UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 97529 / May 19, 2023

WHISTLEBLOWER AWARD PROCEEDING
File No. 2023-59

In the Matter of the Claim for an Award

in connection with

Notice of Covered Action Redacted

Redacted

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM

The Claims Review Staff ("CRS") issued a Preliminary Determination recommending the denial of the whistleblower award claim submitted by Redacted ("Claimant") in connection with the above-referenced covered action (the "Covered Action"). Claimant filed a timely response contesting the preliminary denial. For the reasons discussed below, Claimant's award claim is denied.

I. Background

A. The Covered Action

On Redacted the Commission filed settled administrative and cease-and-desist proceedings against Redacted (the "Company") and *** former Company executives (together with the Company, the "Respondents"). The Commission ordered that the Company cease and desist from committing or causing any violations and any future violations Redacted Redacted The Commission charged certain individual Respondents with violations or aiding and abetting violations of those provisions as well as violations of Exchange Act Rules Redacted

Redacted . The Respondents consented to more than Redacted in monetary sanctions, among other relief.

On Redacted , the Office of the Whistleblower ("OWB") posted a Notice for the Covered Action on the Commission's public website inviting claimants to submit whistleblower award applications within 90 days. Claimant filed a timely whistleblower award claim.

B. The Preliminary Determination

The CRS issued a Preliminary Determination recommending that Claimant's claim be denied on the ground that Claimant did not provide information to the Commission voluntarily within the meaning of Exchange Act Rule 21F-4(a). In the Redacted , the Company's *** Redacted in response to an inquiry from the Commission's Division of Enforcement ("Enforcement"), identified Claimant as an individual likely to have information about certain of the Company's Redacted for its contract with Redacted (the "Contract"). Enforcement staff contacted Redacted counsel in Redacted to schedule an interview with Claimant. Counsel for the Redacted responded that the Company was arranging for individual representation for Claimant and once retained Claimant's counsel would reach out to Enforcement staff directly. In Redacted , individual counsel for Claimant contacted Enforcement staff. The CRS preliminarily determined to recommend that Claimant's subsequent provision of information to the Commission be deemed involuntary because Enforcement staff's request to speak with Claimant regarding Redacted relating to the Contract preceded Claimant's (or his/her counsel's) first communications to staff in connection with this matter. The CRS reasoned that because the Commission treats a request to an employer seeking information from a particular individual as a request directed to the employee for purposes of Rule 21F-4(a), Claimant's information here was not provided voluntarily. The CRS also preliminarily determined to recommend that the Commission find that staff's request to interview Claimant related to the same subject matter as Claimant's later submission of information.

C. Claimant's Response to the Preliminary Determination

Claimant submitted a timely written response (the "Response") contesting the Preliminary Determination.[1] Claimant principally argues that Claimant satisfied the voluntariness requirement because at the time Redacted received a request from Enforcement staff to speak with Claimant about the Contract, Claimant Redacted and was therefore adverse to the Company. Claimant also argues that even if his/her initial submission of information was not voluntary, he/she also voluntarily submitted information on "bigger issues" that caused Enforcement staff to expand its investigation. Finally, Claimant contends that even if he/she did not meet the standard for voluntariness, the Commission should

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

use its authority under Section 36(a) of the Exchange Act to exempt him/her from compliance with the voluntariness requirement and grant him/her an award.[2]

II. Analysis

A. Claimant's Submission Was Not Voluntary

1. The Commission Made a Request "Directed to" Claimant before Claimant Contacted the Commission with His/Her Information

To qualify for an award under Section 21F of the Exchange Act, an individual must voluntarily provide the Commission with original information that leads to the successful enforcement by the Commission of a Federal court or administrative action in which the Commission obtains monetary sanctions totaling more than $1,000,000.[3] The "submission of information is made voluntarily … if [a whistleblower] provide[s the] submission before a request, inquiry, or demand that relates to the subject matter of [the] submission is directed to [the whistleblower] or anyone representing [the whistleblower] (such as an attorney) … [b]y [*inter alia*] the Commission."[4] "[W]e treat a request to an employer specifically seeking an interview of, or other information from a particular employee as 'directed to' that employee or the employee's representative for purposes of Rule 21F-4(a)(1)."[5]

There is no dispute here that Enforcement staff told Redacted counsel in *** *** that they wished to speak with Claimant about the Contract. And there is no dispute that Redacted counsel communicated this request to Claimant's counsel, and only then did Claimant's counsel reach out to the Commission. Claimant argues, however, that when the Company reached out to his/her counsel, he/she was an employee in name only, as he/she *** Redacted . Although the Company continued to pay him/her, Claimant says that we should take into account that the Company was "adverse" to him/her.

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[2] Claimant alleges that the Preliminary Determination was "procedurally deficient" because, among other things, the CRS allegedly acted improperly by relying upon a staff declaration that was signed after issuance of the Preliminary Determination. The unsigned and signed versions of the declaration are identical except for the signature and markings such as "draft" and "privileged" such that the information relied upon by the CRS in its Preliminary Determination was not affected by the signature being affixed after the CRS met to approve the Preliminary Determination. *See Order Determining Whistleblower Award Claims*, Exchange Act Release No. 96669 at 5 n.13 (Jan. 17, 2023); *Order Determining Whistleblower Award Claims*, Exchange Act Release No. 94743 at 2 n.6 (Apr. 18, 2022). Claimant's other complaints of procedural deficiency amount to contentions that the CRS did not take his/her arguments seriously. On the contrary, the CRS carefully considered Claimant's arguments and requested a supplemental declaration from Claimant's counsel to clarify an issue related to Claimant's Response.

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

[4] Rule 21F-4(a)(1), 17 C.F.R. § 240.21F-4(a)(1).

[5] *Order Determining Whistleblower Claim*, Exchange Act Release No. 86010 (June 3, 2019).

We find this argument unpersuasive. To the extent that Claimant is suggesting that the Company did not communicate with Claimant's counsel, that suggestion is not borne out by the evidence. Claimant's counsel declared that he was aware at the time Claimant retained him that Enforcement staff already had made a request through Redacted to speak with Claimant. Moreover, antagonism between the employer and employee is irrelevant to the inquiry of whether there was a request for information "directed to" that employee. Accordingly, we find that Claimant's submission of information was not "voluntary" under Rule 21F-4(a).

Our finding here is consistent with the purpose behind the voluntariness requirement. In the Adopting Release for the Whistleblower Rules, we expressed a concern with an employee front-running an investigation he/she is already aware of by reaching out to the Commission only after the Commission had made its interest in the employee's information known through a request to the employer directed to the employee.[6] When Claimant's counsel first contacted the Commission on Claimant's behalf, Claimant's counsel was aware through communications with Claimant's employer of Enforcement staff's request to speak with Claimant, and Claimant's provision of information therefore was not voluntary. Deeming such a submission voluntary would do little to incentivize potential whistleblowers to proactively provide information to the Commission.

2. Claimant Did Not Submit Other Unrelated Information on a Voluntary Basis

Claimant argues that even if the information he/she provided in response to Enforcement staff's questions during his/her interviews was not voluntary, he/she "affirmatively and voluntarily" provided new information that alerted Enforcement staff to "bigger issues" with *** Redacted for the Contract. We disagree.

Once a putative whistleblower's initial submission has been deemed not voluntary, a future submission by the same individual will not be deemed voluntary merely because it provides new information or expands the scope of an investigation. As we have explained,

> The determination of whether an inquiry "relates to the subject matter" of a whistleblower's submission will depend on the nature and scope of the inquiry and on the facts and circumstances of each case. Generally speaking, however, we will consider this test to be met—and therefore the whistleblower's submission not to be "voluntary"—even if the submission provides more information than was specifically requested, if it only describes additional instances of the same or similar conduct, provides additional details, or describes other conduct that is closely related as part of a single scheme. For example, if our staff sends an individual an investigative request relating to a possible fraudulent accounting

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[6] Whistleblower Rules Adopting Release (Aug. 12, 2011) at 32 ("We believe that this approach strikes an appropriate balance between, on the one hand, permitting any submission to be considered 'voluntary' as long as it is not compelled, and, on the other hand, precluding a submission from being treated as 'voluntary' whenever a whistleblower may have become 'aware of' an investigation or other inquiry covered by the rule, regardless of whether the relevant authority contacted the whistleblower for information.").

> practice, we would ordinarily not expect to treat as "voluntary" for purposes of Rule 21F-4(a) a subsequent whistleblower submission from the same individual that describes additional instances of the same practice, or a different but related practice as part of an overall earnings manipulation scheme. However, the individual could still make a "voluntary" submission that described other, unrelated violations (e.g., Foreign Corrupt Practices Act violations).[7]

Claimant contends that he/she alerted Enforcement staff to "bigger issues" with the Company's Contract. Claimant's Response does not specify exactly what he/she means by "bigger issues." To the extent that he/she means that he/she provided information about the overarching issues concerning how the Company's failure to Redacted the Contract was Redacted, we credit the declaration and supplemental declaration of the Enforcement declarant. Enforcement staff explained that the investigative team had identified the core issues with this Redacted, including the decision to base Redacted Redacted, before Claimant provided any information to staff. Any new information that Claimant provided concerned issues Enforcement staff already was investigating. And to the extent that Claimant contends that Redacted Redacted alerted Enforcement staff to "bigger issues" with the Contract, the contours of the Investigation already had been established by the time Redacted. Claimant's attempts to raise "bigger issues" about the Contract with Enforcement staff amounted to "provid[ing] additional details" or "describ[ing] other conduct that is closely related as part of a single scheme" rather than an unrelated securities-law violation.

Claimant's Response also appears to include within the "bigger issues" he/she raised his/her description of a Redacted Redacted. Providing new information to staff is not enough for a claimant to establish voluntariness in these circumstances. The illustrative example in the Adopting Release of "a different but related practice as part of an overall earnings manipulation scheme" is directly on point. As Enforcement staff explained, Claimant's information fit in more generally with what staff had uncovered about the Company's failure to Redacted Redacted. Staff viewed Claimant's information as evidencing a specific illustration of the Company's broader Redacted to conceal the effects of the problems with the Contract and not as a separate fraud. The Redacted Redacted was one chapter in a larger story—a story staff had been uncovering long before they spoke to Claimant.

We conclude that Claimant did not provide information sufficiently unrelated to the subject matter of Enforcement staff's inquiries to him/her for him/her to satisfy the voluntariness requirement.

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[7] *Id.* at 34-35.

B. A Section 36(a) Exemption Is Not Appropriate Here

Section 36(a) of the Exchange Act grants the Commission the authority in certain circumstances to "exempt any person . . . from any provision or provisions of this title 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." In whistleblower matters, the Commission has found that the public interest warranted an exemption from a rule requirement in a limited number of cases where the unique circumstances of the particular matter raised considerations substantially different from those which had been considered at the time the rules were adopted, and a strict application of the rules would result in undue hardship, unfairness, or inequity.[8]

Claimant has not identified "unique circumstances" here that would warrant a Section 36(a) exemption from the voluntariness requirement. Rather, the Commission specifically considered in its Adopting Release the fact pattern of an employee first reporting to the Commission after his/her employer received a request for information targeting the employee. Claimant's contention that he/she "affirmatively" brought information to the Commission's attention finds little support in the record. Claimant waited more than two years to bring the Redacted to the attention of the Commission. And Claimant says that he/she did not decide whether to provide information to the Commission until *after* he/she became aware of Enforcement's request for his testimony and had a chance to discuss Redacted issues with his/her counsel.[9] Equitable factors do not support exemptive relief for Claimant under Section 36(a).

Claimant cites two cases in which we have granted Section 36(a) exemptions from the voluntariness requirement, but both are distinguishable from the facts here. In *Order Determining Whistleblower Award*, Exchange Act Release No. 84046 (Sept. 6, 2018), the claimant did not know the information that later formed the basis for his/her tip to the Commission at the time he/she was interviewed by a federal agency, and when he/she later learned that information, he/she promptly reported it to the agency. In addition, we determined that the waiver would help minimize the hardship he/she encountered by reporting. Here, Claimant does not point to any information he/she learned after his/her interview that was provided to the Commission.

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[8] *Order Determining Whistleblower Award Claim*, Release No. 34-97450, at 6 (May 8, 2023); *see also Order Determining Whistleblower Award Claims*, Release No. 34-90721 (Dec. 18, 2020) (claimant's counsel used information from claimant to submit application as whistleblower on behalf of themselves); *Order Determining Whistleblower Award Claims,* Release No. 34-90580 (Dec. 7, 2020) (counsel misunderstood communications from staff about whether claimant met procedural requirements for participating in whistleblower program); *Order Determining Whistleblower Award Claim*, Release No. 34-86010 (June 3, 2019) (see below); *Order Determining Whistleblower Award Claims*, Release No. 34-84046 (Sept. 6, 2018) (see below).

[9] Claimant says in his/her Response that he/she needed to consult with his/her counsel "regarding whether to reach out to the SEC to provide [his/her] observations on the Redacted at [the Company]. It was certainly not a given that [he/she] would do so. . . ."

In *Order Determining Whistleblower Claim*, Exchange Act Release No. 72727 (July 31, 2014), on which Claimant also relies, the Commission found the claimant's submission not to have been voluntary because a self-regulatory organization ("SRO") contacted him/her before he/she contacted any relevant agency about the securities-law violation. But the SRO's investigation was initiated based on a tip from another party that specifically identified the whistleblower's efforts to raise the issue internally. The whistleblower was also misled that certain materials he/she had prepared were provided to the SRO, and the whistleblower continued to try to remediate the situation after the SRO investigation was closed. No "highly unusual circumstances" of this magnitude are present here.[10]

Although Claimant does not rely on *Order Determining Whistleblower Claim*, Exchange Act Release No. 86010 (June 3, 2019), that order also does not support an exemption here. There, another authority directed a request for information to relevant employees of a firm who had information about an issue, which included two claimants. The two claimants were not told about the other authority's request when it was made and did not learn of the existence of the other authority's investigation until several months after they reported their information to the Commission. The claimants left the firm prior to learning about the other authority's investigation and reported the issue to the Commission. The two claimants' own remedial efforts had indirectly prompted the other agency to open the investigation resulting in the request for information. Although we determined that the claimants' submission was not voluntary, it was appropriate under those facts and circumstances to exempt the claimants from the voluntariness requirement under Section 36(a). Here, Claimant's counsel admits that he knew that Enforcement staff had requested to interview Claimant prior to Claimant's counsel contacting staff and Claimant providing information to the Commission.

In short, voluntariness is a critical component of the Commission's whistleblower award program. Nothing prevented Claimant from reporting his/her information to the Commission prior to Enforcement's request to interview him/her. To grant exemptive relief from the voluntariness requirement in these circumstances would undermine the Commission's position

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[10] Although not a basis for our denial of Claimant's claim here, we observe that Claimant did not initially comply with the TCR-submission requirement and is not eligible for a waiver of the requirement under Rule 21F-9(e). Claimant was interviewed by Enforcement staff on Redacted, but did not submit a TCR until Redacted Redacted Under Rule 21F-9(e), a claimant's initial noncompliance with the TCR-submission requirement may be waived if he/she complied with the TCR-submission requirements within 30 days of learning of the requirements or retaining counsel to submit information to the Commission, whichever occurred first. Claimant retained counsel for the purpose of submitting information to the Commission no later than Redacted but did not submit a TCR until four months later. Thus, even if Claimant submitted his/her information voluntarily, only original information Claimant submitted on or after Redacted, could be the basis for an award.

Claimant contends that he/she Redacted raised broad concerns about the Company's Redacted Redacted the Contract. According to Claimant, "Redacted counsel Redacted Redacted in an effort to conceal the real Redacted at the center of the . . . Contract." Claimant forgot about the existence of these *** but submitted a TCR soon after the *** came to light as part of staff's investigative efforts. Claimant implies that these circumstances justify his/her failure to timely submit a TCR. But Claimant states that by the time the Redacted *** came to light, he/she had been providing information to Enforcement staff for months, during which time he/she was represented by counsel for the purpose of submitting information to the Commission. When the *** came to light has no bearing on whether Claimant is eligible for a Rule 21F-9(e) waiver.

that "a whistleblower award should not be available to an individual who makes a submission after first being … requested to provide information by the Commission staff …."[11]

III. Conclusion

Accordingly, it is hereby ORDERED that the whistleblower award application of Claimant in connection with the Covered Action be, and it hereby is, denied.

By the Commission.

J. Matthew DeLesDernier
Deputy Secretary

[11] Whistleblower Rules Adopting Release (Aug. 12, 2011) at 30.