re Wild*, 994 F.3d 1244, 1257 (11th Cir. 2021) (en banc) (emphasis added); *see, e.g.*, *Motion*, Black's Law Dictionary (12th ed. 2024) ("Frequently, *in the progress of litigation*, it is desired to have the court take some action which is incidental to the main proceeding. . . . Such action is invoked by an application usually less formal than the pleadings, and called a motion." (emphasis added) (quoting John C. Townes, Studies in American Elementary Law 621 (1911))); *see also Motion in Court*, A modern Dictionary of the English Language 446 (2d ed. 1911) ("[A]n application to a court . . . to have a rule or order made which is necessary to the progress of an action." (emphasis added)). Taken together, these points run contrary to the notion that filing a motion to appoint a Chapter 11 trustee constitutes bringing an action for purposes of § 78u-6(a).

Nevertheless, Petitioners argue that even though the bankruptcy case was not filed by a qualifying entity, bankruptcy actions are "an umbrella for a series of 'cases within a case,'" and filing the motion to appoint a trustee in Life Partners's bankruptcy case qualifies as an "action brought" by a qualifying entity.

Petitioners are generally correct that "bankruptcy case[s] embrace[] 'an aggregation of individual controversies.'"[5] *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 589 U.S. 35, 37 (2020) (citation omitted). But they

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[5] This understanding of bankruptcy cases comes from the application of the final-judgment rule in the bankruptcy context. *See generally* 16 Charles Alan Wright et al., Federal Practice and Procedure § 3926.2 (3d ed.) (June 2024 Update). Petitioners do not provide authority supporting the notion that the way bankruptcy proceedings are treated for final-judgment purposes translates to the context of qualifying actions under § 78u-6(a).

provide no authority to connect this general principle to the facts before us.

It is axiomatic that "statutory terms are generally interpreted in accordance with their ordinary meaning." *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006). As explained above, the ordinary meaning of "action brought" does not readily encompass a motion to appoint a Chapter 11 trustee, and Petitioners provide no authority explaining why the meaning of "action brought" should be understood as something other than its ordinary meaning. They merely point to the various ways in which the SEC and the U.S. Trustee were involved in the bankruptcy case. But it is not clear how or why these contentions demonstrate that the filing of the motion to appoint a Chapter 11 trustee constitutes bringing an action for purposes of § 78u-6. *See* 15 U.S.C. § 78u-6(a)(1), (5), (b)(1); *see also United Servs. Auto. Ass'n v. Perry*, 102 F.3d 144, 146 (5th Cir. 1996) ("A statute is ambiguous if it is susceptible of more than one accepted meaning." (emphasis added)).

Additionally, there are key problems with Petitioners' argument regarding the meaning of "action brought" and the focus on the word "proceeding." They appear to argue that "action" and "proceeding" are synonyms, and therefore any "proceeding" within a bankruptcy case is an "action" for § 78u-6's purposes. While that might be the case in some instances, "proceeding" ordinarily refers to aspects of an already commenced "action." *See Proceeding*, Black's Law Dictionary (12th ed. 2024) ("The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment. . . . An act or step that is part of a larger action."). This is specifically the case in the bankruptcy

context, in which a "proceeding" is "a particular dispute or matter arising within a pending case—as opposed to the case as a whole." *Id.* Moreover, Petitioners' argument that the "action brought" consists of all proceedings from the filing of the motion to appoint a trustee "up to and including the . . . court-ordered reorganization plan" demonstrates the extent to which they attempt to stretch the statutory language. This argument seemingly turns the ordinary meaning of "action brought" on its head. Petitioners do not provide authority explaining why the understanding they articulate is proper. *See Deal v. United States*, 508 U.S. 129, 131-32 (1993) ("[A]ll but one of the meanings [of a word] is ordinarily eliminated by context."), *superseded by statute on other grounds*, First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

Given the lack of fit between the plain language of "action brought" and the filing of a motion to appoint a Chapter 11 trustee, we find that filing a motion to appoint a Chapter 11 trustee does not qualify as bringing a "covered judicial or administrative action" or a "related action." *See* 15 U.S.C. § 78u-6(a)(1), (5).

**3**

Petitioners assert two additional arguments.

First, in a variation on their main argument, Petitioners contend that the SEC's involvement in the bankruptcy case constitutes a "covered judicial or administrative action" because the bankruptcy case was simply a "continu[ation]" of the SEC's "single enforcement strategy" that began with the enforcement action in the United States District Court for the Western District of Texas. But Petitioners do not grapple with the ordinary meaning of "action brought" in § 78u-

6(a). Their "continuation" argument does not comport with the ordinary meaning of "bringing an action," *i.e.*, initiating a lawsuit or legal proceedings. *See Harris v. Garner*, 216 F.3d 970, 974 (11th Cir. 2000) (en banc) ("'[B]rought' and 'bring' refer to the filing or commencement of a lawsuit, not to its continuation."). Petitioners' reading would do away with the commencement aspect of "bringing an action." *See FCC v. AT&T Inc.*, 562 U.S. 397, 407 (2011) (declining to adopt a party's reading of a statutory term where the party did not provide a "sound reason in the statutory text or context to disregard" the term's "ordinary meaning"); *see also* 17 C.F.R. § 240.21F-4(d) ("An action generally means a single captioned judicial or administrative proceeding brought by the [SEC]." (emphasis added)).

Second, Petitioners argue that the SEC's interpretation of 15 U.S.C. § 78u-6 is contrary to the purpose of the whistleblower statute and will damage the design and efficacy of the whistleblower program. These contentions go to policy concerns underlying the statute, which are appropriate for Congress's consideration, not ours. *See BP P.L.C. v. Mayor of Balt.*, 141 S. Ct. 1532, 1542 (2021) ("'[E]ven the most formidable' policy arguments cannot 'overcome' a clear statutory directive." (quoting *Kloeckner v. Solis*, 568 U.S. 41, 55 n.4 (2012))). "Laws are the product of 'compromise,' and no law 'pursues its purposes at all costs.'" *Luna Perez v. Sturgis Pub. Schs.*, 598 U.S. 142, 150 (2023) (brackets and ellipsis omitted) (quoting *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017)). While Petitioners' policy concerns are well-taken, courts "do not generally expect statutes to fulfill 100% of all of their goals." *Cyan, Inc. v. Beaver Cnty. Emps.' Ret. Fund*, 583 U.S. 416, 433 (2018). "[T]he best guide

to what Congress intends" in a statute is "what Congress says in [the] statute's text," *United States v. Koutsostamatis*, 956 F.3d 301, 310 (5th Cir. 2020), and "a statute's purpose may not override its plain language," *United States v. Rainey*, 757 F.3d 234, 245 (5th Cir. 2014). *See Richards v. United States*, 369 U.S. 1, 9 (1962) ("[L]egislative purpose is expressed by the ordinary meaning of the words used."). Because § 78u-6's text is plain and unambiguous, we must give effect to the text as enacted by Congress without considering statutory purpose. *See Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 622 (5th Cir. 2013).

* * *

Because the motion to appoint a trustee in the bankruptcy case was not an "action brought by" a qualifying entity, it does not meet the definition of a "covered judicial or administrative action" under § 78u-6(a)(1) or a "related action" under § 78u-6(a)(5). In the absence of an action identified by the statute, § 78u-6(b)(1) does not require the SEC to pay whistleblower awards to Barr and McPherson predicated on the bankruptcy case.[6]

**D**

Seeking a larger award amount than the SEC originally allotted, McPherson requests that we "clarify the extent of the [SEC]'s exemptive authority" and

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[6] Given this conclusion, Petitioners' remaining arguments on the merits, with the exception of the matter examined in Section III.D *infra*, need not be considered. *See PDK Labs. Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment) ("[I]f it is not necessary to decide more, it is necessary not to decide more. . . .").

remand for further consideration by the SEC. The authority McPherson refers to comes from 15 U.S.C. § 78mm(a)(1), which allows the SEC to "conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this chapter or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors." McPherson supports his request with two contentions: (1) there is no limitation in § 78mm(a)(1)'s text proscribing the SEC's use of its exemptive authority as to the award amount, and (2) the SEC has previously exempted whistleblowers from pertinent statutory requirements.

First, the SEC's final order does not indicate any disagreement as to § 78mm(a)(1)'s meaning. The SEC stated:

> We have used this discretionary authority to exempt whistleblowers from certain of the program's rules under limited circumstances. However, the limitation on the amount of the award to be issued in connection with any Covered Action was set by statute, and we have never used our discretion under Section 36(a)(1) of the Exchange Act to exempt a whistleblower from a statutory requirement or to approve an award amount above the statutory limit. The text of the statute reflects a clear congressional design to grant awards of no more than 30 percent of the amounts collected. Congress established the same framework for awards to be paid to whistleblowers in cases brought by the Commodity

> Futures Trading Commission and under the Anti-Money Laundering Act. Given the clarity and consistency of the statutory design for whistleblower awards, the [SEC] does not believe it would be appropriate to use its exemptive authority to award an amount above the statutory limit even in cases such as this one, where a higher award amount might otherwise be warranted.

It did not take the position that it was statutorily precluded from exercising its exemptive authority as to McPherson.

Second, though McPherson claims the SEC has previously exempted whistleblowers from pertinent statutory requirements, he cites two supporting examples—only one actually involved the use of the exemptive authority, but there the SEC exempted the whistleblower from a regulatory, not statutory, requirement. *See* Order Determining Whistleblower Award Claim, Release No. 72727, 2014 WL 3749705, at *1 (July 31, 2014) ("[W]e therefore believe it appropriate in the public interest and consistent with the protection of investors to waive the 'voluntary' requirement of *Rule 21F-4(a)* on the unique facts of this award claim and to make an award to Claimant." (emphasis added)).

To the extent McPherson's request is simply for the SEC to reconsider its exemptive-authority decision, McPherson must demonstrate that the SEC abused its discretion in declining to exempt McPherson from the statutory limits. *See* 5 U.S.C. § 706(2)(A). But merely disagreeing with the SEC's decision does not show that the agency abused its discretion.

## IV

The petitions for review are DENIED.

**ORDER DETERMINING WHISTLEBLOWER AWARD CLAIMS, AS REDACTED BY SEC [NO UNREDACTED VERSION AVAILABLE TO PETITIONER] (MARCH 27, 2023)**

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Claims for an Award
in connection with

SEC, v. LIFE PARTNERS, INC., ET AL.,
12-CV-00002 (W.D. Tex., filed Jan. 3, 2012)

SECURITIES EXCHANGE ACT OF 1934
Release No. 97202 / March 27, 2023

WHISTLEBLOWER AWARD PROCEEDING
File No. 2023-42

Notice of Covered Action 2015-036

**ORDER DETERMINING WHISTLEBLOWER AWARD CLAIMS**

The Claims Review Staff ("CRS") issued Preliminary Determinations recommending that (i) [redacted] ("Claimant 1") receive a whistleblower award equal to [redacted] percent ([redacted]%) of the monetary sanctions collected, or to be collected in connection with the

above referenced Covered Action (the "Covered Action"); (ii) [redacted] ("Claimant 2") receive a whistleblower award equal to [redacted] percent ([redacted]%) of the monetary sanctions collected, or to be collected, in connection with the Covered Action; and (iii) the whistleblower award applications submitted by [redacted] ("Claimant 3") and John Barr ("Claimant 4") in connection with the Covered Action be denied. Each of the Claimants filed a timely response contesting the Preliminary Determination.

After review of the reconsideration requests and additional information submitted by Claimant 4, we find Claimant 4 to be eligible for an award. Accordingly, we reallocate a maximum thirty percent award among Claimants 1, 2, and 4 and (i) award Claimant 1 [redacted] percent ([redacted]%) of the monetary sanctions collected or to be collected in the Covered Action, equal to over $21,000, (ii) award Claimant 2 [redacted] percent ([redacted]%) of the monetary sanctions collected or to be collected in the Covered Action, equal to over $5,000, and (iii) award Claimant 4 five percent (5%) of the monetary sanctions collected or to be collected in the Covered Action, equal to over $5,000. We deny an award to Claimant 3.

## I. Background

### A. The Covered Action

In April 2010, staff in the United States Securities and Exchange Commission's ("Commission") Division of Enforcement ("Enforcement") opened a matter under inquiry to investigate certain conduct by Life Partners Holdings, Inc. (the "Company"), a public company in the business of brokering life settlements. On January 3, 2012, the Commission filed a civil

action in federal district court charging the Company and three of its officers with violations of the anti-fraud provisions of the federal securities laws. *SEC v. Life Partners, Inc., et al.*, 12-CV- 00002 (W.D. Tex.). The Commission's Complaint alleged, among other things, that the Company systematically used life expectancies that were materially short in brokering life settlements leading to disclosure and accounting fraud.

On January 9, 2014, the district court entered a final judgment by consent in favor of the Commission that ordered one of the Company's officers, the CFO, to pay a civil penalty of $34,961. The remaining defendants continued to trial, and the jury returned a verdict finding that each remaining defendant had violated Section 17(a)(1) of the Securities Act and that the Company violated Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder- and that these violations were aided and abetted by the CEO and General Counsel. After the trial, the court set aside the Section 17(a)(1) verdict as unsupported by the evidence and declined to order reimbursement pursuant to Section 304 of the Sarbanes-Oxley Act ("SOX") against the CEO. On January 16, 2015, the Court entered a final judgment ordering the Company to pay disgorgement of $15 million and a civil penalty of $23.7 million, and the CEO and General Counsel to pay civil penalties of $6.2 million and $2 million. The defendants appealed the judgment. The Commission filed a cross-appeal.

On January 20, 2015, the Company filed a voluntary petition under Chapter 11 in the United States Bankruptcy Court for the Northern District of Texas, Case No. 15-40289-rfn-11 (the "Bankruptcy Action").

On December 9, 2016, the Revised Third Amended Plan of Reorganization of the Company became effective. The plan established a trust to oversee the liquidation of the Company's assets and the distribution of the net proceeds to the Company's defrauded investors. As part of the plan, the Commission received a Creditor's Trust Interest up to the amount of the Commission's Judgment Claim of $38.7 million and agreed that any distributions in respect of its Creditor's Trust Interest would be reallocated to investors. In return, the Company dismissed its appeal. The Commission also dismissed its cross-appeal.

As to the CEO and General Counsel, the Fifth Circuit reinstated the Section 17(a)(1) jury verdict and ordered the district court to reassess penalties as well as reimbursement against the CEO under Section 304 of SOX. On September 28, 2018, on remand, the district court ordered (i) the CEO and General Counsel each to pay $6,500 in civil penalties for their Section 17(a) violations; (ii) the CEO to pay $3,555,000 in civil penalties for aiding and abetting the Company's Section 13(a) violations, (iii) the General Counsel to pay $2,000,000 in civil penalties for aiding and abetting the Company's Section 13(a) violations; and (iv) the CEO to reimburse the Company in the amount of $1,325,566 under Section 304 of SOX.

On April 1, 2015, the Office of the Whistleblower posted a Notice of Covered Action on the Commission's public website inviting claimants to submit whistleblower award applications within ninety days. Claimant 1, Claimant 2, and Claimant 4 submitted timely award claims on Form WB-APP. Claimant 3 submitted a claim on Form WB-APP on [redacted], almost two months after the deadline.

### B. The Preliminary Determinations

The CRS issued Preliminary Determinations[1] recommending that Claimant 1 receive a whistleblower award of [redacted]% and Claimant 2 receive a whistleblower award of [redacted]% of the monetary sanctions collected, or to be collected, in the Covered Action.

The CRS recommended that Claimant 4's application be denied because Claimant 4 did not submit information that led to the successful enforcement of the Covered Action within the meaning of Section 21F(b)(1) of the Exchange Act and Rules 21F-3(a)(3) and 21F-4(c) thereunder. In reaching the Preliminary Determination, the CRS noted that (i) the Enforcement staff opened the underlying investigation more than three years before Claimant 4 submitted his/her tip to the Commission; (ii) Claimant 4 did not testify at trial due to a ruling by the judge; (iii) although Claimant 4's information assisted the staff in preparing the Commission's motion for the appointment of a receiver, the court denied that motion and did not appoint a receiver, noting that the Commission would be able to seek the appropriate relief from the bankruptcy court; and (iv) Claimant 4's assistance in the bankruptcy proceedings does not qualify as having "led to the successful enforcement of" the Covered Action under Section 21F(b)(1) because it did not contribute to the process leading to the entry of the final judgment and consequent relief in the Commission's favor and also did not result in the subsequent entry of any additional relief for the violations alleged by the Commission.

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1 *See* Exchange Act Rule 21F-10(d), 17 C.F.R. § 240.21F-10(d).

The CRS also recommended that Claimant 3's application be denied because Claimant 3 did not submit information that led to the successful enforcement of the Covered Action within the meaning of Section 21F(b)(1) of the Exchange Act and Rules 21F-3(a)(3) and 21F-4(c) thereunder. In reaching the Preliminary Determination, the CRS noted that (i) the Enforcement staff opened the underlying investigation more than two years before Claimant 3 submitted his/her tip to the Commission; (ii) Claimant 3's information was not new or meaningful to the success of the Covered Action; (iii) Claimant 3 was not called to testify at the trial in the Covered Action; and (iv) while Claimant 3 identified a potential witness, Enforcement staff did not present that witness at trial. The CRS also recommended that Claimant 3's application be denied because Claimant 3 failed to meet the deadline for applying for an award in connection with the Covered Action and submitted a Form WB-APP almost two months late.[2]

### C. Claimants' Responses to the Preliminary Determinations

Claimant 1 submitted a timely written response contesting the Preliminary Determination.[3] Specifically, Claimant 1 argues, alternatively, that (i) Claimant

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[2] Exchange Act Rules 21F-10(a) ("A claimant will have ninety (90) days from the date of the Notice of Covered Action to file a claim for an award based on that action, or the claim will be barred") and 10(b)(1) ("All claim forms, including any attachments, must be received by the Office of the Whistleblower within ninety (90) calendar days of the date of the Notice of Covered Action in order to be considered for an award").

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

1's award should be based on the amount that the Commission was "able to collect" rather than the amount it actually collected; (ii) Claimant 1's award should be based on any amounts collected by the bankruptcy trustee and distributed to defrauded investors; or (iii) the Commission should use its discretion under Section 36(a)(1) of the Exchange Act to exempt Claimant 1 from the whistleblower program rules and issue an appropriate award amount.

Claimant 2 submitted a timely written response contesting the Preliminary Determination. Specifically, Claimant 2 argues that the Commission should use its discretion to award [redacted] to Claimant 2. Claimant 2 asserts that this award amount is necessary in order for Claimant 2 to recover the losses Claimant 2 suffered as a result of [redacted] the Covered Action.

Claimant 4 submitted a timely written response contesting the Preliminary Determination. Specifically, Claimant 4 argues that Claimant 4 is entitled to an award because Claimant 4's information led to the success of the Covered Action. Claimant 4 claims that (i) Claimant 4 would have been an important witness were Claimant 4 allowed to testify at the trial; (ii) Claimant 4 provided new information and documents, including certain documents that the Commission introduced as evidence at trial; (iii) Claimant 4 identified a critical witness ("Witness") for the Commission at the trial; and (iv) Claimant 4 provided significant information and supporting evidence, including audio recordings of communications with the CEO that would have been helpful to the Commission in connection with the appointment of a receiver and that helped in the appointment of the bankruptcy trustee. Claimant 4 also claims that even if staff were already

aware of the Witness, he/she provided new, important information by telling staff that the Witness would make a good witness for the SEC at trial because of the Witness' acrimonious departure from the Company. In addition, pursuant to a request from the Office of the Whistleblower ("OWB"), Claimant 4 provided information indicating that the Commission used the audio recordings provided by Claimant 4 in obtaining additional relief in the remanded final judgment.

Claimant 3 submitted a timely written response contesting the Preliminary Determination. Specifically, Claimant 3 argues that Claimant 3 is entitled to an award because Claimant 3's information led to the success of the Covered Action by saving the Commission time and resources in focusing on the key documents and issues. Claimant 3 claims that: (i) Claimant 3 had multiple communications with Enforcement staff during the litigation; (ii) during the trial Enforcement staff relied on the information Claimant 3 provided, namely, that there was [redacted] (iii) while the Commission may already have had the information described in (ii), Claimant 3's provision of this information saved significant Commission resources; and (iv) Claimant 3 initially was asked to testify at the trial, but ultimately did not do so. Claimant 3 did not provide any explanation as to why Claimant 3 submitted the WB-APP late.

Upon further questioning by OWB as to the reason for the late WB-APP, Claimant 3's current counsel explained that Claimant 3 had been previously represented by another attorney, who had represented Claimant 3 with respect to all actions concerning the whistleblower submission and claim process. According

to Claimant 3's current counsel, on [redacted] Claimant 3 was conducting an internet search regarding the status of the SEC enforcement proceeding and discovered that a Notice of Covered Action had been posted. Prior to that time, Claimant 3 was unaware of the Notice of Covered Action process, the existence or need to file Form WB-APP, or of the time requirements for filing. Claimant 3 sent the information he/she had found during the search on [redacted] to his/her then-attorney, who then submitted the WB-APP the following day, [redacted].[4] Claimant 3's current counsel asks that the Commission waive the filing deadline.

## II. Analysis

### A. Claimant 1

#### 1. Award Analysis

The record demonstrates that Claimant 1 voluntarily provided original information to the Commission that significantly contributed to the success of the Covered Action.[5] In reaching this determination, we assessed, among other things, the following facts: (i) Claimant 1 provided information early in the investigation, beginning just three months after the Commission staff opened the matter; (ii) Claimant 1's information saved the staff time and resources in conducting

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[4] We note that the dates provided by Claimant 3's counsel do not comport with other aspects of the record. Claimant 3 faxed the WB-APP to OWB on [redacted], and the WB-APP was dated [redacted]. As such, Claimant 3 must have become aware of the NoCA filing by no later than [redacted], and not on [redacted].

[5] *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).

its investigation and included [redacted] that the staff likely would not have uncovered without Claimant 1's help; (iii) Claimant 1 provided continuing assistance, including communicating with the staff on many occasions and providing voluminous documents to the staff; and (iv) there is a close nexus between Claimant 1's information and several paragraphs in the Commission's Complaint.

The CRS preliminarily determined that the aggregate award in this matter should be at the statutory maximum and that Claimant 1 should receive a [redacted]% award and that Claimant 2 should receive a [redacted]% award because Claimant 1's information was more significant and Claimant 1 provided extraordinary ongoing assistance. Since then, Exchange Act Rule 21F-6(c) was adopted creating a presumption of a statutory maximum award of 30% where: (i) the maximum award would be $5 million or less; (ii) the claimant's application presents no negative award factors under Rule 21F-6(b) — *i.e.*, culpability, unreasonable reporting delay, or interference with an internal compliance and reporting system—and (iii) the award claim does not trigger Rule 21F-16.[6] The Commission may depart from the presumption if: (i) the assistance provided by the whistleblower was, "under the relevant facts and circumstances, limited," or (ii) a maximum award "would be inconsistent with the public interest, the

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[6] Exchange Act Rule 21F-16 applies only when the claimant was ordered to pay sanctions or an entity whose liability was based substantially on conduct that the claimant directed, planned or initiated was ordered to pay sanctions in connection with the covered action. Rule 21F-16 is not applicable here.

promotion of investor protection, or the objectives of the whistleblower program."[7]

The 30% presumption applies in this matter. Based on current collections, the statutory maximum award is approximately $32,000, and the Commission does not reasonably anticipate that future collections would cause the statutory maximum award to exceed $5 million. No negative factors are associated with Claimant 1's application, Claimant 1 bears no responsibility for the misconduct, and Claimant 1 did not benefit financially from the wrongdoing. There is nothing in the record that suggests Claimant 1 unreasonably delayed in reporting information to the Commission or interfered with the Company's internal compliance or reporting systems. Also, there is no reason to depart from the presumption of the statutory maximum award. Claimant 1 provided more than limited assistance. Furthermore, there are no public interest, investor protection, or programmatic concerns that would warrant departure from a 30% award.

Based on these factors and all aspects of the record, and after considering Claimant 1's contributions relative to Claimant 2's and Claimant 4's contributions, we find that an award of [redacted]% is appropriate for Claimant 1.

### 2. Request for Reconsideration

We disagree with Claimant 1's contention that Claimant 1's award calculation should be based on a larger amount than the Commission collected in connection with the Covered Action. Claimant 1 notes that

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[7] Exchange Act Rule 21F-6(c)(1)(iv).

Exchange Act Rule 21F-5(b) provides, in part, that the amount of an award "will be at least 10 percent and no more than 30 percent of the monetary sanctions that the Commission and the other authorities are able to collect." Claimant 1 asserts that the Commission was "able to collect" a much larger amount of monetary sanctions than it in fact did collect in the Covered Action, because it voluntarily subordinated its interest in the Bankruptcy Action to the interests of defrauded investors. As such, Claimant 1 argues that Claimant 1's award should be based on the amount that the Commission could have collected rather than the amount that the Commission actually collected.

*First*, Claimant 1's argument is based on an incorrect factual premise, as Claimant 1 assumes that the Commission could have collected the full [redacted] had it not voluntarily subordinated its interest in the bankruptcy proceeding. The [redacted] million civil penalty against the Company would have been disallowed or subordinated in the bankruptcy as a matter of law. At best, the Commission, as a general unsecured creditor, could only have been able to recover a fraction of the disgorgement.[8] Contrary to Claimant 1's assertions, the Commission did not simply walk away from a collection of [redacted], because it would only have been able to collect a *de minimis* amount, and any such collections would have been dependent upon the Commission winning on appeal.

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[8] The payout rate to unsecured creditors, like the commission, was only [redacted]%. Therefore, the Commission could only have collected [redacted]% of the final disgorgement, which at best would have been [redacted] of the [redacted] of disgorgement.

*Second*, we decline to follow Claimant 1's interpretation of Rule 21F-5(b) because it is at odds with the statute that it is designed to implement. Congress established the statutory minimum and maximum whistleblower awards as "(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."[9] Because the statutory maximum whistleblower award is based on the amount actually collected in connection with the Covered Action, we cannot base the amount of Claimant 1's award on a higher amount that the Commission may have been able to but did not collect.

*Third*, calculating whistleblower award payments based on what the Commission hypothetically "was able to collect," but did not, would introduce uncertainty, inconsistency, and could delay the processing of award claims.

We also disagree with Claimant 1's argument that the award should be based on any amounts collected in the Bankruptcy Action. As we noted in connection with the adoption of several rule amendments, "our statutory authority does not extend to paying whistleblower awards for recoveries in bankruptcy proceedings or other proceedings that may in some way 'result from' the Commission's enforcement action and the activities of the whistleblower."[10] Under Section 21F

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[9] Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1)

[10] *See* Whistleblower Program Rules, Release No. 34-899963, 2020 WL 5763381, at *12 (Sept. 23, 2020).

of the Exchange Act, the Commission is authorized to pay whistleblower awards only on the basis of monetary sanctions that are imposed in a covered judicial or administrative action or related action. A covered judicial or administrative action means an "action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000."[11] A related action must be brought by one of the authorities specified in the statue.[12] Bankruptcy proceedings are not brought by either the Commission acting under the securities laws or by one of the designated related-action authorities, and orders to pay money that result from bankruptcy proceedings are not imposed in Commission covered actions or related actions.

Finally, we deny Claimant 1's request that the Commission use its discretion under Section 36(a)(1) of the Exchange Act to exempt Claimant 1 from the requirements under the whistleblower program and set Claimant 1's award amount above the statutory limit. Section 36(a)(1) provides that "the Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person . . . from any provision or provisions of [the Exchange Act] or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors."[13] We have used this discretionary authority to exempt whistleblowers from certain of the program's

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[11] Exchange Act Section 21F(a)(1), 15 U.S.C. § 78u-6(a)(1).

[12] *See* Exchange Act Section 21F(a)(5), 15 U.S.C. § 78u-6(a)(5).

[13] 15 U.S.C. § 78mm(a)(1).

rules under limited circumstances.[14] However, the limitation on the amount of the award to be issued in connection with any Covered Action was set by statute, and we have never used our discretion under Section 36(a)(1) of the Exchange Act to exempt a whistleblower from a statutory requirement or to approve an award amount above the statutory limit. The text of the statute reflects a clear congressional design to grant awards of no more than 30 percent of the amounts collected. Congress established the same framework for awards to be paid to whistleblowers in cases brought by the Commodity Futures Trading Commission[15] and under the Anti-Money Laundering Act.[16] Given the clarity and consistency of the statutory design for whistleblower awards, the Commission does not believe it would be appropriate to use its exemptive authority to award an amount above the statutory limit even in cases such as this one, where a higher award amount might otherwise be warranted.

### B. Claimant 2

#### 1. Award Analysis

The record demonstrates that Claimant 2 voluntarily provided original information to the Commission

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[14] *See, e.g.*, Order Determining Whistleblower Award Claims, Release No. 34-90580 (Dec. 7, 2020) (providing whistleblower with exemption from the TCR filing requirements under Rules 21F-9(a) and (b)); Order Determining Whistleblower Award Claims, Release No. 34-86010 (June 3, 2019) (providing whistleblower with exemption from the voluntary requirement under Rule 21F-4(a)).

[15] 7 U.S.C. § 26(b)(1).

[16] 31 U.S.C. § 5323(b)(1).

that significantly contributed to the success of the Covered Action. In reaching this determination, we assessed, among other things, the following facts: (i) Claimant 2 voluntarily submitted information to the Commission staff approximately nine months after the investigation was opened and before the Commission had filed its complaint against the Company; (2) Claimant 2 participated in an initial phone call with staff, provided documents related to Claimant 2's [redacted], and provided ongoing assistance to the staff; (3) Claimant 2's information included information that was not previously known to the staff, and the information informed the direction of the staffs investigation and the charges ultimately brought against the Company.

As noted above, the presumption of a statutory maximum award of 30% applies in this matter. Based on all aspects of the record, and after considering Claimant 2's contributions relative to Claimants 1's and Claimant 4's contributions, we find that an award of [redacted]% is appropriate for Claimant 2.

### 2. Request for Reconsideration

We decline Claimant 2's request that we set Claimant 2's award amount at [redacted]. As discussed above, the limit for a whistleblower award to all meritorious claimants in the aggregate is set by statute at 30% of the amount collected of the monetary sanctions imposed in the action or related actions. Even if Claimant 2 were the sole meritorious claimant, which Claimant 2 is not, a 30% award would be less than the amount Claimant 2 requests. We decline to set Claimant 2's award above the statutory limit. Further, whistleblower award payments are based on

the amounts collected in the underlying Covered Action, not the amount of loss suffered by the claimant.

### C. Claimant 4's Award Analysis

The record demonstrates that Claimant 4 voluntarily provided original information to the Commission that significantly contributed to the success of the Covered Action. Specifically, we find that the audio recordings provided by Claimant 4 were helpful to the Commission in obtaining additional relief in the remanded final judgment.[17]

As noted above, the presumption of a statutory maximum award of 30% applies in this matter. Based on all aspects of the record, and after considering Claimant 4's contributions relative to Claimants 1's and Claimant 2's contributions, we find that an award of 5% is appropriate for Claimant 4.

### D. Claimant 3

Claimants must give the Commission information in the form and manner that the Commission requires in order to be eligible for a whistleblower award.[18] The Commission's rules require Claimants to file any application for a whistleblower award on Form WB-APP.[19] Further, the Form WB-APP must be filed within ninety days from the date of the Notice of Covered

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[17] We note that the other information provided by Claimant 4 did not significantly contribute to the success of the Covered Action, because, for example, the Enforcement staff had already obtained the information through other sources.

[18] *See* Exchange Act Rule 21F-8(a), 17 C.F.R. § 240.21F-8(a).

[19] *See* Exchange Act Rule 21F-10(b), 17 C.F.R. § 240.21F-10(b).

Action or the claim will be barred.[20] Claimants bear the ultimate responsibility to learn about and follow the Commission's rules regarding the award application process.[21]

The requirement that claimants file whistleblower award claims within ninety days of the posting of a Notice of Covered Action serves important programmatic functions. The deadline ensures fairness to potential claimants by giving all an equal opportunity to have their competing claims evaluated at the same time. The deadline also brings finality to the claim process so that the Commission can make timely awards to meritorious whistleblowers.[22]

Notwithstanding these important programmatic functions, the whistleblower program rules recognize that there may be rare situations where an exception should be made. To allow for this, Rule 21F-8(a) of the Exchange Act provides that "the Commission may, in its sole discretion, waive" the filing requirements "upon a showing of extraordinary circumstances."[23] The Commission has explained that the "extraordinary circumstances" exception is "narrowly construed"

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

[21] *See* Order Determining Whistleblower Award Claim, Release No. 34-72659, at 5 (July 23, 2014).

[22] *See Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. 34300, 34343 (June 13, 2011); Order Determining Whistleblower Award Claims, Release No. 95711 (Sept. 9, 2022); Order Determining Whistleblower Award Claims, Release No. 88464 (Mar. 24, 2020); Order Determining Whistleblower Award Claims, Release No. 96765 (Jan. 30, 2023).

[23] 17 C.F.R. § 240.21F-8(a).

and requires an untimely claimant to show that "the reason for the failure to timely file was beyond the claimant's control."[24] The Commission has identified "attorney misconduct or serious illness" that prevented a timely filing as two examples of the "demanding showing" that an applicant must make before the Commission will consider exercising its discretionary authority to excuse an untimely filing.[25] The Commission has previously found that "a lack of awareness about the [whistleblower award] program does not . . . rise to the level of an extraordinary circumstance as a general matter [since] potential claimants bear the ultimate responsibility to learn about the program and to take the appropriate steps to perfect their award applications."[26] "A potential claimant's responsibility includes the obligation to regularly monitor the Commission's web page for NoCA postings and to properly calculate the deadline for filing an award claim."[27]

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[24] Order Determining Whistleblower Award Claims, Release No. 77368, at 3 (Mar. 14, 2016), *pet. for rev. denied sub nom. Cerny v. SEC*, 708 F. App'x 29 (2d Cir. 2017), cert. denied, 138 S. Ct. 2005 (2018).

[25] Order Determining Whistleblower Award Claim, Release No. 77368; Order Determining Whistleblower Award Claim, Release No. 82181 (Nov. 30, 2017).

[26] Order Determining Whistleblower Award Claims, Release No. 95711 (Sept. 9, 2022) (citing to Order Determining Whistleblower Award Claim, Release No. 88464 (Mar. 24, 2020)).

[27] *Id.* The whistleblower rules provide "for constructive, not actual, notice of the posting of a covered action and of the deadline for submitting a claim." *Id; see also* Order Determining Whistleblower Award Claims, Release No. 96765 (Jan. 30, 2023) (finding that claimant's lack of awareness about the whistleblower program and limited understanding of the whistleblower rules

Claimant 3's lack of awareness of the NoCA posting or of the 90-day deadline is not an "extraordinary circumstance" that would excuse his/her failure to submit a timely Form WB-APP. Nothing interfered with his/her ability to monitor the Commission's web page or submit an application by the 90-day deadline. Furthermore, there are no unique circumstances here that might support the Commission's exercise of its separate, discretionary authority under Section 36(a) of the Exchange Act to exempt Claimant 3 from the 90-day filing deadline.[28]

We therefore conclude that Claimant 3 failed to submit a claim for award on Form WB- APP to the Office of the Whistleblower within ninety days of the date of the Notice of Covered Action as required under Rule 21F-10(b) of the Exchange Act and that, as a result, Claimant 3 is ineligible for an award with respect to the Covered Action.[29]

## III. Conclusion

Accordingly, it is ORDERED that Claimant 1 receive an award of [redacted] percent ([redacted]%) of the monetary sanctions collected, or to be collected, in the Covered Action; Claimant 2 receive an award of [redacted]

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"failed to meet the demanding standard for showing that there were extraordinary circumstances").

[28] *Cf.* Order Determining Whistleblower Award Claims, Release No. 92086 (June 2, 2021) (exercising Section 36(a) exemptive authority to waive the 90-day deadline where the claimant faced "unique obstacles" to timely filing the claim).

[29] Because Claimant 3 is ineligible for an award based on the late filing of a Form WB-APP, we decline to consider whether Claimant 3's information led to the success of the Covered Action.

percent ([redacted]%) of the monetary sanctions collected, or to be collected, in the Covered Action; Claimant 4 receive an award of five percent (5%) of the monetary sanctions collected, or to be collected, in the Covered Action; and that Claimant 3's award application be denied.

By the Commission.

/s/ Vanessa A. Countryman
Secretary

**ORDER DENYING BARR PETITION FOR REHEARING, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (OCTOBER 29, 2024)**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN M. BARR; JOHN MCPHERSON,

*Petitioners,*

v.

SECURITIES AND EXCHANGE COMMISSION,

*Respondent.*

No. 23-60216

Petition of Review of an Order from the Securities and Exchange Commission Agency No. 2023-42

Before: SMITH, ENGELHARDT, and RAMIREZ, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the John M. Barr petition for rehearing is DENIED.

**ORDER DENYING McPHERSON PETITION FOR REHEARING, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (OCTOBER 29, 2024)**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN M. BARR; JOHN MCPHERSON,

*Petitioners,*

v.

SECURITIES AND EXCHANGE COMMISSION,

*Respondent.*

No. 23-60216

Petition of Review of an Order from the Securities and Exchange Commission Agency No. 2023-42

Before: SMITH, ENGELHARDT, and RAMIREZ, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

Additional material from this filing is available in the Clerk's Office.