

UNITED STATES OF AMERICA

before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 84046 / September 6, 2018

WHISTLEBLOWER AWARD PROCEEDING

File No. 2018-11

In the Matter of the Claims for Award

in connection with

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Notice of Covered Action ^{Redacted}

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIMS

Pursuant to Section 21F of the Securities Exchange Act of 1934 (“Exchange Act”) and the Commission’s rules thereunder, the Claims Review Staff (“CRS”) issued a Preliminary Determination concerning various timely whistleblower award claims made in connection with the above-referenced Covered Action. In pertinent part, the Preliminary Determination recommended the following:

1. ^{Redacted} (“Claimant 1”) receive a whistleblower award in the amount of ^{Redacted} of the monetary sanctions collected in the Covered Action, for a payout of more than \$39,000,000;

2. Claimant 1’s related-action award claim for an action brought by ^{Redacted} ^{Redacted} (“Agency 1”) ¹ be denied;

3. ^{Redacted} ^{Redacted} (“Claimant 2”) receive a whistleblower award in the amount of ^{Redacted} of the monetary sanctions collected in the Covered Action, for a payout of more than \$15,000,000;

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4. Claimant 2's related-action award claim for an action brought by
Redacted ("Agency 2")² be denied; and

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5. The award application submitted by Redacted ("Claimant 3") be denied.

We have considered the timely submissions that Claimants 1, 2, and 3 provided in response to the Preliminary Determination. We have determined to accept the award recommendations in the Preliminary Determination with respect to the claims submitted by Claimants 1 and 2 in connection with the Commission's Covered Action.³ Also consistent with the recommendations in the Preliminary Determination, we are denying Claimant 1's and 2's

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We note that although Claimant 1 initially sought a related-action recovery for this matter as well, Claimant 1 is no longer pursuing that award claim. We further note that Claimant 2 did not challenge the CRS's preliminary denial of Claimant 2's award claim in connection with a separate action brought by Redacted and as such, the Preliminary Determination as to that claim became the final determination of the Commission pursuant to Rule 21F-11(f).

³ We have relied upon the factors identified in Rule 21F-6 under the Exchange Act "to determine the relative allocation of [the] awards" between Claimants 1 and 2. *See also* Exchange Act Rule 21F-5 ("If the Commission makes awards to more than one whistleblower in connection with some action ..., the Commission will determine an individual percentage award for each whistleblower, but in no event will the total amount awarded to all whistleblowers in the aggregate be less than 10 percent or greater than 30 percent of the amount the Commission ... collect[s]."). In applying the award criteria to assess Claimant 1's and Claimant 2's relative contributions to the Covered Action, we relied upon a number of facts, including the following: (1) although both Claimants 1 and 2 Redacted who submitted specific and detailed whistleblower tips, Claimant 1 came to the Commission over one and a half years before Claimant 2; (2) by the time Claimant 1 came forward, the Commission staff had encountered numerous obstacles that were causing delays to the investigation and Claimant 1's information (and assistance) was critical to advancing the investigation; (3) Claimant 1's information, which included a wealth of documents that saved the Commission considerable time and resources, demonstrated that Respondent's misconduct Redacted; (4) Claimant 1, unlike Claimant 2, unreasonably delayed in reporting the misconduct to the Commission, but *see infra* footnote 8 (discussing Claimant 1's unreasonable delay); (5) in reporting to the Commission, Claimant 1 faced Redacted (6) Claimant 1 provided ongoing assistance to the Enforcement staff, including traveling at Claimant 1's own expense to meet with staff in person on multiple occasions; (7) Claimant 2's information, although submitted much later than Claimant 1's, was particularly significant because it provided Enforcement staff with Redacted and (8) Claimant 2, Redacted

After evaluating the foregoing considerations based on the unique facts and circumstances at issue, we have determined that Claimant 1's award percentage should be meaningfully higher vis-à-vis Claimant 2's award percentage. In assessing the relative award amounts for Claimants 1 and 2, we have not considered the fact that Claimant 2's submission was not voluntary under the definition in Rule 21F-4(a).

related-action award claims for the Agency 1 and Agency 2 actions, respectively, and denying the award application submitted by Claimant 3.⁴

I. BACKGROUND

A. The Award Program

In 2010, Congress added Section 21F to the Exchange Act. Among other things, Section 21F authorizes the Commission to pay monetary awards—subject to certain limitations, exclusions, and conditions—to individuals who voluntarily provide the Commission with original information about a violation of the securities laws that leads to a successful Commission judicial or administrative action in which the monetary sanctions exceed \$1,000,000.⁵ Further, when the Commission makes such an award to an individual, it may also make an award in a related action brought by certain statutorily identified law-enforcement and regulatory authorities if the original information the individual voluntarily provided to the Commission also led to the success of an enforcement action by such an authority.⁶ For both Commission actions and related actions, the total award amounts paid shall be “not less than 10 percent, in total, of what has been collected of the monetary sanctions” and “not more than 30 percent, in total, of what has been collected[.]”⁷

B. Relevant Facts

On ^{Redacted}, the Commission issued a ^{Redacted} ^{Redacted} (“Order” or “Commission Order”) in the Covered Action in which it found that ^{Redacted} (“Respondent”) had violated the federal securities laws by ^{Redacted} ^{Redacted} ^{Redacted} ^{Redacted} ^{Redacted} ^{Redacted} ^{Redacted} ^{Redacted} Respondent was ordered to ^{Redacted}

Because the monetary sanctions imposed on the Respondent exceeded the statutory threshold for a potential whistleblower award under Section 21F of the Exchange Act, the Office of the Whistleblower (“OWB”) posted Notice of Covered Action ^{Redacted} for the Covered Action.

⁴ The Preliminary Determination also recommended denying awards to two other claimants. Those determinations were not contested and, thus, the CRS’s recommendation to deny those award applications became final pursuant to Exchange Act Rule 21F-10(f).

⁵ See Exchange Act §§ 21F(a)(1) & (b).

⁶ See Exchange Act §§ 21F(a)(5) & (b).

⁷ Exchange Act § 21F(b)(1).

Agency 1 therefore relied upon the same original information that Claimant 1 provided to the Commission.

Under the whistleblower rules, for a whistleblower to obtain an award in connection with a potential related action, the whistleblower must “demonstrate [that he or she] directly (or through the Commission) voluntarily provided the governmental agency, regulatory authority or self-regulatory organization the same original information that led to the Commission’s successful covered action, and that this information led to the successful enforcement of the related action.”¹⁰ Claimant 1’s application fails to meet this standard in two respects.

First, Claimant 1 did not directly, or through the Commission, provide the original information to Agency 1. The record demonstrates that Claimant 1 never directly provided Claimant 1’s original information (or any materials) to Agency 1, or even had any communications with Agency 1.¹¹ The record also demonstrates that Claimant 1’s original information was not provided to Agency 1 by the Commission itself pursuant to the Commission’s procedures for sharing information.¹² Declarations in the administrative record reveal that the Enforcement staff responsible for the Covered Action and the underlying investigation never shared any information or materials with Agency 1—including the information and materials provided by Claimant 1 to the Commission—and that Agency 1’s staff never received any information or materials from Claimant 1 or the Commission.

Claimant 1 contends that “[b]ecause [Agency 1] relied on the Commission’s [final] order [in the Covered Action], there simply was no need for [Agency 1] to receive information directly from [Claimant 1], ... or to receive any of the documents/testimony provided by [Claimant 1] that helped form the basis of the [Commission’s final] order.” We disagree. As discussed above, we believe that the appropriate interpretation of our whistleblower rules is that a

¹⁰ See Rule 21F-11(c).

¹¹ In Claimant 1’s opposition to the Preliminary Determination, Claimant 1 does not dispute that the record evidence demonstrates that Agency 1 never received the Claimant’s original information directly from the Claimant or that the Commission staff never provided it to Agency 1. Notably, OWB provided this record evidence to Claimant 1 following the issuance of the Preliminary Determination, as provided for by Rule 21F-11(e)(1)(i), and before Claimant 1 filed Claimant 1’s response to the Preliminary Determination. Accordingly, we find that Claimant 1 has waived any challenge to the record evidence on these factual points.

¹² We note that Section 21F provides express authority for the Commission to share information that may identify a whistleblower with other authorities that may, in turn, bring related actions. See Section 21F(a)(5) and (h)(2)(D)(i).

whistleblower must directly provide the original information to the other agency or the Commission must do so pursuant to its procedures for sharing information.¹³

Relatedly, Claimant 1 argues that a requirement that a whistleblower provide information directly to the agency responsible for a related action would be “at war with Congress’ clear instruction that the identity of a whistleblower must be protected.” Claimant 1 thus posits that the Commission cannot require a whistleblower to directly provide information to another agency to obtain a related-action award for any successful enforcement action the other agency brings if the agency “does not have explicit rules protecting whistleblowers’ confidentiality[.]”

In advancing this argument, Claimant 1 appears to misunderstand the relevant statutory and regulatory framework. As discussed, Rule 21F-11(c) provides that a whistleblower can either directly submit the original information to the other agency or the other agency can receive the information “through the Commission[.]” To the extent that a whistleblower does not want to report directly to the other agency out of a concern that the agency lacks “explicit rules” protecting the whistleblower’s identity, they can choose not to do so. The whistleblower is in the best position to determine whether they are comfortable reporting directly to the other agency. There is an alternative avenue under which a whistleblower’s information may be shared with another agency and, in turn, may potentially be eligible for a related action award; the Commission may, when it deems it appropriate to do so after an assessment of the information, transmit his or her information to the other agency. Moreover, when the information is shared “through the Commission” in this manner, Section 21F(h)(2)(D)(ii)(I) of the Exchange Act provides that the other agency “shall maintain such information as confidential” subject to the same confidentiality requirements that apply to the Commission under Section 21F(h)(2)(A). Thus, we do not believe there is any conflict between the information transmittal mechanisms provided for in Rule 21F-11(c) and Section 21F’s confidentiality protections; rather, Congress, by statute, extended the same whistleblower confidentiality protections that govern the Commission to agencies that bring related actions when those agencies receive the

¹³ We also believe that this interpretation is consistent with the requirement in Section 21F(a)(5) of the Exchange Act that a related action must be “based upon the original information provided [to the Commission] by a whistleblower[.]” To be “based upon” the whistleblower’s information, in our view, the same information that the whistleblower provided to the Commission must have been provided to the other authority and that information must have itself directly contributed to the other authority’s investigative or litigation efforts leading to the success of that authority’s enforcement action. It is undisputed that this did not happen with respect to Agency 1’s action. Instead, Agency 1’s order recited the fact of the Commission’s enforcement action as background in partial support of Agency 1’s action without Agency 1 ever actually receiving and utilizing Claimant 1’s original information. In this situation, Claimant 1’s original information could, at best, be described as a derivative factor potentially contributing to the success of Agency 1’s action, and we deem this too attenuated a causal connection to meet the “based upon” standard, which in our view requires actual reliance by Agency 1 on the whistleblower’s original information. Accordingly, we deny Claimant 1’s application for the additional reason that Agency 1’s action was not a “related action” because it was not “based upon” Claimant 1’s original information.

whistleblower's information from the Commission, irrespective of whether the other agency has "explicit rules" protecting a whistleblower's identity. But here neither of these steps was taken to share Claimant 1's information with Agency 1.

Second, we find that Claimant 1's original information did not lead to the success of the Agency 1 action. Claimant 1 concedes that the applicable standard to assess whether Claimant's information led to the success of the Agency 1 action is whether Claimant 1's "submission significantly contributed to the success of the action."¹⁴ As described above, Agency 1 never received a submission that contained the actual original information that the Claimant provided to the Commission and, thus, the causal relationship required by this prong of the "led to" definition—a submission to Agency 1 (either from the whistleblower directly or through the Commission) that "significantly contributed" to the success of the Agency 1 matter—was not met here.¹⁵

Accordingly, Claimant 1's related-action application for the Agency 1 matter is denied.¹⁶

¹⁴ See Rule 21F-4(c)(2); *see also* Rule 21F-3(b)(2) (providing that to grant an award to a whistleblower in connection with a related action, the Commission must determine that the same original information the whistleblower gave to the Commission also led to the successful enforcement of the related action under the same criteria described in the rules for awards made in connection with Commission actions).

¹⁵ We believe that this result is particularly appropriate on the facts here given that (i) Agency 1, before the Commission's issuance of the Order in the Covered Action, had already conducted its own investigation and learned the material facts of the Respondent's misconduct; and (ii) Agency 1's final order, on its face, recited the Commission's action only as partial support for Agency 1's action.

¹⁶ Claimant 1 makes several additional arguments based on certain proposed amendments to the whistleblower rules that the Commission voted to release for public comment in June 2018 in accordance with Sections 553(b) and (c) of the Administrative Procedure Act (APA), *see* 5 U.S.C. 553(b) & (c). *First*, Claimant 1 "opposes the retroactive application of the proposed rules"; however, those proposed rule amendments have not been adopted and are not being applied to Claimant 1's award claim. *Second*, Claimant 1 argues that the Commission should not "rely, directly or indirectly, on the...public comments submitted in response to the rulemaking proceeding when adjudicating" Claimant 1's award claim. Any public comments received before the issuance of this order have not been considered in connection with the Commission's resolution of this award claim. *Third*, Claimant 1 asserts that the Commission's consideration of the proposed rule amendments might have interfered with Claimant 1's rights under the Due Process Clause and the APA if a "Commissioner has formed an opinion on any of the issues outstanding in this matter" as a result of the rulemaking proposal. We find no due process or APA violation, however; even though the rulemaking proposal articulates the Commission's interpretation of certain statutory and regulatory provisions that bear upon Claimant 1's award application, we have carefully considered Claimant 1's arguments against those interpretations and have determined that Claimant 1's arguments are unpersuasive. *See generally* *Air Transport Assoc. v. Nat'l Mediation Bd*, 663 F.3d 476, 487 (D.C. Cir. 2011) (agency decision makers do not violate the due process clause unless they act with an "unalterably closed mind" and are "unwilling or unable" to rationally consider arguments") (quoting *Assoc. of Nat'l Advertisers v. FTC*, 672 F.2d 1151, 1170 (D.C. Cir. 1979)). Accordingly, there is nothing improper about our determination to apply here any interpretations of existing statutory or

III. CLAIMANT 2

A. Covered Action

Based on our review of the record, including declarations from Commission staff who handled the Covered Action and the underlying investigation, we find that Claimant 2, ^{Redacted}
^{Redacted}, provided original information to the Commission that led to the successful enforcement of the Covered Action pursuant to Section 21F(b)(1) of the Exchange Act and Rule 21F-3(a) promulgated thereunder. But we agree with the CRS’s preliminary determination that Claimant 2’s information was not submitted “voluntarily” under Rule 21F-4(a).

Section 21F(b)(1) of the Exchange Act requires that a whistleblower submit original information “voluntarily” in order to be considered for an award. Rule 21F-4(a) establishes a simple and straightforward test for when we will treat a whistleblower as having submitted information voluntarily; as relevant here, the whistleblower must provide his or her tip to the Commission *before* investigators direct a “request, inquiry, or demand” to the whistleblower that relates to the subject matter of the tip. If the Commission or any of the other governmental or regulatory authorities designated in the rule direct a request to the whistleblower first, the whistleblower is not eligible for an award.¹⁷ Agency 2 is one of the authorities designated in the rule.

Here, it is undisputed that, ^{Redacted}, Claimant 2 appeared before Agency 2 for an investigative interview; ^{Redacted}
^{Redacted} that Claimant 2 made ^{Redacted} whistleblower submission more than a year after the interview; and that the interview related to the subject matter of Claimant 2’s later tip.¹⁸

regulatory text that we may have articulated in the proposing release that accompanied the proposed whistleblower rule amendments.

¹⁷ See Rule 21F-4(a)(2).

¹⁸ In Claimant 2’s request for reconsideration of the Preliminary Determination, Claimant 2 did not contest the finding of the CRS that the ^{Redacted} interview with Agency 2 and Claimant 2’s subsequent whistleblower submission related to the same subject matter. Further, we find no inconsistency between this conclusion and our determination (discussed below) that Agency 2’s enforcement action is not cognizable as a “related action” within the meaning of Section 21F because it was predominantly a ^{Redacted} ^{Redacted} matter subject to a separate whistleblower award program administered by ^{Redacted}. Both Claimant 2’s ^{Redacted} interview and later whistleblower submission related to Respondent’s activities in ^{Redacted} That Agency 2—acting pursuant to its jurisdiction—^{Redacted} and the Commission—acting pursuant to its separate jurisdiction—charged violations of the federal securities laws arising out of the same scheme, does not detract from the conclusion that Claimant 2’s ^{Redacted} interview and later whistleblower tip related to the same basic subject matter. Indeed, Claimant 2’s

Claimant 2 argues that Rule 21F-4(a) requires that Agency 2 have directed a “request, inquiry, or demand” for an interview *specifically* to Claimant 2, and that this never happened; Claimant 2 bases this argument on the following sequence of events:

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Redacted Claimant 2’s Redacted interview does not foreclose Claimant 2’s later whistleblower submission from being deemed voluntarily made under Rule 21F-4(a). We disagree.

Rule 21F-4(a) establishes a straightforward, temporally based test for voluntariness; the whistleblower must come forward *before* the government or regulatory authorities designated in the rule seek information from the whistleblower. The Commission adopted this approach after considering extensive comments and alternative suggestions (*e.g.*, that a submission should be deemed voluntary unless compelled by subpoena) to create a “strong incentive for whistleblowers to come forward early with information about possible violations of the securities laws rather than wait until Government or other official investigators ‘come knocking on the door.’”¹⁹

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Thus, in our view,

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Agency 2’s request became “directed to” Claimant 2 within the meaning of Rule 21F-4(a).

We also find a separate ground for determining that Claimant 2’s whistleblower submission was not voluntarily provided under our rule.

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whistleblower submission, on its face, purported to offer new information about

¹⁹ *Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, 75 FR 70488, 70490/3 (Nov. 17, 2010); *see also Securities Whistleblower Incentives and Protections*, 76 FR 34300, 343006-307 (June 13, 2011).

²⁰ 76 FR 34300, 34309/1.

Under these circumstances, we find that Claimant 2’s subsequent whistleblower submission relating to the same subject matter was not made voluntarily.²¹ In reaching this determination, we note our concern that the strong incentivizing purpose of the rule could be undermined if ^{Redacted} could claim an award by becoming whistleblowers only after learning that government investigators were seeking to question them.

At the same time, we recognize that the specific concerns animating Rule 21F-4(a) are not present under the unique circumstances of this case and that relief from the strict operation of the rule is appropriate. Although we reject Claimant 2’s interpretation of the rule, we concur with the CRS’s recommendation that we exercise our discretionary authority under Exchange Act Section 36(a) to grant a limited waiver of Rule 21F-4(a) to permit an award to Claimant 2 in connection with the Covered Action. Specifically, we have determined that it is appropriate in the public interest and consistent with the protection of investors that we grant a limited waiver here in light of certain unique circumstances presented by Claimant 2’s claim. These include the facts that: (1) at the time that Claimant 2 was interviewed by Agency 2, Claimant 2 did not know the information that later supplied the critical basis for Claimant 2’s whistleblower tip to the Commission; (2) when Claimant 2 learned of the information, Claimant 2 promptly reported that information to the Commission and to Agency 2, which is consistent with the policy goal of the whistleblower rules that a whistleblower come forward early with information about possible violations of the federal securities law rather than wait to be approached by investigators; (3) Claimant 2 was not legally obligated to update the information that Claimant 2 had provided to Agency 2, nor was Claimant 2 a target or a subject of Agency 2’s investigation (and therefore potentially motivated to implicate other actors instead of Claimant 2 in unlawful conduct), nor did Claimant 2 otherwise have a separate self-interested motive to come forward with new information learned subsequent to Claimant 2’s initial interview; and (4) a waiver will help

²¹ Claimant 2 also argues that Claimant 2 was under no obligation to submit to the ^{Redacted} interview, but acted “of [his/her] own free will,” and that Agency 2 had no basis to ^{Redacted}

Neither consideration is pertinent to the operation of Rule 21F-4(a), which, as noted, was intended to create a powerful reporting incentive through a straightforward, temporally based approach that requires would-be whistleblowers to come forward before investigators come to them. *Cf.*, *City of Chicago ex rel. Rosenberg v. Redflex Traffic Systems*, 884 F.3d 798, 805 (7th Cir. 2018), *citing United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326 (3d Cir. 2005) (voluntary requirement of federal False Claims Act “is designed to reward those who come forward with useful information and not those who provide information in response to a governmental inquiry”); *Barth v. Ridgedale Electric, Inc.*, 44 F.3d 699, 704 (8th Cir. 1994) (*qui tam* relator did not “voluntarily provide” information to the government where government began its investigation first and investigator initiated interview with relator; “rewarding [relator] for merely complying with the government’s investigation is outside the intent of the Act.”). However, we consider the fact that Claimant 2 subsequently came forward with important new ^{Redacted} information that ^{Redacted} interview as relevant to our determination to grant Claimant 2 an exemption from the requirements of Rule 21F-4(a).

minimize the hardship that Claimant 2 encountered by seeking to report the violations after learning of them.

Based on the foregoing, and considering the relative contributions of Claimant 2 vis-à-vis Claimant 1, we adopt the Preliminary Determination’s recommendation that Claimant 2 should receive “” of the monetary sanctions collected in the Covered Action.²²

B. Agency 2 Related-Action Claim

The CRS preliminarily denied Claimant 2’s claim for award in connection with the Agency 2 action because that action is predominantly a ^{Redacted} ²³ Congress established a directly applicable whistleblower award program under ^{Redacted} to provide whistleblower awards to individuals who enable the Federal Government to ^{Redacted} ²⁴ Due to the existence of ^{Redacted} whistleblower program and the overall nature of the Agency 2 action, the CRS determined that Claimant 2 should look to ^{Redacted} program for a recovery of any whistleblower award instead of arguing that the Agency 2 action qualifies for a related-action award from the Commission.

As an initial matter, we note that in Claimant 2’s award application for the Agency 2 action, Claimant 2 sought from the Commission an award in connection with ^{Redacted} ^{Redacted} *but not* ^{Redacted} ^{Redacted} The apparent reason for this limited claim for recovery was that, at the time Claimant 2 made the

²² See *supra* footnote 3.

²³ We agree with the CRS’s determination that the Agency 2 action is predominantly a ^{Redacted} and that the specific ^{Redacted} award program that Congress designed, which is administered by ^{Redacted} more appropriately applies than the general related-action recovery mechanism that Congress established in Section 21F of the Exchange Act. *Cf. generally Norwest Bank Minnesota Nat’l. Ass’n v. FDIC*, 312 F.3d 447 (D.C. Cir. 2002) (“When both specific and general provisions cover the same subject, the specific provision will control, especially if applying the general provision would render the specific provision superfluous.”). In finding that the Agency 2 action was predominantly a ^{Redacted} to which ^{Redacted} award program more directly and specifically applies, we have found the following facts determinative: Respondent ^{Redacted}

^{Redacted} ^{Redacted} and Respondent ^{Redacted} ^{Redacted} Further buttressing our conclusion, the administrative record reflects that Claimant 2 described Claimant 2’s ^{Redacted} interview before Agency 2 as “aggressively centered on ^{Redacted} and whether ^{Redacted} And Claimant 2’s later whistleblower submission states that the ^{Redacted}

²⁴ ^{Redacted}

award application,

As a result, under interpretation, Claimant 2 would be eligible for an award based only on Respondent was ordered to pay in connection with the Agency 2 action. that

Given this we have no hesitation in concluding that Claimant 2’s recourse is not to seek a related-action award from the Commission based on the Agency 2 action but to seek an award through program.

Under Exchange Act Section 21F(b) and Rule 21F-11, any whistleblower who obtains an award based on a Commission enforcement action may be eligible for an award based on monetary sanctions that are collected in a related action. Exchange Act Section 21F(a)(5) and Rule 21F-3(b)(1) provide that a related action is a judicial or administrative action that is both: (i) brought by the Attorney General, an appropriate regulatory authority (as defined in Rule 21F-4(g)), a self-regulatory organization (as defined in Rule 21F-4(h)), or a state attorney general in a criminal case; and (ii) based on the same original information that the whistleblower voluntarily provided to the Commission and that led to the successful enforcement of the Commission action. We acknowledge that, on its face, Exchange Act Section 21F does not exclude from the definition of related action those judicial or administrative actions such as the Agency 2 action that have a less direct or relevant connection to our whistleblower program than another whistleblower scheme. We nonetheless perceive ambiguity when considering this language in the context of the overall statutory scheme. We believe that an understanding focused exclusively on the statutory definition of related action would produce a result that Congress neither contemplated nor intended. We base this determination on several considerations.

First, when Congress established the Commission’s whistleblower program, it set a firm ceiling on the maximum amount that should be awarded for any particular action—“*not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed*” in the action.²⁶ Indeed, it appears that in establishing federal whistleblower award programs in the modern era Congress has determined that an award of more than 30 percent on any particular action is not necessary or appropriate.²⁷ Yet if both the Commission’s whistleblower program

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²⁶ Exchange Act § 21F(b)(1)(B) (emphasis added).

²⁷ *See, e.g.*, 7 U.S.C. 26 (providing under the CFTC’s whistleblower program for awards of “not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions”); 26 U.S.C. 7623(b)(1) (providing under the IRS administered whistleblower award program for “an award ... not more than 30 percent of the collected proceeds (including penalties,

and ^{Redacted} whistleblower award scheme were to apply to the Agency 2 action, this would create the very real potential for a total award exceeding the 30-percent ceiling due to a dual recovery.

Second, the apparent purpose of the related-action award component of the Commission’s whistleblower program was to allow meritorious whistleblowers the opportunity to obtain additional financial awards for the ancillary recoveries that may result from the same original information that the whistleblowers gave to the Commission. In this way, the potential for a related-action recovery can further enhance the incentives for an individual to come forward to the Commission. But neither the text of Section 21F, nor the relevant legislative history²⁸ suggests that Congress considered the unusual situation in which there may be a separate whistleblower award scheme that has a more direct or relevant connection to the judicial or administrative action, and that in such situations any additional financial incentive that would otherwise result from the related-action component of the Commission’s award program would be unnecessary to encourage individuals to report misconduct.

Third, we believe that permitting potential whistleblowers to recover under both our award program and a separate award scheme for the same action would produce the irrational result of encouraging multiple “bites at the apple” in adjudicating claims for the same action and could potentially allow multiple recoveries.²⁹ In the adopting release that accompanied the original whistleblower rules, the Commission recognized the irrational result that would flow from allowing a whistleblower to have multiple separate opportunities to adjudicate his or her contributions to a case and to potentially obtain multiple separate rewards on that same enforcement action; the Commission foreclosed such an approach in the specific contexts that the Commission considered at the time that it adopted the whistleblower program rules. Specifically, the Commission adopted Rule 21F-3(b)(3), which provides that the Commission will not pay on a related action if the whistleblower program administered by the Commodity Futures Trading Commission (“CFTC”) has issued an award for the same action, nor will the Commission allow a whistleblower to relitigate any issues decided against the whistleblower as

interest, additions to tax, and additional amounts”); 31 U.S.C. 3730 (providing in a False Claims Action that a *qui tam* plaintiff shall receive “not more than 30 percent of the proceeds of the action or settlement”). We note that our preliminary analysis indicates that Congress’s determination not to go above a 30-percent ceiling for awards appears to comport with a similar determination by those states that have adopted their own false claims acts and securities-law whistleblower programs.

²⁸ See generally S. REP. NO. 111-176 at 110-112 (2010).

²⁹ *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) (“If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity.”); see also *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68-69 (1994) (rejecting the “most natural grammatical reading” of a statute to avoid “absurd” results); *Green v. Bock Laundry Machine Company*, 490 U.S. 504, 527, 527-29 (1989) (Scalia, J., concurring); *In re Nofziger*, 925 F.2d 428, 434 (D.C. Cir. 1991); Veronica M. Dougherty, *Absurdity and the Limits of Literalism*, 44 AM. U. L. REV. 127 (1994).

part of the CFTC’s award denial. In adopting that rule, the Commission made clear its view that a whistleblower should neither have two recoveries on the same action nor multiple bites at the adjudicatory apple.³⁰ Relatedly, the Commission explained in the adopting release that it would for similar reasons not make an award to a whistleblower who was also a *qui tam* plaintiff under the False Claims Act.³¹ Although at the time of the original rulemaking for the whistleblower program the Commission did not expressly consider the potential for separate awards issued by ^{Redacted} whistleblower award program, the principles underlying Rule 21F-3(b)(3) are nonetheless relevant here and consistent with the Commission’s views going back to the award program’s founding.³²

The CRS also recommended denying Claimant 2’s application for an award in connection with Agency 2’s action on the separate ground that Claimant 2’s whistleblower submission was not made voluntarily and a discretionary waiver of this requirement to permit an award would not be appropriate. We concur. For the reasons discussed above, Claimant 2’s whistleblower submission to the Commission, more than a year after Claimant 2’s interview with Agency 2, cannot be considered voluntary under Rule 21F-4(a).³³ Further, we do not believe it would be in

³⁰ 76 FR 34300, 34305/3.

³¹ *Id.* n.52 (“[W]e do not believe Congress intended Section 21F of the Exchange Act to permit additional recovery for the same action above what it specified in the False Claims Act.”).

³² Claimant 2 contends that “the concern with double recovery is ... illusory because it is entirely avoidable through an offset or agreement” ^{Redacted} We disagree. *First*, as we explain above, we believe that it is illogical that Congress would have intended two separate whistleblower award programs to apply to the same case (in this instance, Agency 2’s enforcement action). *Second*, any type of offset approach would run afoul of a separate concern that we have here—permitting a whistleblower two bites at the adjudicatory apple for the same enforcement action. Under an offset approach, Claimant 2 would presumably have the opportunity to argue Claimant 2’s grounds for a specific award percentage before both the Commission and ^{Redacted} Although Claimant 2 has offered no details on how precisely the offset might work, we assume that if one agency reached a larger award determination based on a different assessment of Claimant 2’s contributions to Agency 2’s enforcement action, the agency with the larger award assessment would just offset (or deduct) the amount paid by the other agency and pay Claimant 2 the balance. But the critical difficulty would remain—Claimant 2 would be permitted two bites at the adjudicatory apple with respect to the appropriate award percentage. *Finally*, we find that any type of agreement between ^{Redacted} and the Commission in connection with an allocation of responsibility to pay on Agency 2’s action would not be possible for the reasons discussed in paragraphs 9-12 of the supplemental declaration that was provided by the OWB staff attorney assigned to this award matter. *See* Exchange Act Rule 21F-3(b)(2)(ii) (“The Commission will deny an award in connection with the related action if: ... (ii) The Commission is unable to make a determination because the Office of the Whistleblower could not obtain sufficient and reliable information that could be used as the basis for an award determination pursuant to § 240.21F-12(a) of this chapter.”).

³³ The voluntary provision of information to the Commission is a pre-requisite for an award in a related action just as it is in a Commission enforcement action. *See* Section 21F(b)(1) of the Exchange Act and Rule 21F-3(b)(1).

the public interest to waive this requirement in connection with Claimant 2’s application for an award for the Agency 2 action. The “” whistleblower program affords the appropriate forum for Claimant 2 to seek and possibly obtain an award in connection with Agency 2’s action. Congress established Redacted whistleblower program specifically to make awards available for Redacted and we believe that Redacted is in the best position to evaluate Claimant 2’s contributions to Agency 2’s Redacted. In particular, given the Redacted that unambiguously makes Redacted

Claimant 2 has not shown that Claimant 2 will suffer any prejudice by being required to present Claimant 2’s claim to the more appropriate whistleblower award program. Accordingly, we find that it is not in the public interest to extend the limited waiver that we provided to permit an award for the Covered Action to also permit an award for the Agency 2 action; we therefore decline to exercise our discretion to grant such a waiver.

IV. CLAIMANT 3

The CRS preliminarily determined to deny Claimant 3’s award claim because Claimant 3’s information did not lead 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. None of the information submitted by Claimant 3 caused the Commission to: (i) commence an examination, (ii) open or reopen an investigation, or (iii) inquire into different conduct as part of a current Commission examination or investigation under Rule 21F-4(c)(1) of the Exchange Act; or significantly contributed to the success of a Commission judicial or administrative enforcement action under Rule 21F-4(c)(2) of the Exchange Act.

In reaching this preliminary determination, the CRS considered record evidence—including declarations from Enforcement staff members assigned to the Covered Action and underlying investigation—that Enforcement staff responsible for the Covered Action never received any information from Claimant 3 and had no communication with Claimant 3 during the course of the underlying investigation. We find that the record demonstrates that Claimant 3’s information was reviewed by staff in the Commission’s Office of Market Intelligence (“OMI”), closed with a disposition of “no further action planned,”³⁴ and was not forwarded to any other Enforcement staff members for action or follow-up.

In the response, Claimant 3 has not identified any factual or legal basis to refute the clear record evidence that Claimant 3’s information was not used in the Covered Action or the underlying investigation. Indeed, we note that based on our own review of Claimant 3’s information, we find that on its face that information lacks any reasonable nexus to the facts and circumstances of the Covered Action.

³⁴ Under normal practice, a “no further action” designation by OMI means that a tip will not be forwarded to Enforcement staff for any further investigation or follow-up unless subsequent information leads OMI staff to reopen, or re-examine, the tip.

Accordingly, we find that the record demonstrates that Claimant 3 did not provide information that led to the success of the Covered Action. As staff on the Investigation did not receive any information directly or indirectly from Claimant 3, and Claimant 3's information does not appear to have a reasonable nexus to the Respondent's misconduct that was at issue in this matter, we conclude that Claimants 3's information did not cause staff to open the investigation, nor did it significantly contribute to the success of the Covered Action.

V. CONCLUSION

Accordingly, it is ORDERED that Claimant 1 shall receive an award of ^{Redacted} _{Redacted} of the monetary sanctions collected in the Covered Action.

ORDERED that Claimant 1's related-action award claim in connection with Agency 1's action is denied.

ORDERED that Claimant 2 receive an award of ^{Redacted} of the monetary sanctions collected in the Covered Action.

ORDERED that Claimant 2's related-action award claim in connection with Agency 2's action is denied.

ORDERED that Claimant 3's whistleblower award claim be denied.

By the Commission.

Brent J. Fields
Secretary